STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1284-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICARDO L. CONCEPCION,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE ANTHONY G. MILISAUSKAS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. The Fourth Amendment's prohibition against unreasonable searches and seizures does not extend to a private party's search. Concepcion allowed a friend, who was an Illinois law enforcement officer, to stay at his Kenosha mobile home. The friend unlocked a box and found computer disks. Upon playing the disks, he discovered child pornography. Did Concepcion's friend's search of the disks constitute a private party search that did not violate Concepcion's Fourth Amendment rights?

The circuit court answered: Yes.

This Court should answer: Yes.

2. Did the circuit court reasonably exercise its sentencing discretion and impose a sentence that was not unreasonably harsh?

The circuit court answered: Yes.

This Court should answer: Yes.

3. Did trial counsel provide ineffective assistance of counsel at Concepcion's sentencing hearing?

The circuit court answered: No.

This Court should answer: No.

INTRODUCTION

Ricardo Concepcion was convicted of child pornography charges after his friend, an off-duty police officer, discovered child pornography at Concepcion's residence while staying there. Conception, an Illinois police officer, and other off-duty police officers operated a volunteer search and rescue organization based at a Kenosha airport. Concepcion maintained a residence near the airport, and he occasionally allowed Daniel Bitton, who was a friend, a fellow volunteer, and an Illinois police officer, to stay at the residence.

Concepcion gave Bitton permission to stay at the Kenosha residence before a scheduled flight. When Bitton entered the residence, he saw several pairs of headsets that he knew had been missing from the search and rescue organization. Bitton searched for additional headsets, intending to return them to the organization. Bitton unlocked a container and observed several computer disks marked with female names and numbers that Bitton believed referred to the females' ages. Bitton played the disks and observed child pornography. Bitton immediately contacted his employing agency in Illinois and the Kenosha County sheriff. Based on Bitton's statements, investigators obtained a search warrant and executed it at Concepcion's Kenosha residence. Investigators searched a computer and found image and video files that contained child pornography.

Concepcion contends that Bitton acted in his official capacity as a law enforcement officer when he searched Concepcion's residence without a warrant and that the circuit court should have suppressed the evidence that investigators subsequently seized under the search warrant. The circuit court appropriately determined that Bitton's examination of the disks did not violate the Fourth Amendment because Bitton was acting as a private party when he searched Concepcion's belongings. Wisconsin law enforcement officers did not encourage Bitton to search Concepcion's belongs. Bitton conducted the search to further his own interest, and he did not conduct the search for the purpose of assisting law enforcement officers.

Concepcion also argues that the circuit court inappropriately exercised its sentencing discretion and that it imposed an unduly harsh sentence. The circuit court's sentence was the product of a reasoned and reasonable exercise of its sentence discretion. Its sentence was not unduly harsh because it was a sentence well within the

limits of the maximum sentence available for Concepcion's offenses.

Finally, Concepcion asserts that his trial counsel rendered ineffective assistance of counsel at his sentencing hearing. The circuit court appropriately denied this claim because Concepcion failed to demonstrate that his trial counsel's performance was deficient. Concepcion also failed to demonstrate that the outcome of his sentencing proceeding would have been different if his trial counsel had performed differently.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs and the issues presented involve the application of settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

I. The search of Concepcion's property.

Concepcion was a deputy police chief for Winthrop Harbor, Illinois, Police Department. (R. 60:9.) He was also a member of a volunteer search and rescue helicopter organization known as "Law Enforcement Aviation Coalition" or "LEAC."[1] (R. 23:11; 60:9, 28; 61:6.) Concepcion

[1] According to the website for the "Air-One Emergency Response Coalition," the Law Enforcement Aviation Coalition was incorporated in 2005 as a not-for-profit organization. Its mission includes searching for lost persons, assisting with felonies in progress, and life-saving rescues. The organization's members are volunteers who rely on surplus military helicopters to conduct its mission. The organization changed its name in 2011. See the "About" page, http://www.airsupport.org (last viewed September 13, 2017).

helped found the organization in 2004. (R. 60:22–23.) The police search and rescue helicopter unit had bases in Kenosha and Rockford. (R. 60:7, 23.) Concepcion flew from the Rockford base. LEAC members serve on a "purely volunteer basis," signing up to make themselves available for helicopter rescue calls. (R. 60:25.) The volunteers are not on duty when they take flights. They are not paid or reimbursed. They are not covered under their police department's insurance. (R. 60:26.)

Concepcion had a mobile home near the airport. (R. 60:10.) He allowed another person, Daniel Bitton, to stay in his mobile home on several occasions. (R. 60:16.) Bitton was also a Winthrop Harbor police officer and was also a volunteer and commander for the search and rescue helicopter unit in Kenosha. Bitton was a part-time pilot who periodically flew jets. (R. 60:7.) Britton stated that he did not have arrest powers in Kenosha County, but he had a limited deputation to drive with red lights and a siren on the way to a search and rescue call. (R. 60:7.)

Bitton described Concepcion as "his best friend since 1998." (R. 60:8.) Concepcion was Bitton's deputy chief. They also worked together in the helicopter unit. They socialized outside of work, inviting each other to their respective homes. (R. 60:8–9.) Britton stated that there were no secrets between him and Concepcion. "[H]e had access to everything I owned, locked or unlocked, and I had access to everything he owned, locked or unlocked." (R. 60:16–17.) Bitton explained that "it was a very special relationship . . . but it's friends through combat, friends through saving people." (R. 60:17.)

