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DISTRICT I

February 8, 2022

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Electronic Notice

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Milwaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1030-CR State of Wisconsin v. Kayla Ann Urban (L.C. # 2018CF4402)

Before Brash, C.J., Donald, P.J. and Dugan, J.

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).

Kayla Ann Urban appeals a judgment of conviction entered upon her guilty pleas to three felonies that arose when she drove at high speed to avoid the Milwaukee police. She also appeals a postconviction order denying her claim that trial counsel was ineffective at sentencing. On appeal, the sole issue is whether the circuit court properly denied her postconviction motion without a hearing. 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]

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

Because we conclude that Urban's postconviction motion failed to show that her trial counsel was ineffective at sentencing, we affirm.

The facts underlying Urban's criminal convictions are not in dispute. On September 10, 2018, Urban was twenty-one years old and was in a vehicle with a companion near South Seventh Street in Milwaukee. The two were using drugs. Police approached, and Urban's companion got out of the vehicle and fled on foot. Urban slid into the driver's seat and sped away from the scene. As she did so, she apparently tried to run over one of the officers. Police pursued her as she struck a parked car and narrowly avoided several moving vehicles. The chase ended when she entered an intersection against a red light and collided with another car, a Nissan Rogue. Both vehicles burst into flames. The two occupants of the Nissan, N.V. and E.V., were transported to the hospital. N.V. and E.V. each sustained multiple bone fractures. N.V. also sustained a head injury resulting in ongoing memory loss, E.V. suffered a collapsed lung, and both victims endured prolonged recovery periods lasting many months.

The State filed a criminal complaint charging Urban with multiple crimes. She elected to resolve the charges with a plea agreement. Pursuant to that agreement, Urban pled guilty to second-degree reckless injury; fleeing an officer while operating a motor vehicle, resulting in great bodily harm to another; and reckless driving causing great bodily harm to another. *See* WIS. STAT. §§ 940.23(2)(a), 346.04(3), 346.17(3)(c), 346.62(4), 346.65(5) (2017-18). She faced aggregate penalties of twenty-eight years and six months of imprisonment and $60,000 in fines. *See* WIS. STAT. § 939.50(3)(f), (i) (2017-18).

At sentencing, the State requested that Urban receive a substantial prison sentence and in support emphasized the gravity of the offenses, Urban's history of substance abuse, and her

failed treatment efforts. The victims addressed the court and described the suffering that Urban's conduct had caused them. Urban exercised her right of allocution and apologized. In response to the circuit court's inquiries, she confirmed that she was twenty-one years old and she explained that she had been addicted to heroin and cocaine since she was sixteen years old. Urban's trial counsel described Urban's remorse, her acceptance of responsibility, and her desire and urgent need for substance abuse treatment. Counsel went on to argue that Urban's criminal actions stemmed from her addiction and from her related impulses towards escapism and avoidance. As a disposition, counsel asked the circuit court to consider a term of imprisonment shorter than four years and to find Urban eligible to participate in the Wisconsin substance abuse program while imprisoned.[2]

The circuit court's sentencing discussion reflected the exercise of discretion required by ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that punishment and deterrence were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The discussion encompassed the gravity of the offenses, Urban's character, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In considering the relevant factors, the circuit court acknowledged that Urban had no criminal record but found that "she has a drug problem she can't control" and "strong" rehabilitative needs. The circuit court emphasized that Urban's conduct had resulted in "a tragedy" for the

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[2] With exceptions not applicable here, when an inmate successfully completes the Wisconsin substance abuse program, his or her remaining initial confinement time is converted to extended supervision time. *See* WIS. STAT. §§ 302.05(1)(am), 302.05(3)(c)2.

victims, whose lives "will never be the same," and that punishment was therefore a particularly important consideration in fashioning a disposition.

At the conclusion of its sentencing remarks, the circuit court imposed consecutive terms of imprisonment for second-degree reckless injury and for fleeing an officer resulting in great bodily harm. Each term consisted of seven years and six months of initial confinement and five years of extended supervision. For reckless driving causing great bodily harm, the circuit court imposed a concurrent term of eighteen months of initial confinement and two years of extended supervision. The circuit court thus imposed an aggregate sentence of fifteen years of initial confinement and ten years of extended supervision. The circuit court also found Urban eligible for the Wisconsin substance abuse program, but delayed that eligibility until she had served twelve years in prison.

Urban moved for postconviction relief, claiming that she received ineffective assistance of counsel at sentencing because her trial counsel failed to present alleged mitigating information about human brain development. She began by directing the circuit court's attention to ***Graham v. Florida***, 560 U.S. 48 (2010), ***Miller v. Alabama***, 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 577 U.S. 190 (2016), which discuss the sentencing of offenders who were juveniles when they committed their crimes. In ***Graham***, she said, the Supreme Court recognized that "parts of the brain involved in behavior control continue to mature through late adolescence," *see* ***id.***, 560 U.S. at 68, while in ***Miller***, the Supreme Court acknowledged studies showing that "'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,'" *see* ***id.***, 567 U.S. at 471 (citations, brackets, and some quotation marks omitted).

Urban went on to argue that the brain of a twenty-one-year-old woman is not fully developed and that offenders younger than twenty-five years old should be viewed as adolescents for sentencing purposes. In support, she submitted a psychologist's report. The psychologist indicated at the outset of the report that she had not examined Urban but had been retained to explain, "in a user friendly way," the research on adolescent and young adult development. The psychologist then offered conclusions that "important neurobiological development is ongoing throughout the teenage years and continuing into the early 20s," and that "adolescents are developmentally different from adults; thus, the signature qualities of these developmental changes reduce their culpability and increase their capacity for change."

Urban asserted that trial counsel's sentencing presentation should have included information about "Urban's developing mind," and that the failure to do so deprived the circuit

court of relevant facts about her character and culpability. The circuit court rejected this claim without a hearing.[3] Urban appeals.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). When conducting that review, we

[3] Urban also claimed in postconviction proceedings that her trial counsel was ineffective for urging the circuit court to find her eligible for the Wisconsin substance abuse program. She argued that she is statutorily excluded from participating in that program because she is serving a sentence for second-degree reckless injury, a crime in violation of WIS. STAT. § 940.23(2)(a) (2017-18). Urban is correct that, pursuant to WIS. STAT. § 302.05(3)(a)1., inmates are disqualified from participation in the Wisconsin substance abuse program while they are serving sentences for certain crimes, including, as relevant here, crimes codified in WIS. STAT. ch. 940. However, an inmate serving consecutive sentences may be considered for admission to the program after completing service of any disqualifying sentences. *See* DAI Policy 300.00.11 IV (C)(a), https://doc.wi.gov/DepartmentPoliciesDAI/3000011.pdf (last visited Jan. 28, 2022). In this case, the circuit court responded to Urban's postconviction claim regarding her program ineligibility by modifying the structure of her sentences, specifically requiring her to serve her sentence for second-degree reckless injury as the first of her consecutive sentences. On appeal, Urban nonetheless asserts in her brief-in-chief that her trial counsel performed deficiently by requesting eligibility for the Wisconsin substance abuse program, "for which she is ineligible." Her reply brief does not address the State's argument that the modified sentence structure imposed in the postconviction order ensured the eligibility that her trial counsel requested and that the circuit court intended. Urban's failure to reply to the State's argument constitutes a concession that her trial counsel did not perform deficiently by requesting program eligibility. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. We observe that the concession is well-advised, and we do not discuss the matter further.

"may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice[.]" ***Id.***

In this case, we conclude that Urban fails to show prejudice from the absence of an expert witness. The question of whether expert testimony is necessary rests within the circuit court's discretion. *See* ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶28, 323 Wis. 2d 682, 781 N.W.2d 88. In the postconviction proceedings here, the circuit court determined that it "did not require the assistance of an expert to explain that an offender in her early [twenties] might still have a developing brain that would lead her to make reckless or impulsive decisions." The circuit court explained that it "is familiar with ***Miller***, ***Montgomery***, and ***Graham***, and takes those decisions into consideration whenever sentencing a youthful offender." The circuit court further stated that it had sentenced many such offenders and "underst[ood] the mitigating nature of youth on decision-making." Urban expresses skepticism about the circuit court's statements in this regard but, as this court has explained, the vulnerabilities of youth have long been known. *See* ***State v. McDermott***, 2012 WI App 14, ¶¶19-20, 339 Wis. 2d 316, 810 N.W.2d 237. "To say ... that the [circuit] court did not realize what recent scientific research has confirmed ignores reality, and, in essence, puts the old wine of human experience in the new bottles of recent research[.]" ***Id.***, ¶21.

The circuit court went on to explain that an expert opinion would not have altered the outcome of the sentencing proceeding or affected the sentencing determination. The circuit court observed that it had sentenced Urban "based on the need to deter her and others from engaging in such extraordinarily reckless conduct, to impose a sentence consistent with the seriousness of the offenses, and to punish her for the devastating impact this [conduct] has had on the victims." Based on these considerations, the circuit court found that "imposing anything less than [fifteen]

years of initial confinement would have unduly depreciated the seriousness of these offenses regardless of her age." In light of the foregoing, Urban cannot demonstrate that she suffered prejudice as a consequence of her trial counsel's actions in omitting an expert opinion from the sentencing presentation. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (concluding that the defendant did not prove prejudice from an alleged deficiency where the circuit court found that it would not have fashioned a different sentence had trial counsel taken different action).

A circuit court may deny a postconviction motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The record here conclusively shows that Urban was not prejudiced by her trial counsel's alleged deficiency. Accordingly, the circuit court properly denied her claim without a hearing.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed. *See* 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