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DISTRICT II

October 6, 2021

To:

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Circuit Court Judge
Electronic Notice

Kristina Secord
Clerk of Circuit Court
Walworth County
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Christine A. Remington
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1828-CR	State of Wisconsin v. Zachary D. Granat (L.C. #2017CF312)
2020AP1829-CR	State of Wisconsin v. Zachary D. Granat (L.C. #2018CF14)

Before Gundrum, P.J., Neubauer and Reilly, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Zachary D. Granat appeals judgments of conviction for two sex offenses and an order denying his postconviction motion seeking resentencing before a different judge. He argues his attorney at sentencing was constitutionally ineffective for failing to object to some of the circuit court's sentencing remarks—statements that Granat contends show his sentence was based on impermissible or inaccurate sentencing considerations. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

Granat entered into a plea agreement with the State that resolved two Walworth County cases. In case No. 2017CF312, Granat was convicted of second-degree sexual assault of a child. In case No. 2018CF14, Granat was convicted of fourth-degree sexual assault. A joint sentencing hearing was held before the Honorable Kristine E. Drettwan. The circuit court imposed a sentence consisting of four years' initial confinement and twelve years' extended supervision on the sexual assault of a child charge, with a consecutive nine-month sentence for fourth-degree sexual assault.

Granat filed a postconviction motion in which he asserted that during the sentencing hearing, the circuit court "had utilized various inappropriate/inaccurate sentencing factors." The challenged remarks concerned Granat's fear of being sexually assaulted in prison, his having quit sex offender counseling, and his past sexual experiences as a teenager. Recognizing that his attorney had not objected to any of the remarks at sentencing, Granat asserted that he received ineffective assistance of counsel. The court held a ***Machner*** hearing,[2] after which it denied his motion. The court concluded that its remarks were not impermissible and therefore defense counsel had not performed deficiently by failing to object to them.

On appeal, Granat renews the arguments contained in his postconviction motion. To demonstrate that he received constitutionally ineffective assistance, Granat must show both that

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

his attorney performed deficiently and that the deficient performance prejudiced him. *See* ***State v. Savage***, 2020 WI 93, ¶25, 395 Wis. 2d 1, 951 N.W.2d 838. If the defendant fails to satisfy either prong, we need not consider the other. ***Id.*** We accept the historical facts found by the circuit court unless they are clearly erroneous, but we review de novo whether those facts establish ineffective assistance of counsel. ***Id.***

We conclude Granat's counsel did not perform deficiently because there was no basis to object to the circuit court's sentencing remarks. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). The underlying premise of Granat's ineffective assistance claim is that the court erroneously exercised its sentencing discretion because it violated his due process right to be sentenced only upon materially accurate information. *See* ***State v. Spears***, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). As a result, Granat must show that some of the information presented was inaccurate and that the court actually relied on that misinformation when reaching its determination of the appropriate sentence. *See* ***State v. Tiepelman***, 2006 WI 66, ¶28, 291 Wis. 2d 179, 717 N.W.2d 1.[3]

When discussing Granat's character and personality traits, the circuit court stated: "And you told the PSI writer you are afraid of being incarcerated, that you are afraid of being raped [in prison]; that's a legitimate fear. But maybe now you know how these girls feel."[4] Granat

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[3] To the extent Granat contends that some of the circuit court's comments indicate it misapplied the sentencing methodology set forth in ***State v. Gallion***, 2004 WI 42, ¶¶40-46, 270 Wis. 2d 535, 678 N.W.2d 197, we also reject that argument for the reasons set forth in this order.

[4] The PSI writer included the following observation in the report:

(continued)

acknowledges his character was a relevant sentencing factor, but he argues the court erred by treating his "legitimate fear" as an aggravating factor rather than a mitigating factor. In Granat's view, the court's comments demonstrated an impermissible retributive attitude.

"Whether a particular factor or characteristic relating to a defendant will be construed as either a mitigating or aggravating circumstance will depend upon the particular defendant and the particular case." ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992). Here, the court plainly believed Granat's fear, articulated in an effort to avoid prison, demonstrated a failure to appreciate the gravity of his own conduct and a lack of empathy with the victims of his crimes.[5] Because these were relevant and permissible sentencing considerations, there was no basis for his counsel to object.

