STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2
Appeal No. 2013 AP 2559 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. CARLSON,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON OCTOBER 28, 2013, AND A JUDGMENT OF CONVICTION ENTERED MAY 16, 2012, AND AMENDED ON OCTOBER 10, 2013, IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, HON. SANDY A. WILLIAMS PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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Introduction

The State begins its brief by suggesting that if the Court of Appeals agrees with Carlson that his sentence is unduly harsh or unconscionable or the court relied on inaccurate information at sentencing, this would require resentencing. After that, the State submits, Carlson "will have to file a new postconviction motion after his resentencing." According to the State, the resentencing will "moot Carlson's claim that the circuit court should have held an evidentiary hearing on his postconviction motion." State's brief at 4.

Carlson disagrees with the State. In his postconviction motion, Carlson was clear that he sought alternative remedies. He first sought withdrawal of his guilty plea (62:1). If this Court, or the circuit court after remand, allows him to withdraw his plea, then Carlson's sentence will necessarily be vacated as a result. In such a circumstance, there would be no need for this Court to rule on his request for resentencing or sentence modification. However, in addition to ruling on Carlson's request for plea withdrawal, this Court may also choose to rule on Carlson's alternate requests on sentencing, and it is within its authority to do so.

The State cites to *State v. Walker,* 2006 WI 82, 292 Wis. 2d 326, 716 N.W.2d 498, presumably in support for its statement that Carlson will have to file a new post-conviction motion after his resentencing. Carlson does not believe that *Walker* is

relevant to his situation. *Walker* held that when a defendant seeks modification of a sentence imposed at a resentencing, he cannot appeal directly to the Court of Appeals; rather he must file a postconviction motion with the circuit court before taking an appeal. *Id.* at ¶37. Here, Carlson *did* file a postconviction motion with the circuit court, and is now on appeal. It seems pointless to require him to refile his motion after a possible resentencing.

Therefore, Carlson urges this court to rule on his request to withdraw his plea, and either grant the request, or remand for an evidentiary hearing. If he is allowed to withdraw his plea, then the sentencing issues become moot. If he is not allowed to withdraw his plea, this Court can rule on the sentencing issues.

In this brief Carlson will address the issues in the same order as in his opening brief, rather than the order followed by the State.

I. The Court erred in denying, without a hearing, Carlson's claim that his attorney was ineffective for advising that he had a realistic possibility of receiving a community-based sentence if he pled guilty.

Carlson is puzzled by the State's response to Carlson's request to withdraw his plea. The State's point heading is clear enough—that the circuit court did not err in denying the postconviction motion to withdraw his plea. But then the State correctly points out that the court must assume the allegations in the postconviction motion to be true. State's brief at 21. Applying that standard, the State agrees that

it is a credibility determination as to whether Carlson would have insisted on going to trial. Since the circuit court did not conduct an evidentiary hearing, the State seems to recognize that an evidentiary hearing must be conducted in this case, assuming this Court reaches this clam. State's brief at 24.

Along the way, the State makes several points to which Carlson will respond:

First, the State points out that a trial court is not bound by the State's sentence recommendation. State's brief at 21. Carlson agrees that it is possible that the prosecutor could have asked for a lengthy prison sentence, and the court could still have imposed a term of probation. However, Carlson still submits that probation was an unlikely outcome, and the prosecutor's recommendation made it even more unlikely.

Second, the State argues that the data cited by Carlson shows that a percentage of sexual assault defendants do receive probation. State's brief at 21. But as stated in his opening brief, Carlson would likely not have fared as well as those in the data cited, since he was charged with both Repeated Sexual Assault of the Same Child (Wis. Stat. § 948.025) *and* Second Degree Sexual Assault of a Child (Wis. Stat. § 948.02(2), rather than only one of those offenses.

Third, the State argues that Carlson "stood a better chance of receiving probation after guilty pleas than he did by insisting on a trial. State's brief at 23. That may be true, but of course, this assumes that he would have been convicted after a trial. Certainly, a

reasonable attorney could advise his client that if convicted, he will fare better at sentencing. But that is not what Carlson alleged in his postconviction motion. He did not claim that his attorney told him he would fare better at sentencing. He claimed that his attorney improperly advised him that there was a realistic chance of obtaining probation upon his plea, and that he then pled guilty based on his attorney's advice (62:13).

Since there are issues of credibility that can only be determined at an evidentiary hearing—as the State recognizes—this Court should remand this case for a *Machner* hearing, at which time Carlson can offer evidence in support of his claims.

II. The Court erred in denying, without a hearing, Carlson's claim that trial counsel was ineffective at sentencing for failing to refute the Court's statement that Carlson sexually assaulted AJK 300-400 times.

Although the Point Heading of section II-D of the State's brief is that Carlson's attorney did not perform deficiently at sentencing, the State provides no corresponding argument. Instead, it argues that there was no prejudice because it was "harmless error" that Carlson's attorney did not object when the court blamed Carlson for sexually assaulting AJK for up to 400 assaults. State's brief at 17.

In a different section of its brief, the State argues that any error was harmless because the court gave adequate reasons for its sentence. State's brief at 12-14. The State points out that the victim's

mother's presence in the house would not necessarily have deterred the assaults, as they could have occurred late at night when everyone else was sleeping. That is true, but certainly the victim's mother in the house would make the assaults less likely. In addition, that does not take into account Carlson's allegation that he was away from home for work for extended time during the offense period.

The State also argues that some of the assaults could have been multiple assaults on one occasion. State's brief at 14. But it is illogical and therefore extremely unlikely that, when AJK reported that the abuse occurred "at least twice a week" for three years, she was talking about multiple assaults at the same time (for example, if he touched various body parts during the same time frame).

As for prejudice, the State agrees that the circuit court actually relied on the 300-400 figure. State's brief at 15. However, it argues that any error the court made by referring to the more than 300 assaults was harmless. State's brief at 15. The State claims that it was the "length of the period over which the assaults took place, the frequency and regularity of the repeated contacts, rather than the actual number of assaults upon which the court based its sentence." *Id.* at 16.

But, as stated in Carlson's opening brief, it seems unlikely that the sentencing court could have set aside its belief that Carlson sexually assaulted a minor up to 400 times. The allegation that led to the 300-400 figure was stated repeatedly prior to sentencing. At sentencing, both the PSI and the State emphasized the great number of alleged

assaults against AJK (35:16). The court spent a considerable amount of time addressing the seriousness of the offense, during which time it referred to the 300 - 400 assaults (74:77).

The State does not suggest any possible strategic reason why Carlson's attorney would not object to the court's use of this figure, and there is none. Evidence rebutting the 300-400 figure necessarily diminishes the seriousness of the offense to some degree, and creates a reasonable probability of a different sentencing outcome.

III. The Court erred in denying, without a hearing, Carlson's claim that the sentence was based on inaccurate information, that Carlson sexually assaulted AJK 300-400 times.

The State disputes Carlson's claim that his sentence relied on inaccurate information that there were 300-400 assaults. The State submits that Carlson has not shown that the court's calculation was erroneous. State's brief at 12-14.

Carlson has addressed in Point Heading II that the 300-400 figure is inaccurate, and will not repeat that argument here.

IV. Carlson's sentence was unduly harsh or unconscionable.

In Section I of its brief, the State argues that the court's sentence was not unduly harsh or unconscionable. It points out that Carlson's sentence represented only 30% of the maximum exposure on

initial confinement. State's brief at 11. But, as stated in the opening brief, sentences well within the limits of the maximum sentence can be harsh or unconscionable, even though courts are unlikely to find them to be so. *State v. Scaccio,* 2000 WI App 265, 240 Wis. 2d 95, 108, 622 N.W.2d 449.

In his opening brief, Carlson pointed to a number of factors that make his sentence harsh or unconscionable. They include:

- that Carlson accepted responsibility by pleading guilty;
- that Carlson had no prior criminal record;
- that Carlson had ceased his criminal conduct for over seven years before his arrest;
- that the two counts involved essentially one course of conduct;
- that Carlson participated in sex offender treatment before sentencing;
- that his social worker at Pathways Counseling, Brandi Tetzlaff, stated that Carlson had progressed;
- that Dr. Michael Woody (and Tezlaff) agreed that Carlson posed a low risk of re-offending;
- that the 23-year term was significantly longer than the PSI recommendation;
- that the sentence was considerably longer than the terms of other defendants who pled guilty to both charges;
- that AJK did not think that prison would help Carlson.

Added together, these factors demonstrate that the court's sentence was harsh and unconscionable.

CONCLUSION

For the above reasons, Carlson respectfully requests that this court remand this case to the circuit court for an evidentiary hearing on his claims that his attorney was ineffective, or grant him the right to withdraw his plea, be resentenced, or have his sentence modified.

Respectfully submitted this 18th day of June, 2014.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1,734 words.

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Gregory W. Wiercioch

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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Gregory W. Wiercioch