On January 18, 2011, Bitton asked Concepcion for permission to stay at the home near the airport. Bitton knew that the home was unoccupied because Concepcion was working out of state. Bitton explained that he wanted to get some sleep before a flight. (R. 60:9.) Bitton went to the home

with his girlfriend. (R. 60:22, 27.) Bitton did not need a key to enter as it was unlocked. (R. 60:16.)

Upon entering the home, Bitton saw a box for a headset for a helicopter that Concepcion flew. (R. 60:10.) He looked inside and saw a headset. Bitton initially thought that Concepcion had taken the headset home to clean or repair it. (R. 60:11.) Bitton then entered the bedroom and saw two more headset boxes on a shelf. Headsets were inside those boxes. (R. 60:12.) Bitton knew that headsets valued at nearly $15,000 were missing from the LEAC (R. 60:13); he thus continued to look for headsets because he planned to take any headsets he could locate back to the hanger (R. 60:13).

When Bitton grabbed the headsets in the bedroom, a set of keys fell down. (R. 60:12, 22.) Bitton saw three additional containers near the closet. He looked in two containers. (R. 60:12.) He then used a key to unlock the third container to see if any headsets were inside. (R. 60:13.) Inside the container Bitton saw sexual aids, unexposed film, and DVDs with handwriting on them. (R. 60:13.) Bitton recognized the handwriting as Concepcion's. Bitton noticed female names with numbers on the DVDs. Bitton believed that the numbers represented the female's ages. (R. 60:14, 24.) He played the DVDs and he saw pornographic material of children which he guessed to be between 4 and 12 years old. He described the images as those of sexually explicit, unclothed, small children. (R. 60:14.)

Bitton contacted a supervisor at the Winthrop Harbor Police Department. He also contacted the Kenosha County Sheriff's Department. (R. 60:15.) Bitton left the trailer. (R. 60:16.) Bitton was not present at Concepcion's home when other police officers went there. (R. 60:18.)

Michael Hoell, a special agent for the Wisconsin Department of Justice, Division of Criminal Investigation,

obtained a search warrant for Concepcion's mobile home based in part on the information that Bitton provided. (R. 23:4–5; 61:4.) Bitton told Hoell that he was looking for missing helicopter headsets and that he used a key to open a box. (R. 61:7–8, 13.) Bitton did not see anything associated with the helicopter headsets in the box. But he did see tapes with writings of female names and numbers on them. (R. 61:10.) Hoell believed that Bitton played the tapes because he thought that they might contain depictions of child pornography. (R. 61:16.) Hoell stated that Bitton was not on duty when he was at the mobile home. (R. 61:17.)

Hoell's affidavit is included in the record. (R. 23:3–16.) The affidavit details Hoell's background, including experience investigating Internet crimes against children. (R. 23:5.) The affidavit summarizes Hoell's interview with Bitton. It includes a discussion of Bitton's and Concepcion's involvement with LEAC, Bitton's use of Concepcion's mobile home, Bitton's observations of the missing helicopter headsets, his use of a key to open the locked box, and the discovery of computer disks with female names and numbers next to them. (R. 23:11–13.) Hoell's affidavit includes details that were not fully covered in Bitton's suppression hearing testimony. Bitton acknowledged that it was common for Concepcion to have equipment in his home as he repaired and maintained them there. (R. 23:11.) Bitton also observed that locked box had Concepcion's name written on it and Bitton believed that it contained the remainder of the missing headsets. When Bitton unlocked the box, he saw stacks of compact discs and rows of VCR tapes. (R. 23:12.) Bitton played two CDs with a name and single digit number on a DVD player in the living room. He saw a video that depicted children involved in sexual activity with adults and other children who appeared to be under the age of 16 and images that depicted nude female children in sexually explicit poses. (R. 23:13.)

Agent Hoell obtained a search warrant to search Concepcion's mobile home. Investigators recovered documentary evidence, computer hard drives, film, and compact discs. A search of these items revealed the presence of child pornography. (R. 1:1–5.)

II. Procedural history of Concepcion's case before his plea.

The State charged Concepcion with possession of child pornography. (R. 1:1; 22.) Concepcion moved to suppress the evidence seized from his mobile home on the ground that Concepcion did not consent to Bitton's search and that Bitton acted in an official, law enforcement capacity during the search. (R. 23:2.) Bitton and Agent Hoell testified at the suppression hearing. (R. 60; 61.)

Following the hearing, the circuit court made several factual findings related to Concepcion's motion. These findings related to Bitton's law enforcement background and volunteer search and rescue work, Bitton's lack of arrest authority in Wisconsin, Concepcion and Bitton's friendship, and Bitton's use of Concepcion's mobile home. (R. 62:14–15.) The circuit court also discussed Bitton's discovery of the headsets, his use of a key to open a locked box, Bitton's observations of the locked box's contents, and Bitton's discovery of child pornography on a disk. (R. 62:16.) The circuit court determined that Bitton did not do anything after he found the pornography and left the home. (R. 62:15–16.) Based on this record, the circuit court determined that Bitton conducted himself as a private citizen. The circuit court denied Bitton's motion. (R. 62:17.)

III. Concepcion's plea and sentencing hearing.

After the circuit court denied Concepcion's motion to suppress evidence, Concepcion pled guilty to ten counts of possession of child pornography. (R. 63:2.) The circuit court

ordered a presentence investigation report. (R. 28.) Following a sentencing hearing, the circuit court sentenced Concepcion on each count to a three-year term of confinement and two-year term of extended supervision. (R. 66:28–29.) The circuit court ordered Concepcion's sentences to be served concurrently with some counts and consecutively to other counts. The circuit court structured Concepcion's sentence in a manner that effectively resulted in Concepcion receiving a 15-year term of imprisonment consisting of a nine-year term of initial confinement and a six-year term of extended supervision with credit for 540 days. (R. 66:29.)

IV. Concepcion's motion for postconviction relief.

Concepcion moved for postconviction relief. (R. 44.) He renewed his challenge to the circuit court's decision to deny his motion to suppress. (R. 44:3.) Concepcion also challenged the circuit court's exercise of sentencing discretion. (R. 44:3–15.) He contended that the circuit court exercised its sentencing discretion in an unduly harsh manner. (R. 44:15–22.) Concepcion also sought sentence modification based on new factors. (R. 44:22–23.) Finally, Concepcion alleged that his trial counsel was ineffective for failing to make appropriate sentencing arguments. (R. 44:23–25.)

The circuit court conducted an evidentiary hearing on Concepcion's ineffective assistance of counsel claim. (R. 68:3.) Concepcion's trial counsel testified at the hearing. (R. 68:4–21.)

On June 3, 2016, the circuit court denied Concepcion's postconviction motion. (R. 70:10.) It rejected Concepcion's challenge to its prior determination that Bitton was not serving as a police officer when he searched Concepcion's belongings. (R. 70:2–3.) The circuit court also determined that trial counsel's performance was not deficient with her representation of Concepcion at the sentencing hearing. (R.

70:3–4.) The circuit court found that Concepcion did not present any new factors warranting sentence modification. (R. 70:5.) The circuit court also determined that it properly exercised its sentencing discretion and did not impose an unduly harsh sentence. (R. 70:5–9.)

Concepcion appeals.

ARGUMENT

I. Britton's search of Concepcion's mobile home was a private party search.

A. Standard of review.

Whether a search is a private search or a government search presents a mixed question of law and fact. This Court applies a two-step standard of review. It will not overturn the circuit court's factual findings unless they are clearly erroneous. But this Court will independently determine the ultimate question of whether the search constituted a government search or private-party search. *State v. Payano-Roman*, 2006 WI 47, ¶ 16, 290 Wis. 2d 380, 714 N.W.2d 548.

B. General legal principles.

"Private searches are not subject to the Fourth Amendment's protections because the Fourth Amendment applies only to government action." *Payano-Roman*, 290 Wis. 2d 380, ¶ 17. Wisconsin courts apply a three-part test to determine when a search constitutes a private party search. First, "the police may not initiate, encourage, or participate in the private entity's search." *Id*. ¶ 18. Second, "the private entity must engage in the activity to further its own ends or purpose." *Id*. Third, "the private entity must not conduct the search for the purpose of assisting governmental efforts." *Id*.

A private party search may become a government search if it is a "joint endeavor" that involves a private party and a government official. *Id*. ¶ 19. But a government

official's mere presence does not transform a private search into government action. *Id.* ¶ 20. The defendant bears the burden of proving by a preponderance of the evidence that government involvement in the search or seizure brought it within the Fourth Amendment's protections. *Id.* ¶ 23.

This Court has previously addressed whether an off-duty law enforcement officer is a government agent for Fourth Amendment purposes. Whether there is governmental involvement in a search is not measured by the actor's primary occupation, but by the capacity in which the actor acts at the time in question. *State v. Cole*, 2008 WI App 178, ¶ 13, 315 Wis. 2d 75, 762 N.W.2d 711. In *Cole*, a deputy opened a letter mailed to her residence. After opening the letter, she realized that the letter was not intended for her and constituted evidence of intimidation of a witness. The deputy provided the letter to the prosecutor handling the underlying case. *Id.* ¶ 20. In determining that the deputy acted in her private capacity, this Court noted that the deputy's act of turning over the evidence to another officer indicated that the off-duty officer was acting in a private capacity when she discovered the evidence. *Id.* ¶ 20.

In *State v. Berggren*, 2009 WI App 82, 320 Wis. 2d 209, 769 N.W.2d 110, this Court applied the standard adopted in *Cole* for assessing whether an off-duty law enforcement officer's conduct constituted government action for Fourth Amendment purposes. *Id.* ¶ 15. In *Berggren*, a twelve-year old girl became upset after she viewed sexually graphic pictures involving her father and her step-sister on her father's camera. *Id.* ¶ 2. She removed the memory stick and gave it to her mother. *Id.* ¶ 3. Her mother gave it to her brother, a police lieutenant, who was off-duty and on a holiday related vacation. *Id.* ¶¶ 4–5. The lieutenant viewed the contents of the memory stick and observed a male having oral sex with a child. *Id.* ¶ 5.

This Court rejected Berggren's argument that the off-duty lieutenant was acting in his official investigative capacity as a law enforcement officer merely because the circumstances "would have led a reasonable law enforcement officer to believe that there was evidence of a crime" on the memory stick. *Id*. ¶ 13. Applying the *Payano-Roman* test, this Court determined that the police did not instigate the lieutenant's actions. Further, the lieutenant acted in the family's interest when he viewed the photographs that his niece described as nasty. Finally, nothing in the record suggested that the lieutenant acted for the purpose of assisting governmental efforts. *Id*. ¶ 17. Based on this analysis, this Court determined that the lieutenant's viewing of the memory stick did not constitute government action. *Id*.

C. Because Bitton searched Concepcion's mobile home in his private capacity, his actions do not constitute government action for Fourth Amendment purposes.

The circuit court denied Concepcion's Fourth Amendment motion to suppress based on its determination that Bitton acted in his private capacity when he played the disk that contained the child pornography. (R. 62:16–17.) The record supports the circuit court's determination. Applying the *Payano-Roman* test for private party searches to this record, Concepcion has not demonstrated that Bitton acted as a governmental agent when he searched Concepcion's mobile home.

1. Law enforcement did not initiate, encourage, or participate in Britton's search of Concepcion's property.

Law enforcement officers did not initiate, encourage, or otherwise participate in Bitton's search of his friend's mobile home or the discs found in his locked box. Bitton's

status as an Illinois police officer does not automatically transform his conduct into a search that law enforcement initiated or encouraged. Bitton was not acting in a governmental capacity when he was at Concepcion's Kenosha mobile home.

Bitton came to Kenosha to either fly a jet, which he did on a part-time basis, or fly a helicopter for LEAC. (R. 60:7, 9.)[2] While LEAC assists law enforcement agencies and other first responders in search and rescue operations, it is not a governmental entity. (R. 60:9, 28; 61:6.) Bitton flew for LEAC on a purely voluntary basis. (R. 60:25.) He is off duty, unpaid, and not covered under his department's insurance when he takes a flight. (R. 60:26.) As an Illinois police officer, Bitton had no arrest authority in Kenosha County. (R. 60:7)

Further, Bitton was not acting in an official police capacity when he went to Concepcion's home. Bitton had a longstanding friendship with Concepcion; they socialized with each other and visited each other at their homes. (R. 60:8.) Bitton received permission to stay at Concepcion's mobile home before a flight, just as he had done previously. (R. 60:9, 16.) Bitton's girlfriend accompanied Bitton to Concepcion's home, also supporting the circuit court's determination that Bitton was not acting in a governmental capacity. (R. 60:22, 27.)

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[2] At the suppression hearing, Bitton stated that he was at the airport to fly the jet, something that he did periodically on a part-time basis. (R. 60:7, 9.) According to the search warrant affidavit, Agent Hoell reported that Bitton told him that he was scheduled to take a LEAC flight. (R. 23:11.) Whether Bitton was flying the jet privately or flying a helicopter through LEAC, he was not acting in a governmental capacity for Fourth Amendment purposes.

When Bitton entered the home, he saw helicopter headsets that were missing from LEAC. He initially thought that Concepcion had brought them there for cleaning or repairs. (R. 60:11). Bitton noted that the headsets were expensive and that he planned to take the headsets back to the hanger (R. 60:13)—a purpose which is consistent with his role as a helicopter pilot in a volunteer organization rather than an Illinois police officer investigating a crime.

In his quest to locate other missing headsets, Bitton used a key to open a locked box bearing Concepcion's name. (R. 23:12; 60:14.) Inside, he saw several DVDs inside the box with writing that he recognized as Concepcion's. Specifically, the writing included female names with numbers next to them. (R. 60:14, 24.) Bitton played the discs and saw sexually explicit images of unclothed, small children. (R. 60:14.) Bitton notified his employer, the Winthrop Harbor Police Department, and the Kenosha County Sheriff's Department. (R. 60:15.) Bitton left the trailer. (R. 60:16.) The circuit court specifically found that Bitton did not do anything further after he found the pornography. (R. 62:16.) Bitton then provided information to Agent Hoell, who obtained a search warrant and subsequently searched the mobile home and seized the contraband. (R. 61:4; 23:4–5.) Bitton was not present when the other officers were at Concepcion's home. (R. 60:18.)

Wisconsin law enforcement officers did nothing to initiate, encourage, or participate in Bitton's search of Concepcion's property.

2. Bitton searched Concepcion's property for his own purposes rather than law enforcement purposes.

Further, Bitton searched Concepcion's mobile home for his own purposes rather than as part of a criminal investigation. After Bitton saw the first headset, he began to

look for other headsets that were missing. Bitton wanted to return the headsets to the hanger. (R. 60:13.) This was equipment that LEAC needed to perform its volunteer mission and Bitton wanted it back. This is certainly a private purpose and not a law enforcement purpose.

Bitton candidly explained why he decided to play the disks. He was "disturbed at the age groups" and whether the disks contained "what [Bitton] assumed it was at the time[,]" Bitton said that it was "just contrary to what I believed . . . to be right." (R. 60:14.) While Bitton may well have suspected that child pornography was on the disks, he played the disks to further his own ends, i.e., curiosity and disgust, rather than as part of a law enforcement investigation. Suspicion and curiosity simply do not transform his actions, conducted while off-duty and in a jurisdiction where he lacked authority, into a governmental search.

Bitton's search is no different from the search that an off-duty officer undertook in *United States v. Ginglen*, 467 F.3d 1071 (7th Cir. 2006). There, an off-duty police officer read a local news story about a serial armed robber. Based on the description, the officer and his brothers believed that their father could be the perpetrator. The officer and his brothers went to the father's house to confront him. The officer wore his bullet-proof vest and brought his gun and badge. Upon entering the house, they saw clothing that matched the description of the clothing that the robber wore. The officer and his brothers informed the police of their observations. The police then obtained a search warrant for the property. *Id.* at 1073.

The Seventh Circuit rejected Ginglen's argument that the search was a governmental search in part because his son had a non-law enforcement purpose for entering his father's home. *Id.* at 1075. It reached this conclusion based on several factors, including the fact that the officer was off-

duty, acting outside his jurisdiction, not in uniform, and had a primary purpose to protect the community rather than assist law enforcement. *Id*.

Just as in *Ginglen*, Bitton did not collect evidence as a law enforcement officer would have collected it. Further, like the off-duty officer in *Ginglen*, Bitton contacted another law enforcement agency with jurisdiction so that it could conduct an investigation. *Id*. at 1076. Further, Bitton acted even less like a police officer than the off-duty officer in *Ginglen*. Unlike the officer in *Ginglen*, Bitton did not go to Concepcion's mobile home to confront him. And further, unlike the officer in *Ginglen*, the record is devoid of any evidence that Bitton brought the accoutrements traditionally associated with law enforcement officers, including a gun, badge, and bulletproof vest, with him.

Bitton searched Concepcion's property for his own private purposes, rather than law enforcement purposes.

3. Bitton did not search Concepcion's property for the purpose of assisting governmental efforts.

Finally, Bitton did not search the disks for the purpose of assisting governmental efforts. *Id*. Concepcion was not under investigation for any crimes when Bitton viewed the disks. Once Bitton discovered sexually explicit images of children on the disks, he left the mobile home and reported his observations to authorities. (R. 62:16.) While Bitton cooperated with authorities once he discovered the contraband, he was not searching Concepcion's property for the purpose of assisting in governmental efforts.

* * * * *

Based on this record, the circuit court correctly determined that Bitton was not acting in his official investigative capacity when he discovered child pornography

on disks while visiting Concepcion's mobile home in a private capacity with Concepcion's consent. Concepcion has not met his burden of proving by a preponderance of the evidence that Bitton's discovery of the child pornography constituted government action for Fourth Amendment purposes.

D. Concepcion's arguments notwithstanding, Bitton was not acting as a governmental actor.

Concepcion asserts that Bitton was at Concepcion's mobile home for a state purpose. That is, Bitton was there to fly for LEAC, an organization that Concepcion describes as a "law enforcement unit." (Concepcion's Br. 19–20.) Contrary to Concepcion's assertion, LEAC is not a law enforcement agency, but an organization that assists law enforcement agencies in search and rescue efforts. Its members serve on a purely voluntary, unpaid basis. (R. 23:11; 60:7, 9, 25–26, 28; 61:6.) But even if LEAC were a governmental actor, Bitton's presence at Concepcion's home flowed from their friendship and was unrelated to a law enforcement purpose.

Concepcion suggests that when Bitton looked for the headsets, he was conducting an investigation for stolen property. (Concepcion's Br. 20–21.) In fact, Bitton testified that when he first saw a headset, he thought that Concepcion had it there to clean and fix it. (R. 60:11.) He also explained that LEAC was missing some headsets, they were expensive to replace, and he just planned to return them to the hanger. (R. 60:13.) The record simply does not demonstrate that Bitton searched for the headsets as part of a theft investigation. Nor does the record even suggest that he was motivated to accuse or report Concepcion for theft. Bitton simply acted in a manner that would facilitate the return of expensive equipment to LEAC.

Concepcion contends that had Bitton searched containers for headsets so that he could steal them and resell them, Bitton's conduct would be for a private purpose. But because Bitton acted to return them to LEAC, this was a public purpose and demonstrates a public motive. (Concepcion's Br. 21–20.) Returning misplaced or misappropriated property needed for the operation of a volunteer, nongovernmental organization did not transform Bitton's actions into those of a government actor for Fourth Amendment purposes.

Finally, Concepcion contends that Bitton's decision to view the disks constituted a public purpose and that any public purpose is enough to establish that a search is a non-private search under *Payano-Roman*. (Concepcion's Br. 22–23.) Contrary to this assertion, nothing in *Payono-Roman* suggests that a person who is motivated to report criminal misconduct to authorities converts an otherwise private search to a governmental search. Bitton's employment in Illinois as a law enforcement officer is not enough to transform his conduct in Wisconsin into a governmental search. To hold otherwise would undermine this Court's holding in *Cole* that governmental involvement is not measured by the actor's primary occupation but by the capacity in which the actor acts at the time in question. *Cole*, 315 Wis. 2d 75, ¶ 13.

II. The circuit court properly exercised its sentencing discretion when it sentenced Concepcion, and its sentence was not unduly harsh.

A. Standard of review.

This Court generally reviews a circuit court's sentencing decisions under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. When the record demonstrates

an exercise of discretion, an appellate court follows a "consistent and strong policy against interference with the discretion of the trial court in passing sentence." *Id.* ¶ 18 (citations omitted).

This Court reviews a claim that the circuit court imposed an unduly harsh or excessive sentence under the erroneous exercise of discretion standard. *State v. Cummings*, 2014 WI 88, ¶ 45, 357 Wis. 2d 1, 850 N.W.2d 915.

B. General legal principles.

The exercise of sentencing discretion. Sentencing is committed to the trial court's discretion. *Gallion*, 270 Wis. 2d 535, ¶ 17. In exercising its sentencing discretion, the circuit court must identify the objectives of its sentence, including but not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* ¶ 40. Circuit courts should impose the minimum amount of confinement consistent with the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* ¶ 44. Circuit courts may consider a variety of factors in making this assessment. *Id.* ¶ 43 n.11 (citation omitted). The circuit court decides which factors are relevant and how much weight to give to any particular factor. *State v. Stenzel,* 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20.

A circuit court's postconviction explanation of the exercise of its discretion. A circuit court has the opportunity to further explain and clarify its sentence when a defendant challenges the circuit court's exercise of its sentencing discretion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). But the opportunity to explain its sentence is not intended to create "an opportunity to stuff the record with post-sentencing rationalizations clearly absent from the original sentencing decision." *State v.*

Hall, 2002 WI App 108, ¶ 19 n.9, 255 Wis. 2d 662, 648 N.W.2d 41.

Unduly harsh sentences. The circuit court has the authority to modify an unduly harsh or unconscionable sentence. *Cummings*, 357 Wis. 2d 1, ¶ 71. A sentence is unduly harsh when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Id.* ¶ 72 (citation omitted). "[But a] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

C. The circuit court did not impose an unduly harsh or excessive sentence.

On its face, Concepcion's sentence was not excessive because it was well within the limits of the maximum possible sentence for his convictions. Concepcion entered pleas of no contest to ten counts of possession of child pornography. (R. 30:1.) Wisconsin Stat. § 948.12(3) provides that the maximum possible penalty for possession of child pornography is a Class D felony. This meant that Concepcion faced a maximum possible penalty of a fine not to exceed $100,000 and a maximum possible term of imprisonment not to exceed 25 years for each count. Wis. Stat. § 939.50(3)(d). The maximum term of initial confinement for a Class D felony may not exceed 15 years. Wis. Stat. § 973.01(2)(b)4. In addition, by operation of Wis. Stat. § 939.617(1), the circuit court was also required to impose a minimum five-year term of imprisonment and a minimum three-year term of initial confinement. But the

circuit court may decline to impose a presumptive minimum sentence if it makes the requisite statutory findings on the record. Wis. Stat. § 939.617(2). Finally, the circuit court had the authority to impose a consecutive sentence as to each count. Wis. Stat. § 973.15(2)(a).

Here, had the circuit court imposed maximum consecutive sentence on each count, Concepcion would have received a 250-year term of imprisonment with a 150-year maximum term of confinement. But instead, the circuit court imposed a combination of concurrent and consecutive sentences that effectively resulted in a 15-year term of imprisonment, comprised of a nine-year term of initial confinement and a six-year term of extended supervision. (R. 66:29.) Concepcion's sentence was well within the limits of the maximum sentence for the crimes that he committed. In fact, it was well with the limits of the maximum penalties for a conviction of a single count of possession of child pornography.

Concepcion's sentence was not so excessive or so disproportionate to the offenses that he committed such that his sentence shocked public sentiment. The circuit court's sentence was not unduly harsh. Rather, as demonstrated below, Concepcion's sentence was the result of a reasoned and reasonable exercise of the circuit court's sentencing discretion.

D. The circuit court reasonably exercised its sentencing discretion.

The circuit court properly exercised its sentencing discretion and determined Concepcion's sentence based on an appropriate assessment of the seriousness of his criminal conduct, his character, and the need to protect the public.

The circuit court placed significant weight on the seriousness of Concepcion's offenses, characterizing it as "severe" and "disgusting." (R. 66:25.) The circuit court

described the victimization of the prepubescent children in the images. These images included depictions of digital penetration and oral sex. (R. 66:24–25.) In addition to the approximately 73 images that were downloaded from the hard drive, all of which appeared to contain child erotica and nude images, investigators also found a variety of video clips depicting several types of sexual activity between children and adults. (R. 1:1–5.) In addition, the circuit court also noted that Concepcion had pending child pornography charges in Illinois. (R. 66:26.) Finally, the circuit court recognized Concepcion's crimes harmed the public, creating issues for "these victims that we never hear about, that we're never going to see." (R. 66:28.)

The circuit court also considered Concepcion's character. It specifically identified several mitigating factors including Concepcion's acceptance of responsibility (R. 66:24, 28), his lack of a prior record, and his long-term and positive employment history (R. 66:26).

While the circuit court did not directly address the need to protect the public, it recognized that people who watch child pornography create a demand for it. (R. 66:25.) This demand results in the creation of more child pornography and more child victims.

Concepcion candidly acknowledged that his long-term addiction to pornography became a "gateway drug leading to worse things[,]" i.e., child pornography. (R. 28:2.) He also admitted that he became so desensitized that what most people would consider "repulsive and shocking" became "normal" for him. (R. 28:2.) But Concepcion claimed that he was no longer interested in pornography (R. 66:19) and that the computer seized in this case had last been accessed years earlier (R. 66:10–11). The circuit court could reasonably view Concepcion's lack of interest with skepticism, noting that Concepcion claimed that he wanted to get rid of the pornography in 2010 but never did so. (R. 66:24.) In light of

Concepcion's long-term addiction, the circuit court could reasonably conclude that Concepcion was still addicted to child pornography and that the prison sentence it imposed was necessary to protect the public.

When the circuit court denied Concepcion's postconviction motion, the circuit court reviewed its exercise of sentencing discretion. It rejected the assertion that it did not properly apply the *Gallion* sentencing factors. (R. 70:5.) It noted how it credited Concepcion for accepting responsibility for his crimes, the seriousness of the offenses, and several positive factors related to his character. (R. 70:8–9.) The circuit court then explained why a prison sentence was appropriate based on the seriousness of the crimes and how it arrived at a sentence that was less than the sentence that either the State or the presentence report recommended. (R. 70:9–10.)

Based on this record, Concepcion's sentence is the product of the circuit court's reasoned and reasonable exercise of sentencing discretion. Concepcion has failed to demonstrate that the circuit court erroneously exercised its sentencing discretion when it imposed a sentence far less than the maximum sentence possible for his crimes.

E. Concepcion's arguments notwithstanding, the circuit court properly exercised its sentencing discretion and was not unduly harsh.

Concepcion criticizes the circuit court for failing to acknowledge all of his positive accomplishments. (Concepcion's Br. 26.) While the circuit court did not expressly address each of Concepcion's accomplishments, it was aware of them through the presentence report, trial

counsel's arguments, and letters submitted on his behalf.[3] (R. 28:6–7; 66:2, 13–14.) The circuit court was not required to identify each piece of information it considered. It was only required to discuss those sentencing factors that it believed were relevant. *Stenzel*, 276 Wis. 2d 224, ¶ 16 (citation omitted). The circuit court was simply required to provide "rational and explainable" basis for its sentence. *Gallion*, 270 Wis. 2d 535, ¶ 39 (citation omitted). As demonstrated in the preceding section, the circuit court provided a rational and explainable basis for its sentence based on the factors it deemed appropriate.

Concepcion criticizes the circuit court for placing too much weight on the severity of his offense. Because Concepcion did not possess as many images as some offenders possess, Concepcion suggests that his conduct "fits somewhere between mild and unremarkable" and that he is merely a "dabbler." (Concepcion's Br. 27–28.) Even accepting Concepcion's characterization that his conduct was "about average" or "simply the norm among [child pornography] offenders" (Concepcion's Br. 29), possession of child pornography is nonetheless a serious offense. The legislature certainly determined that the pernicious nature of child pornography is so serious that it presumptively warrants a minimum confinement term in most cases. *See* Wis. Stat. § 939.617(2). And here, while Concepcion's crimes constituted serious offenses, the circuit court imposed a sentence far less than the maximum possible sentence.

Concepcion asserts that the circuit court "ignored" several mitigating factors including his cooperation, plea, acceptance of responsibility, and remorsefulness. (Concepcion's Br. 29.) The record belies this assertion. The circuit court noted that Concepcion entered a no contest plea

[3] The letters do not appear to be part of the record.

(R. 66:23) and that he has never denied his conduct (R. 66:24; 70:7).

Concepcion also challenges the harshness of his sentence, contending that the circuit court should have considered sentences given to other, similarly situated offenders, especially codefendants. (Concepcion's Br. 34.) Concepcion's case does not involve a codefendant. But even if it did, this Court has recognized that a codefendant's sentence, though relevant to a circuit court's sentencing decision, is not controlling. *State v. Giebel*, 198 Wis. 2d 207, 221, 541 N.W.2d 815 (Ct. App.1995).

Characterizing his sentence as an outlier, Concepcion contends that he received an unduly harsh sentence compared to other persons convicted of possession of child pornography. (Concepcion's Br. 34–36.) In support of his argument, Concepcion selectively references a handful of cases—fewer than a dozen state cases and two federal cases. While Concepcion and the other defendants referenced in his brief may have been convicted of the same crimes, Concepcion does not provide the necessary information from which this Court could reasonably conclude that these other defendants were actually "similarly situated" to him. This Court is not obligated to sift the record for facts to support Concepcion's argument. It should decline to address an argument that Concepcion has inadequately developed. *See State v. McMorris*, 2007 WI App 231, ¶ 30, 306 Wis. 2d 79, 742 N.W.2d 322.

Further, Concepcion's rudimentary comparison of his sentence to other sentences imposed for the same conduct ignores the supreme court's admonition that "[i]ndividualized sentencing . . . has long been a cornerstone to Wisconsin's criminal justice jurisprudence." *Gallion*, 270 Wis. 2d 535, ¶ 48. As the supreme court has recognized, no two offenders "stand before the sentencing court on identical footing . . . and no two cases will present identical

factors." *State v. Lechner*, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998) (citation omitted).

Concepcion also argues that the circuit court's imposition of consecutive sentences constituted an erroneous exercise of discretion and resulted in an unduly harsh sentence. (Concepcion's Br. 31, 37–41.) Concepcion does not dispute the circuit court's authority to impose consecutive sentences. But he suggests that sentencing courts should follow the practice under the federal guidelines "that offenses will be 'grouped' so that additional penalties for multiple offenses is additive rather than multiplicative." (Concepcion's Br. 38–39.) Concepcion's comparison to federal sentencing procedures is a non-starter because Wisconsin courts "are not bound by a sentencing rubric applicable only to the federal courts." *State v. Kaczynski*, 2002 WI App 276, ¶ 11 n.1, 258 Wis. 2d 653, 654 N.W.2d 300.

Relying on *Hall*, Concepcion asserts that the circuit court should only impose consecutive sentences in a manner consistent with the ABA Standards for Criminal Justice Sentencing. (Concepcion's Br. 39.) For several reasons, Concepcion misplaces his reliance on *Hall*. In *Hall*, this Court vacated consecutive sentences that resulted in a 304-year sentence because none of the underlying offenses carried a life term and the sentencing court failed to explain how the relevant sentencing factors yielded Hall's sentence. *Hall*, 255 Wis. 2d 662, ¶ 1. In contrast, the circuit court sentenced Concepcion in a manner that resulted in a total sentence on all counts that was less than the maximum possible penalties for a conviction for a single count of possession of child pornography. Further, unlike the sentencing court in *Hall*, the circuit court here explained the basis for its sentence. Finally, Concepcion's advocacy for applying the ABA standards for imposing consecutive sentences ignores the supreme court's repeated refusal to accept guidelines or limitations on consecutive sentences.

State v. Paske, 163 Wis. 2d 52, 66, 471 N.W.2d 55 (1991). As the supreme court explained, "We adhere to our prior decisions which give deference to legislative enactment and judicial discretion, and therefore do not adopt any limitations on consecutive sentencing." *Id.* at 67–68.

* * * * *

The circuit court reasonably exercised its sentencing discretion. While the circuit court could have placed greater weight on Concepcion's positive characteristics, it placed greater weight on the seriousness of Concepcion's crimes. Concepcion's sentence is not unduly harsh, but the product of a reasoned sentencing process.

III. Concepcion received effective assistance counsel.

A. Standard of Review.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. This Court will uphold the circuit court's factual findings unless they are clearly erroneous. "[T]he circumstances of the case and the counsel's conduct and strategy" are considered findings of fact. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786. Whether counsel's performance was ineffective presents a legal question that this Court reviews independently, benefiting from the circuit court's analysis. *Id.*

B. General legal principles.

A criminal defendant has the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); and *State v. Sanchez*, 201 Wis. 2d 219, 226–36, 548 N.W.2d 69 (1996). A defendant alleging ineffective assistance of trial counsel has the burden of

proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the defendant fails to establish one prong of the test, the court need not address the other. *Id.* at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id.* at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "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.

C. Concepcion has not met his burden of demonstrating that trial counsel was ineffective.

1. Trial counsel did not perform deficiently at Concepcion's sentencing hearing.

Trial counsel provided constitutionally effective representation to Concepcion before and during his sentencing hearing. Before the sentencing hearing, she submitted numerous letters to the circuit court on Concepcion's behalf. (R. 66:2.) Trial counsel also reviewed the presentence report with Concepcion, noting several

corrections to the report that the circuit court accepted. (R. 66:2–5).

At the hearing, trial counsel reminded the circuit court that the child pornography had been seized from a computer that was broken and that it had last been accessed years earlier. (R. 66:10–11.) This fact reinforced her client's statement in the presentence that he intended to get rid of the child pornography. (R. 28:3.) While acknowledging the seriousness of child pornography generally, trial counsel noted that Concepcion downloaded the images from the Internet rather than having children pose for him. (R. 66:13.) While he had access to minors, trial counsel emphasized that there was not even a "shadow of a suggestion" that Concepcion offended against minors. (R. 66:16.)

Trial counsel argued that Concepcion had only received a lengthy recommendation "just because he was a police officer." (R. 66:11.) Trial counsel reasonably explained to the circuit court that his status as a police officer should not trigger a more serious penalty because he did not use his status to commit his crimes. (R. 66:14.)

Trial counsel also noted Concepcion's positive character, including his favorable employment history and his volunteer work with the helicopter rescue organization. (R. 66:14–15.) Trial counsel's comments reinforced many of the positive aspects of Concepcion's character noted in the presentence report. (R. 28:6–8.) In support of her claims regarding Concepcion's good character, she reminded the circuit court of the positive letters that private persons had submitted on Concepcion's behalf. (R. 66:14.) Finally, trial counsel also argued that Concepcion was a low risk to reoffend based on the risk assessment in the presentence report. (R. 26:99; 66:11–12.)

There was nothing deficient about trial counsel's performance. She did her best to minimize the seriousness of Concepcion's serious crimes. Trial counsel pointed out Concepcion's good character as demonstrated through his employment and volunteer history, the letters of support, and his low risk of re-offense. That the circuit court assessed the relevant sentencing considerations differently than Concepcion's trial counsel viewed them does not render her performance deficient.

Nonetheless, Concepcion asserts that his trial counsel performed deficiently. He claims that at the postconviction hearing, his trial counsel "testified repeatedly that she should have mentioned things she did not, that she had no strategic reason, or no reason at all, for her omissions." (Concepcion's Br. 43, citing R. 68:13.) In fact, at the postconviction hearing, trial counsel stated, "I still have no idea of what I should have done differently." (R. 68:13.) She did acknowledge that perhaps, in hindsight, that she should have obtained a private presentence report. But even then, trial counsel recognized that she is not sure "whether that would have made a big difference, I don't know." (R. 68:14.)

Concepcion's challenge to his trial counsel's performance is grounded in hyperbole rather than substance. He accuses his trial counsel of making a "wholly inadequate plain vanilla response . . . Her main mistake was not realizing the need to step it up." (Concepcion's Br. 42.) Concepcion suggests that if only he had received "a full-throated defense . . . it seems improbable that his sentence would have been so anomalously severe." (Concepcion's Br. 43–44.) Concepcion's claim that he would have received a different sentence had trial counsel performed more vigorously is, at best, highly speculative. When the circuit court denied Concepcion's postconviction motion, it observed that it "obviously makes the final determination as to the sentence" after the State and defense make their

recommendations. (R. 70:4.) Noting that the presentence report included mitigating and positive information about Concepcion, the circuit court reasonably questioned whether a private presentence would have actually provided different information. (*Id*.)

Based on this record, the circuit court reasonably concluded that trial counsel did not perform deficiently. (R. 70:4.) Concepcion has not established that his trial counsel performed deficiently.

2. Any deficiencies in trial counsel's representation did not prejudice Concepcion.

Concepcion has also failed to prove that if trial counsel had performed differently, the outcome of his sentencing proceeding would have been different. For example, he argues that a private presentence memorandum "could have contained [ ] facts or arguments that were available and not raised to the court." (Concepcion's Br. 44.)

In advancing his argument, Concepcion fails to identify what additional information, whether provided by trial counsel or through a private presentence, might have tipped the circuit court's sentencing scale further in his favor. While Concepcion is critical of the way that trial counsel discussed the seriousness of his offenses or his positive character traits, his trial counsel nonetheless presented this information to the circuit court. Nothing in the record suggests that the circuit court ignored trial counsel's arguments or that it would have imposed a different sentence had trial counsel argued the case differently.

Concepcion has failed to demonstrate that the circuit court would have imposed a lesser sentence had trial counsel performed differently. Under the circumstances, he has not

established prejudice necessary to sustain a claim of ineffective assistance of counsel.

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm the circuit court's entry of Concepcion's judgment of conviction and order denying his postconviction motion.

Dated this 19th day of October, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,225 words.

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DONALD V. LATORRACA
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of October, 2017.

_____
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