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DISTRICT III

March 8, 2022

To:

Hon. Steven P. Anderson
Circuit Court Judge
Electronic Notice

Hon. Eugene D. Harrington
Circuit Court Judge
Electronic Notice

Shannon Anderson
Clerk of Circuit Court
Washburn County Courthouse
Electronic Notice

Aaron Bruce Marcoux
Electronic Notice

Daniel J. O'Brien
Electronic Notice

Mark A. Schoenfeldt
Electronic Notice

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

2020AP1692-CR State of Wisconsin v. Allan N. Dahl (L. C. No. 2018CF78)

Before Stark, P.J., Hruz and Nashold, 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).

Allan Dahl appeals a judgment, entered upon his no-contest plea, convicting him of third-degree sexual assault. Dahl also appeals the order denying his motion for postconviction relief.[1] Dahl argues the circuit court erred by denying his postconviction motion for plea

[1] The Honorable Eugene D. Harrington presided over the plea hearing and imposed the sentence. The Honorable Steven P. Anderson denied the postconviction motion.

withdrawal 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).[2] We reject Dahl's arguments and summarily affirm the court's judgment and order.

In May 2018, the State charged Dahl with one count each of sexual assault of a child under the age of sixteen and exposing his genitals to a child. The complaint alleged that Dahl, then seventeen years old, had sexual intercourse with thirteen-year-old Carrie[3] on two separate occasions when Carrie was a guest at the Dahl home for a sleepover with Dahl's sister. The State further alleged that Dahl exposed his genitals to Carrie when photos were taken of him and Carrie naked together.

The State filed a pretrial motion to admit evidence of various "crimes, wrongs or acts" committed by Dahl when he was a juvenile. The circuit court granted the State's request to admit evidence of: (1) a sexual assault committed by Dahl against eleven-year-old "Sue" during a sleepover at the Dahl home; and (2) Dahl's sexual misconduct with ten-year-old "Amy" when he was staying at Amy's home. The court, however, denied the balance of the State's motion to admit acts of sexual misconduct by Dahl as a juvenile.

In exchange for Dahl's no-contest plea to an amended charge of third-degree sexual assault, the State agreed to recommend that the circuit court dismiss and read in the remaining charge of exposing genitals to a child. The State also agreed to recommend a "non-prison

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

[3] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims' names.

disposition" at sentencing. Before accepting Dahl's no-contest plea, the court engaged him in an extensive plea colloquy.

Though Dahl faced a maximum possible ten-year sentence, both defense counsel and the prosecutor recommended an imposed and stayed sentence with probation and conditional jail time. Before imposing its sentence, the circuit court considered proper sentencing factors, including the seriousness of the offense; Dahl's character; the need to protect the public; and the mitigating factors Dahl raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court acknowledged Dahl's youth, and while it emphasized that Dahl was not being sentenced for his prior bad acts, it noted that his "significant prior behavior" could be considered by the court in the context of showing Dahl's character. To that end, the court noted:

> His first referral was in 2012. He had asked girls to expose their tops and their bottoms. He asked a ten-year-old neighbor to rape him and tried to pull her pants down. 2012 was the masturbation at the school. 2014, he asked a female at the school to take photographs of other girls in the locker room. … October of 2014 was the window peeping thing. April of 2017 was the child solicitation charges.

The circuit court also recounted the presentence investigation agent's assessment that Dahl had "established a lengthy pattern of sexually deviant predatory behaviors that have escalated over time." The court concluded that Dahl had already had "ample opportunity as a juvenile for community treatment and supervision," and it emphasized the "overwhelming need to protect the public" before imposing an eight-year sentence, consisting of three years' initial confinement and five years' extended supervision. The court also ordered lifetime sex offender

registration. Dahl's postconviction motion for plea withdrawal was denied without a hearing.[4] This appeal follows.

Dahl argues he is entitled to an evidentiary hearing on his postconviction motion for plea withdrawal based on the ineffective assistance of his trial counsel. We apply a mixed standard of review when determining whether a defendant's postconviction motion alleged sufficient facts to entitle the defendant to a hearing for the relief requested. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief is a question of law that this court reviews de novo. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing, a postconviction motion should present its allegations in a "who, what, where, when, why, and how" format, with sufficient particularity to allow the court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23. If the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11.

Decisions on plea withdrawal requests are discretionary and will not be overturned unless the circuit court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). Where, as here, the circuit court did not exercise its discretion on the merits of the motion, our review is de novo. *See generally* ***State v. Sullivan***, 216 Wis. 2d

[4] The circuit court did not reach the merits of Dahl's postconviction motion, instead denying it because the deadline for deciding the motion pursuant to WIS. STAT. RULE 809.30(2)(i) had passed. It is unclear from the record why neither Dahl nor the court sought an extension of the time for deciding the motion.

768, 781, 576 N.W.2d 30 (1998) ("When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion.").

In a postconviction motion for plea withdrawal, the defendant carries the heavy burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Ineffective assistance of counsel can constitute a manifest injustice. ***Bentley***, 201 Wis. 2d at 311. In order to prove ineffective assistance, however, Dahl must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

In his motion, Dahl alleged that his counsel was ineffective by failing to inform him that the acts of sexual misconduct that would have been excluded at his trial could nevertheless be considered at his sentencing. Dahl further alleged that had he known the sentencing court could consider the excluded evidence, he would not have entered a no-contest plea and he would have insisted on proceeding to trial. Even if we assumed that counsel performed deficiently by failing to inform Dahl that the sentencing court could consider his entire juvenile record despite its pretrial ruling, his postconviction motion is facially deficient on the prejudice prong of our inquiry.

Dahl's unsubstantiated and conclusory allegation that he would have insisted on going to trial is insufficient to establish prejudice. *See* ***Bentley***, 201 Wis. 2d at 313-15. A specific explanation for why he would have gone to trial is required, *see* ***id.*** at 314, yet Dahl offered no

evidence or explanation for why the sentencing court's consideration of his juvenile misconduct made any difference to his decision to enter a no-contest plea. At a minimum, Dahl knew the circuit court had not excluded from trial the evidence from 2012 of Dahl's sexual assault of an eleven-year-old girl and sexual misconduct with a ten-year-old girl. The additional prior juvenile acts that Dahl thought the sentencing court would not consider were far less serious than the acts that Dahl knew it could consider.

Further, Dahl's motion does not specify what he and his counsel discussed regarding what the circuit court could consider at sentencing. Dahl may not rely on conclusory allegations of ineffective assistance of counsel in hopes that the court will allow him to engage in a fishing expedition to prove his claim. *See* ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334. "The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance." ***Id.*** Dahl's motion also fails to explain why he would have risked convictions on the original charges at trial—which carried a maximum possible aggregate sentence of forty years and nine months—just because he was unaware the court could consider a few additional prior acts of his sexual misconduct as a juvenile.

Ultimately, Dahl's motion fails to allege sufficient facts for us to conclude that he would have gone to trial on the original charges but for counsel's alleged deficiency. Because the plea withdrawal motion is deficient on its face as to prejudice, it was properly denied without a hearing.

Upon the foregoing,

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