> [Granat's] primary concern was what would happen to him if and when he was imprisoned. He fears that since he had committed sex crimes that he would be raped and taught his lesson by other inmates because he heard that this was how things were done behind bars. He showed almost no remorse for the victims, yet he took complete responsibility for his actions and acknowledged what he did was wrong and selfish.

[5] Granat contends that sentencing discretion may not be exercised "to punish a [d]efendant by intentionally, or even recklessly, forcing him to be the subject of abuse by other prisoners in the prison system." The assertion that the imposition of a prison sentence authorized by law for Granat's admitted crimes is the equivalent of ordering him to be forcibly abused by other prisoners is logically incoherent. As the State points out, Granat has other vehicles for challenging the conditions of his confinement, should the need arise.

Additionally, the circuit court's postconviction decision specifically observed that there was no punitive intent associated with the court's comment at sentencing. The court recalled that its comment "was not said out of malice, was not said out of some sort of ha-ha, now you're going to get yours." Rather, the court was "making a legitimate link between the defendant and the girls to try to impart the need for him to empathize with his victims in terms of how they felt, how they were currently feeling, the fears they were still expressing." Although Granat contends the court's postconviction rationale is beyond our review, he is incorrect. *See* ***State v. Helmbrecht***, 2017 WI App 5, ¶13, 373 Wis. 2d 203, 891 N.W.2d 412.

Granat also contends the circuit court erroneously considered as an aggravating factor his failure to continue with sex offender treatment. At sentencing, the court stated that it had read that Granat "did receive some sex offender therapy, but you quit. So that's a concern for the Court why you wouldn't want to continue with that. This should be the number one priority."[6] He faults his attorney for failing to show that he wanted to continue treatment but was financially unable to continue seeing his therapist, Brandie Tetzlaff.[7] The court's statement that Granat quit therapy was factually accurate and a relevant sentencing consideration; the court recognized that Granat needed treatment. The court never remarked upon the reason for Granat quitting therapy. The court's comments indicate it believed Granat had failed to prioritize treatment, a belief that Granat does not truly attempt to disprove. Because there was no basis for objecting to the court's observation that Granat quit treatment, Granat's counsel did not perform deficiently.

Finally, Granat argues his attorney should have objected at the sentencing hearing to the "improper consideration of [Granat's] childhood sexual experiences as an aggravating factor." Granat reported to the PSI author that his first sexual experience occurred when he was fourteen, and when he was fifteen or sixteen, he had sex with an adult woman who "liked to be tied up and have him play out rape scenarios with her." At sentencing, the circuit court remarked:

> I do not see you at the time you committed these offenses as some virginal, unsocialized seventeen or eighteen-year-old kid; that label does not apply to you because of your history with sex, regardless of how you got into it. And I understand that you were fourteen. You weren't old enough to make those choices either, absolutely.

[6] Additionally, later in the sentencing hearing, when discussing the suitability of probation, the circuit court remarked: "Does it concern me that you started treatment and then you just quit? Yes."

[7] In fact, the circuit court had that information before it. The PSI stated: "He reports seeing a licensed sex offender specialist for two sessions, but he discontinued it due to the cost."

> But then you were sixteen and involved in that S & M relationship and then you just went from there, and it might explain some of the behavior but it doesn't excuse it. And I've never heard in this case any allegation that you felt yourself to be a victim of your sexual experiences.

Granat argues the court's remarks indicate the court erroneously treated his past sexual experiences as an aggravating favor rather than as a mitigating factor because of his youth at the time. *See* WIS. STAT. § 948.01(1) (defining a "child" for purposes of WIS. STAT. ch. 948).

There was no basis to object to the circuit court's comments. The court recognized that Granat's sexual experiences occurred when he was too young to consent. It then observed that his sexual history "might explain" Granat's attitudes and character traits that led him to commit the sexual assaults. This view was endorsed by Granat himself, both in his sentencing memorandum and in his statements to the PSI author. Contrary to Granat's claim, the court did not clearly regard his past sexual experiences as an aggravating factor—certainly not in a way that would have constituted deficient performance by his counsel for failing to object.

Therefore,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals