RECEIVED
01-12-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

C O U R T   O F   A P P E A L S

DISTRICT I

Case No. 2016AP2209-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRICK L. BENNETT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION AND SENTENCE ENTERED IN
THE MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE DAVID L. BOROWSKI
AND JOSEPH DONALD, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

STANDARDS OF REVIEW 18

ARGUMENT 18

I. Bennett is not entitled to post-sentencing plea withdrawal as counsel was not constitutionally ineffective. 18

A. Principles of post-sentencing plea withdrawal. 18

B. Bennett is not entitled to relief because his argument is conclusory and without merit. 20

II. Bennett's disagreements with the sentencing court's consideration of sentencing factors are not new factors for sentence modification. 24

A. The legal principles for sentence modification based upon alleged new factors. 24

B. The pleading burden is clear and convincing evidence. 25

C. Bennett failed to meet his burden and did not allege any fact that would amount to a new factor. 25

III. Bennett is not entitled to postconviction discovery to go on a fishing expedition for information "relevant to his sentence." 27

Page

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Cresci v. State,
89 Wis. 2d 495, 278 N.W.2d 850 (1979) 18

Harris v. State,
75 Wis. 2d 513, 250 N.W.2d 7 (1977) 26, 27, 28

Rosado v. State,
70 Wis. 2d 280, 234 N.W.2d 69 (1975) 24

State v. Bentley,
201 Wis. 2d 303, 548 N.W.2d 50 (1996) 19

State v. Carter,
208 Wis. 2d 142, 146, 560 N.W.2d 256 (1997),
abrogated on other grounds by State v. Harbor,
2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828................... 24

State v. Crochiere,
2004 WI 78, 273 Wis. 2d 57, 681 N.W.2d 524................... 24

State v. Echols,
175 Wis. 2d 653, 499 N.W.2d 631 (1993) 26, 27, 28

State v. Felton,
110 Wis. 2d 485, 329 N.W.2d 161 (1983) 19, 21, 23

State v. Franklin,
148 Wis. 2d 1, 434 N.W.2d 609 (1989) 25

State v. Harbor,
2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828................... 24

State v. Norton,
2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656....... 24

State v. O'Brien,
223 Wis. 2d 303, 588 N.W.2d 8 (1999) 27, 28

Page

State v. Phillips,
2009 WI App 179, 322 Wis. 2d 576,
778 N.W.2d 157 .... 18, 19

State v. Taylor,
2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482................... 18

State v. Thomas,
2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836................. 18

State v. Young,
2009 WI App 22, 316 Wis. 2d 114, 762 N.W.2d 736......... 13

State v. Ziebart,
2003 WI App 258, 268 Wis. 2d 468, 673 N.W.2d 369....... 18

Strickland v. Washington,
466 U.S. 668 (1984) 19, 20, 21

United States v. Bui,
795 F.3d 363 (3rd Cir. 2015).. 23

Statutes

Wis. Stat. § 908.045(3)... 22

Wis. Stat. § 939.23(3)... 22

ISSUES PRESENTED

1. Did counsel provide constitutionally ineffective assistance resulting in a manifest injustice for post-sentencing plea withdrawal?

The circuit court answered no.

This Court should answer no.

2. Are Bennett's disagreements with how the sentencing court weighed sentencing factors new factors that warrant sentence modification?

The circuit court answered no.

This Court should answer no.

3. Is Bennett entitled to postconviction discovery of the victim's medical records and juvenile record to search for information alleged to be relevant to his sentence?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying well established law to the facts.

INTRODUCTION

Darrick L. Bennett brutally beat his live-in girlfriend to death. He beat her out of anger. She never fought back, instead begged for forgiveness. Bennett knew she was frail. He knew she was seriously injured. He knew she fell unconscious. He left her to die. After many years, and many attorneys, Bennett now seeks plea withdrawal, sentence modification, and postconviction discovery. His arguments

are without merit, and this Court should affirm the circuit court's decision denying relief.

SUPPLEMENTAL STATEMENT OF THE CASE

In the early morning hours of September 13, 2011, Milwaukee police were dispatched to Bennett's home for a reported suicide attempt. (R. 1:1.) Bennett was the one who called 911. (R. 1:2.) When they arrived they saw a deceased woman, C.S., lying on the bed. (R. 1:1.) She was cold and stiff. (R. 1:1.)

A neighbor advised the police that C.S. and Bennett lived together and had a history of physical abuse. (R. 1:1–2.) The night before, C.S. had told her neighbor that Bennett had been beating her often, and if she was to die, it would be at Bennett's hands. (R. 1:2.)

The police interviewed Bennett, who told them that he had discovered that C.S. was having an affair with his cousin. (R. 1:2.) Bennett said he told C.S. that she had to leave. (R. 1:2.) When she did not leave and tried to hug him, Bennett responded by pushing her hands away and then pushing her body into a dresser. (R. 1:2.)

Bennett walked away to put his kids to bed around 8:30 p.m. (R. 1:2.) When he returned, C.S. begged for forgiveness and again attempted to hug him. (R. 1:2.) Bennett took her cell phone and threw it against the wall. (R. 1:2.) Bennett then went back to speak with his daughter and ask her what she knew about C.S.'s affair. (R. 1:2.)

Bennett and C.S. returned to their bedroom, and C.S. continued to try to hug Bennett. (R. 1:2.) Bennett "smacked" her "whole face" and she fell onto the dresser again. (R. 1:2.) C.S. got back up and went to Bennett in a pleading manner. (R. 1:2.) Bennett smacked her again and knocked her head down. (R. 1:2.) Bennett said C.S. looked "horrible." (R. 1:2.)

She was slouched over and hurting. (R. 1:2.) Yet, he smacked her onto the dresser again. (R. 1:2.)

Bennett again told C.S. to leave, grabbed her by the ponytail, and yanked her head back. (R. 1:2.) Bennett grabbed her by the neck and squeezed hard, even though he knew she was frail from prior injuries. (R. 1:2–3.) He was well aware that this was injuring C.S.; he could see it in her face. (R. 1:2.)

Bennett then left to check on his children. (R. 1:3.) When he returned to his bedroom, he saw C.S. on the bed and thought she was faking a seizure. (R. 1:3.) Bennett decided to take his children to their mother's home in West Bend. (R. 1:3.) Bennett called the children's mother at approximately 1:30 a.m., five hours after the beating started. (R. 1:3.) He left around 2:30 a.m. and was presumably gone for more than an hour. When he returned home, he checked on C.S. (R. 1:3.) She was unconscious, but had a faint heartbeat. (R. 1:3.) He left again, this time to purchase cocaine. (R. 1:3.) When he returned home, C.S. was barely breathing. (R. 1:3.)

Bennett admitted to being the source of all of C.S.'s injuries. (R. 1:3.) When asked about self-defense, he responded: "I'm not going to paint no picture, I know self defense and I'm not gonna hear that shit." (R. 1:3.) He went on to explain: "I slapped her pretty hard, you got to understand she was like 107 pounds and is sick." (R. 1:3.) He said that he did not call for help because he knew he was in trouble. (R. 1:3.) He called 911 only after he knew she was dead, her body stiff. (R. 1:3.)

The autopsy revealed that C.S. had received multiple blunt force injuries to the head and neck. (R. 1:2.) The cause of death was blunt force injury and manual strangulation. (R. 1:2.) Bennett was charged with first-degree reckless homicide. (R. 1; 2.)

Bennett was unhappy about being represented by the Office of the State Public Defender. (R. 4; 5.) He cycled through two appointed attorneys, but could not afford to retain a private attorney. (R. 4; 5.) Bennett explained that he was unhappy because he did not feel like his attorneys were willing to tell his story. (R. 33:2.) Bennett was appointed a third, and final trial attorney, Scott Anderson. (R. 34:3.)

Attorney Anderson hired a defense expert to investigate C.S.'s cause of death. (R. 35:3–5; 37:5–6.) The defense theory was that C.S.'s seizure disorder was a factor in her death. (R. 35:5; 37:5–6.)

Because of the resulting delay of trial, the circuit court asked:

> We are looking for some doctor to say that the victim just happened to have a seizure while she was allegedly being beaten to death?
>
> I mean that sounds somewhat preposterous when the words come out of my mouth. Is that what we are looking for? To find a doctor that's going to say the victim allegedly had a seizure disorder and the seizure happened to occur at the moment she was allegedly being beaten to death with your client's bare hands?

(R. 37:6.)

Attorney Anderson clarified that the defense's expert was tasked with trying to determine if strangulation was the primary or contributing cause of death and what role the seizure disorder played. (R. 37:7.) "I don't expect a doctor to say that she had a seizure disorder and she would have died any ways. Something like that, no." (R. 37:7.)

The prosecutor responded that such an expert would not affect the State's case and:

> If the defense wants to call someone like that, I would almost welcome it to have the jury once again

> see all of the injuries caused by this defendant and how that even a seizure cannot be a substantial factor in causing this death over and above strangulation and multiple blunt force injuries.

(R. 37:7–8.)

At that same time, the State filed an amended information charging Bennett with first-degree intentional homicide. (R. 37:11–12; 10.) Shortly thereafter, the parties reached a plea agreement. Bennett agreed to plead guilty to first-degree reckless homicide in exchange for a sentencing recommendation by the State of 35 years of initial confinement. (R. 11:1–2; 38:2.) Bennett signed the "Plea Questionnaire/Waiver of Right Form" and checked that he understood that he was waiving his right to have the State prove its case beyond a reasonable doubt. (R. 11:1.) He also signed the "Addendum to Plea Questionnaire and Waiver of Rights" form that specifically included the additional understanding that he was giving up the right to present defenses. (R. 11:3.)

Bennett was sworn in at the plea hearing. (R. 38:3.) Bennett responded affirmatively when asked whether he was pleading guilty because he was guilty in fact. (R. 38:4, 7–8.) He also responded affirmatively when asked if he understood that he was giving up his right to have the State prove its case beyond a reasonable doubt. (R. 38:5.) The court asked Bennett if he understood that he was "giving up the right to present certain defenses that might or might not apply in this case including if it applied or could possibly apply an alibi, self-defense, intoxication, insanity, other defenses." (R. 38:10.) Bennett replied that he understood. (R. 38:10.) The parties then stipulated to the facts in the criminal complaint. (R. 38:10.)

Attorney Anderson informed the court that the defense's pathologist submitted findings, which he shared with Bennett. (R. 38:12.) That information was taken into

account in Bennett's decision to plead guilty. (R. 38:12.) The court addressed Bennett and confirmed that he and Attorney Anderson discussed the expert's opinion in deciding to resolve this case by a plea agreement. (R. 38:12–13.)

The court then asked Bennett, for a second time, if he understood that he was giving up the right to argue that a possible defense applied to his actions. (R. 38:14.) The court clarified:

> I'm not saying they would. But like you are giving up those defenses. You are also obviously giving up the right at a trial to call this doctor. And I don't know if that testimony would be positive or negative . . . but you are giving up the right to call that doctor as part of a possible jury trial.

(R. 38:14.)

Bennett confirmed that he understood. (R. 38:14.) The court accepted the plea and found Bennett guilty of first-degree reckless homicide. (R. 38:11.)

A presentence investigation was completed. (R. 14.) Bennett admitted to "arguing" with C.S. for two to three hours. (R. 14:9.) He admitted to breaking her phone, pushing her away, grabbing her by the neck, and throwing her onto the bed. (R. 14:9.) Bennett said he then went to his children's room to calm down. (R. 14:9.) It was then that he learned from his daughter that C.S. had the affair in their home. (R. 14:9.) Bennett said he confronted C.S. in their bedroom and smacked her in the head. (R. 14:9.) She fell, hit her head on the dresser, and had a seizure. (R. 14:9.)

Bennett claimed that he shut the bedroom door and left with his children. (R. 14:10.) Bennett said he returned home more than an hour later, checked on C.S., and noticed that she was breathing and had a slight pulse. (R. 14:10.) Her eye was swollen, and he claimed he placed a towel over it. (R. 14:10.) He also said he cleaned up C.S., wiping her

bloody nose, and propping her head up on a pillow so that she could breathe easier. (R. 14:10.)

Bennett claimed he then went to the living room to call a few people because he was feeling "hurt and torn." (R. 14:10.) When he checked on C.S. again, she was dead. (R. 14:10.)

Bennett characterized this violent, physical attack as "normal" and claimed he did not intend for C.S. to die. (R. 14:10.) In Bennett's mind, it was an accident. (R. 14:19.)

The presentence investigation agent noted that Bennett presented as self-centered and unfriendly. (R. 14:19.) The agent was concerned with the "callousness" of Bennett's behaviors and believed him to be "an extremely violent person, and a major threat to the safety of others." (R. 14:20.) The agent recommended 20–40 years of initial confinement followed by 7–10 years of extended supervision. (R. 14:20–21.)

At the sentencing hearing, the prosecutor argued that Bennett had "an attitude that he can beat her when he wants; that he can control her when he wants, and on this occasion he beat her to death." (R. 39:9.) The prosecutor went on to add that even in the context of domestic violence, "this one stands out" as a "very violent," close, personal attack. (R. 39:9, 16.) He introduced three photographs of the crime scene that he argued showed that Bennett left C.S. to die a horrible death. (R. 39:9–10.)

The prosecutor also commented on Bennett's account of his crime, characterizing it as "chilling" and without "a realization at how wrongful this type of conduct is." (R. 39:10.) He explained that Bennett had an extensive record of "extraordinary violence" and "domestic abuse." (R. 39:11–14.)

Attorney Anderson argued that Bennett had always accepted that the death of C.S. was not "accidental" and that

Bennett had accepted responsibility for his actions from the beginning. (R. 39:17.) Because Bennett did not intend to kill C.S., Anderson argued that the first-degree reckless homicide charge was appropriate. (R. 39:18.)

Attorney Anderson informed the court that throughout the time he has spent with Bennett, "[h]e's always tearful, his remorse is genuine, he can't believe that his behavior led to her death." (R. 39:17–18.) He said that, "[h]e acknowledge[d] that he's responsible for her death and has accepted that responsibility." (R. 39:18.)

Regarding the evaluation by their expert, Attorney Anderson wanted to and did confirm that either the blunt force trauma or the strangulation could have independently caused C.S.'s death.[1] (R. 39:18.) He went on to explain that Bennett's actions in not seeking medical assistance could be explained by his belief that C.S. was having a seizure. (R. 39:18–19.) While Anderson admitted that Bennett's knowledge of C.S.'s medical conditions "cuts both ways," "[Bennett] had been present at other seizures, and she'd always come out of it." (R. 39:19.) Bennett chose to deal with C.S.'s condition on his own because he did not understand how much distress she was in. (R. 39:19.)

Attorney Anderson repeated that Bennett's remorse was genuine, and told the court that "[Bennett] and I have went around and around about his behavior that night and what should have been done," but Bennett had come to accept full responsibility. (R. 39:19–20.) He asked that the court take that into consideration when evaluating Bennett's

---

[1] Attorney Anderson says "either" and "neither" within the same sentence. (R. 39:18.) His postconviction affidavit clarified that the defense expert concluded that C.S.'s death "could have been caused by manual strangulation alone, blunt-force injuries alone, or a combination of the two." (R. 72:20.)

character. (R. 38:22–23.) Specifically, he asked that the court take into account that Bennett chose to resolve this case, and that the age of the case should not be viewed as an indicator that Bennett was unwilling to accept responsibility until now. (R. 38:22–23.) Rather, Bennett had always accepted responsibility. (R. 38:23.)

Bennett addressed the court. (R. 39:23–24.) He explained that he had been truthful from the beginning, but it was "just so hard to understand that my behavior caused someone to pass away." (R. 39:24.) Bennett explained that he wanted to speak from the beginning and wanted the court to know the truth. (R. 39:23–24.)

The court described this crime as one of the worst the court had seen. (R. 39:25–26.) Commenting that it "was a violent, vicious, brutal attack" on someone Bennett claimed to love, and the court could not "believe that one human being would do [this] to another human being." (R. 39:25.)

The one mitigating factor that the court found was that Bennett accepted responsibility for his actions. (R. 39:25.) He gave Bennett credit for "pleading guilty and not forcing this case to trial." (R. 39:25.)

The court explained the aggravating factors. First the court commented on severity of the crime. Regarding C.S.'s injuries the court said:

> I've had the very unpleasant experience for the last year-and-a-half seeing autopsy photos, photos of children that were beaten to death, photos of adults that were beaten and shot. And these photos of the victim's face, neck area, reflecting the brutal, vicious, frankly, evil attack that she suffered, are among the worst that I had to see in my career and in the last 18 months.

(R. 39:26.)

The court noted that "I don't know if it was 20 minutes or an hour or two hours, but it had to be a significant period

of time beating and punching and choking and strangling his victim." (R. 39:26.) The court characterized C.S.'s eye as "smashed in" and swollen shut, and noted multiple "cut marks" to her face. (R. 39:26.) The court then said:

> [T]he victim is barely recognizable based on the injuries to her face but particularly the right side of her face and her neck. I'm not a doctor. Obviously, the medical examiner issued the opinion in this case as to the cause of death. But there are many marks on the victim's neck on Exhibit No. 1 and 2 and 3, for that matter, that indicate choking, strangulation possibly fingerprints, handprints in the neck area. This was the most brutal and vicious personal attack that I've seen. I've sentenced people for homicides in shootings and stabbings, with the possible exception of one case, this was the most personal.

(R. 39:27.)

Exhibits 1–3, photographs from the crime scene, show C.S.'s left eye swollen shut. (R. 18:1, 3.) The swelling is severe enough that the eyelid folded in on itself, her eyelashes barely visible. (R. 18:1.) The top portion of her eyelid is black and that bottom portion is red with black spots. (R. 18:1, 3.) There are multiple lacerations or abrasions on her left cheek and multiple blue, purple and yellow bruises under the left side of her chin. (R. 18:1–2.) There are bruises to her left ear and the left side of her nose. (R. 18:1.) The right side of C.S.'s face sustained fewer injuries, but there is a black line under her right eye and an abrasion on her right cheek. (R. 18:1–2.)

The court went on to further explain the gravity of the offense and commented:

> The gravity of this offense was certainly raised beyond the personal nature. When I say personal nature, this is not like the many cases I have that, frankly, that occur weekly, if not sometimes daily in this community where someone shoots another person or you have a reckless

> homicide where a gun went off and someone is dead. This had to go on for a long period of time with the defendant looking the victim right in the eyes as he struck her, slapped her, punched her, choked her, as she fell to the ground and begged, I'm sure, for him to stop.
>
> . . . .
>
> This was not, not to minimize shootings, which are rampant in this community which go on unabated, but this was a case where the victim was left to die over a number of hours, suffering most likely, agonizing pain for those two or three or four hours that she laid there before she eventually passed away.
>
> . . . .
>
> Someone who could be as vicious and, again, frankly, evil, as Mr. Bennett, to beat a woman who weighs about a 100 pounds to death and leave[ ] her to die while he smokes cocaine or snorts cocaine, needs to go to prison for a long, long, long time.

(R. 39:31–33.)

Based on Bennett's prior record and past acts, the court concluded that Bennett was a serial abuser who would abuse again. (R. 39:33–34.) The court further commented:

> I don't . . . want to lose track in terms of the gravity of the offense and the fact that this was a young lady who was deprived of 30 or 40 years of life, her family is deprived of her company, her brother, her parents, other relatives. This is a tragic and completely, unnecessary, completely, unwarranted beating, which resulted in a tragic loss of life.

(R. 39:38.)

The court sentenced Bennett to 35 years of initial confinement and 10 years of extended supervision. (R. 39:39.)

Bennett's first postconviction counsel was Attorney Randall Paulson. (R. 43:1.) He filed a no merit report. (R. 43:1; 44:1.) Bennett filed a response alleging that he would not have pled guilty if Attorney Anderson would have fully informed him of the findings by the defense expert, and asked this Court to require Paulson to obtain that report. (R. 43:1–2; 44:1–2.) Paulson followed up with Anderson and discovered that a report was never produced, and that Anderson had informed Bennett that no report would be produced because of Bennett's decision to plead guilty. (R. 43:2.) Bennett filed a reply asserting that he was not fully informed of the expert's finding and, had he been, he would have chosen to go to trial and requested that the jury be instructed on a lesser included offense. (R. 44:2.) He also asserted he would have "testified on the stand before the jury arguing that I was not guilty of the charge of 1st-degree reckless homicide, but rather a lesser charge." (R. 44:2.) This Court ordered Paulson to obtain an affidavit from Anderson and to evaluate whether the facts would support a conviction on a lesser-included charge. (R. 44:3.)

A couple of weeks after that order, Attorney Gary Grass wrote to this Court advising the court that he had agreed to represent Bennett and asked that the court "hold the pending no merit petition in abeyance, as it is likely to be withdrawn." (R. 45:2.) The Court ultimately granted substitution of counsel and dismissed the no-merit appeal without prejudice. (R. 41:2.)

Attorney Grass filed numerous extension motions and finally filed a postconviction motion a little over a year after this Court remitted the case to the circuit court. (R. 42; 47–61.) Bennett's postconviction claims included a claim for postconviction discovery premised on the allegation "that there [was] a substantial likelihood that the victim suffered from a pre-exiting weakening of the bridging vessels that were shorn to produce the intracranial bleeding that killed

her." (R. 60:2.) He asserted that he obtained some support for this allegation from Waukesha County Medical Examiner Linda Biedzrycki, but did not include an affidavit or report of her findings. (R. 60:5.)

Bennett believed that evidence of such a pre-existing condition would have been relevant to his decision to plead guilty and relevant to the court's exercise of sentencing discretion. (R. 60:2.) As such, he asked for postconviction discovery, arguing that he should be "allowed to discover the previous medical records of the victim and be provided [with] funds for an expert to evaluate those records and other medical reports in this case, to determine whether a pre-existing condition" existed. (R. 60:2.)

Bennett also asked for postconviction discovery of C.S.'s juvenile records and her sealed presentence investigation records, arguing that such information "would bear on his claims in his postconviction motion." (R. 60:2.) Bennett was looking for information to support his claim that C.S. was aggressive. (R. 60:3.)

Bennett also claimed that 1) he was falsely led to believe that he had no meaningful defense, 2) his counsel was ineffective for failing to accurately advise him of his chances at trial,[2] 3) that a new factor existed for sentence modification, and 4) counsel was ineffective at sentencing.[3] (R. 61:1–2.)

---

[2] In this section, Bennett also raised a claim of ineffective assistance of counsel for failing to share actuarial data with Bennett regarding Bennett's life expectancy. (R. 61:7–8.) That claim is abandoned on appeal and will not be addressed. *See State v. Young*, 2009 WI App 22, ¶ 15 n.6, 316 Wis. 2d 114, 762 N.W.2d 736.

[3] This claim was also abandoned on appeal.

Regarding plea withdrawal, Bennett conceded that, had this case gone to trial, "there would have been compelling evidence that he committed a battery . . . [and] substantial evidence that the injuries caused by that battery were a substantial contributing cause of [C.S.'s] death, which could have elevated battery to felony murder." (R. 61:3.) However, Bennett argued that he was not subjectively aware that beating and choking C.S. created a risk of death or great bodily harm because he did not strike her with "great force" and he did not show utter disregard for her life because all of her substantial injuries where internal and not visible to or undiscernible by him. (R. 61:3–5.)

Bennett conceded that "[i]t may not have been prudent to take this matter to trial," but argued that it was an option that should have been available to him. (R. 61:5.) He alleged in a conclusory way that he could have prevailed at trial because Attorney Anderson "could simply have relied on the inability of the state to prove recklessness, and argued this to the jury." (R. 61:5.) Bennett further alleged that Attorney Anderson told him he had "*no defense*—simply literally none" and that is why Bennett pled guilty. (R. 61:6.)

Regarding sentence modification, Bennett alleged a slew of new factors. (R. 61:9–19.)[4] Bennett's argument for sentence modification was that correcting inaccurate information relied upon by the sentencing court or inaccurate weight given to a particular factor can be a new factor for sentence modification. (R. 61:8–9.)[5]

---

[4] The State will only identify the ones not abandoned on appeal.

[5] In this section Bennett presented the conclusory argument that "the prosecutor presented a version of the battery . . . [that] included details that were unreliable and false." (R. 61:9.)

First, he argued that the court's description of the assault as a protracted beating was unsupported by the photographs, and there was no reliable basis in the record for that conclusion. (R. 61:10.) He claimed that the injuries that the court classified as cuts were really abrasions, and the injury the court termed as a "smashed eye" was "a puffy black eye." (R. 61:10.) He relied upon the autopsy photographs and report for these claims and not on the crime scene photographs that the sentencing court viewed. (R. 61:10.) He then opined that C.S. would have looked much worse if he had beaten her for a protracted period of time because he was a large man that "can punch." (R. 61:11.) He also argued that the court should not have placed weight on C.S.'s appearance after the beating because, by his own assertion, C.S. bruised easily. (R. 61:11.)

Bennett also took issue with the court's sentencing comment that the court could imagine C.S. looking Bennett in the eye and that the court imagined that C.S. suffered an agonizing death. (R. 61:12.) Bennett argued "the first part is simply embellishment or fictionalization; the second part is at best unknowable." (R. 61:12.) He opined that C.S. might have lost consciousness and might had some analgesic effect from her cannabis usage. (R. 61:12.)

Bennett then argued that the court should have considered information of C.S.'s past. (R. 61:13–15.) He posits that her past dangerousness should have justified some of Bennett's abuse on the night of her death and the court should have considered that as a mitigating factor. (R. 61:13–15.)

Bennett did not disclose what those details were and abandons that argument on appeal.

Bennett disagreed with the court's assessment that he deprived C.S. of 30 to 40 years of life. (R. 61:16.) He argues that such an assessment was far too high because C.S. was sick and suicidal. (R. 61:16.) He also took issue with the court's comment that Bennett deprived C.S.'s parents of her company because both of C.S. parents were dead. (R. 61:16.)

Bennett complained that the court did not consider his good qualities, such as his care for his children and his service to the community. (R. 61:17.)

And finally, Bennett argued that the court over-assessed his dangerousness. (R. 61:19.)

The circuit court denied all of his claims. (R. 79.) Regarding plea withdrawal, the court concluded that the record did not establish that Attorney Anderson performed deficiently. (R. 79:5.) "Counsel investigated the possibility of raising a defense that pre-existing medical conditions or injuries caused the victim's death but was not able to find sufficient support for a defense of this nature." (R. 79:5.) "Counsel duly informed the defendant of the same, and the defendant was aware that the defense was not viable at the time he entered his plea." (R. 79:5.) "Consequently, the court is not persuaded that the defendant's decision to enter a guilty plea in this case was the result of any ineffective assistance on the part of Attorney Anderson." (R. 79:5.)

Regarding sentence modification, the court concluded that Bennett did not present a single new factor. (R. 79:10.) The court concluded that Bennett's "facts" were largely "speculation or a disagreement with the court's consideration of sentencing factors." (R. 79:10.) The court further concluded that even if there was "incomplete or incorrect" information at sentencing, "it was not significant

enough to justify modification." (R. 79:10.) The court specifically concluded:

1. "While the defendant may believe that the court overstated [C.S.'s] appearance, a claim of hyperbole is not a viable argument for sentence modification. Nor is speculation." (R. 79:8.)
2. Whether the "defendant or another attacker could have beaten the victim more severely within the same time frame is irrelevant and does not mitigate the seriousness of the beating in this case." (R. 79:8.)
3. "[T]he defendant's claim that the victim bruised more easily is not only self-serving, it is entirely speculative that the photos would have depicted less bruising than they did." (R. 79:8–9.)
4. Bennett presented nothing to call into question the sentencing court's "reasonable inferences" about the "personal nature of the beating and the victim's slow, eventual death." (R. 79:9.)
5. Regarding the evaluation of Bennett's character and C.S.'s character, the court concluded that "[n]o matter what the victim did in her past, she did not deserve to be beaten to death, and it is insulting for the defendant to suggest that she invited at least some injury on herself in this case." (R. 79:10.)

Finally, the court denied Bennett's claim for postconviction discovery. The court explained Bennett's claim as: "if the victim had a condition that predisposed her to intracranial hemorrhage, it would mean that her death was not, beyond a reasonable doubt, reasonably foreseeable to someone, like him, who lacked knowledge of the condition." (R. 79:12.) "Consequently, . . . his lack of knowledge of the condition would negate both objective and subjective knowledge of the risk." (R. 79:12.) The court rejected that argument because recklessness requires the

actor's subjective awareness of the risk, not subjective awareness of the probability of the result of the risk. (R. 79:12.) Noting that one takes his victim as he finds her, the court was not persuaded that a pre-existing condition would have been a defense or would have been relevant to the sentencing court. (R. 79:13.)

Bennett appeals.

STANDARDS OF REVIEW

The standard of review for all issues is the erroneous exercise of discretion standard. *See*, *State v. Thomas*, 2000 WI 13, ¶ 13, 232 Wis. 2d 714, 605 N.W.2d 836 (denial of post-sentencing plea withdrawal); *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157 (denial of evidentiary hearing for failure to allege sufficient facts); *Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979) (denial of sentence modification); *State v. Ziebart*, 2003 WI App 258, ¶ 32, 268 Wis. 2d 468, 673 N.W.2d 369 (denial of postconviction discovery).

Given this standard of review, this Court focuses mainly on the arguments as presented in Bennett's postconviction motions.

ARGUMENT

I. Bennett is not entitled to post-sentencing plea withdrawal as counsel was not constitutionally ineffective.

A. Principles of post-sentencing plea withdrawal.

When a defendant seeks to withdraw his or her plea post-sentencing, he or she must establish by clear and convincing evidence that withdrawal is necessary to prevent a manifest injustice. *State v. Taylor*, 2013 WI 34, ¶ 24, 347

Wis. 2d 30, 829 N.W.2d 482 (citations omitted). A defendant can satisfy the manifest injustice test by proving that he or she received ineffective assistance of counsel. *See State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance actually prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Our supreme court "has often stated that it disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). A reasonable strategic choice results from "deliberateness, caution, and circumspection." *Felton*, 110 Wis. 2d at 502. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Bennett's claim of ineffective assistance of counsel was denied without a hearing. A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a hearing. *Phillips*, 322 Wis. 2d 576, ¶ 17. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *Id*. (citing *Bentley*, 201 Wis. 2d at 309–10).

Bennett's motion must contain sufficient facts to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. He must also allege sufficient facts to establish 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. In this case, that meant Bennett had to allege sufficient facts to establish that but for counsel's error, he would not have pled guilty.

B. Bennett is not entitled to relief because his argument is conclusory and without merit.

Bennett argues that reversal is appropriate here because the circuit court misconstrued his claim for relief. (Bennett's Br. 22–24.) While it is true that the circuit court rephrased Bennett's argument, there is no need for reversal. Bennett's argument for plea withdrawal is without merit because it is based entirely on postconviction counsel's conclusory allegations that Bennett could successfully challenge the State's proof of the mens rea elements of first-degree reckless homicide. (R. 61:3–6.)

Bennett argued that he was entitled to plea withdrawal even though his actions *were* the cause of C.S.'s death, because trial counsel should have counseled Bennett to go to trial with the hopes that the jury would convict him of felony murder as opposed to first-degree reckless homicide. (R. 61:3.) His argument relied on the assumption that the jury would have been presented with the lesser included offense instruction on felony murder, with the underlying crime being battery. (R. 61:3.) He argued that trial counsel could have argued for a conviction of that offense and could have been successful. (R. 61:3–6.) His entire argument is a series of conclusory allegations and assumptions not worthy of an evidentiary hearing.

Postconviction counsel's belief that an attorney could have argued that the State's evidence did not establish the mens rea element of first-degree reckless homicide does not mean that Attorney Anderson was deficient for advising Bennett that Bennett would not be successful at trial. The test for deficient performance is not whether postconviction counsel, years after the conviction and after a full year of

review, weighed the plausible options differently. *See Strickland*, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."). The test is whether Anderson "made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. That is not the case here. Anderson was required to provide Bennett with a candid assessment of the probable outcome of the case, *see Felton*, 110 Wis. 2d at 506, and he did just that.

Bennett was fully aware that he had the option to go to trial and it was disingenuous for postconviction counsel to suggest otherwise. (*See* R. 34:5–6; 36:16; 61:5.) Bennett's concern from the beginning was *causation*. (R. 72:20.) Bennett believed that C.S. may have died from medical problems that predated his attack. (R. 72:19.) Attorney Anderson appropriately investigated that theory. (R. 72:19–20.) If Anderson advised against going to trial without a defense to causation, that is not deficient performance. Going to trial, and losing, meant a mandatory life sentence. Pleading, on the other-hand, meant a reduced charge and an agreement that the State would not recommend the maximum term of initial confinement. The benefits of Bennett's plea agreement were far greater than Bennett admits, and his argument that a trial would have only reduced sentencing exposure is simply false. (*See* Bennett's Br. 19.)

Bennett was facing trial for first-degree intentional homicide, not first-degree reckless homicide. (R. 10; 37:13.) Thus, his argument that Attorney Anderson could have argued that Bennett lacked the mens rea elements of first-degree reckless homicide is simply off-mark. However, even if you assume that Anderson should have told Bennett that they could challenge the State's proof at trial, postconviction counsel conceded that it "may not have been prudent to take this matter to trial." (R. 61:5.) It would not have been

prudent, and thus, it was not deficient for Attorney Anderson to counsel Bennett to accept the State's plea offer.

If Bennett had gone to trial, the State would have introduced evidence of Bennett's prior violence towards C.S. (R. 36.) There was a potential witness that told the police C.S. had told her the night before that Bennett had been "beating her a lot lately" and that C.S. feared for her life. (R. 1:1–2; 8:1.)[6] The jury would have heard Bennett's *Mirandized* confession of his one-sided attack against C.S.; that "[he] slapped her pretty hard" into a dresser, and that he choked her. (R. 1:3.) The jury would have heard that "she was like 107 pounds and is sick," that Bennett knew that he was seriously injuring her, and that Bennett did not call for help right away because he knew he was in trouble. (R. 1:3.) The jury would have heard extensive medical testimony relating to C.S.'s injuries that would have established that Bennett brutally beat C.S. and did far more than give her "bump on the head."[7] (*See* Bennett's Br. 18.)

This is all circumstantial evidence of Bennett's state of mind, and the jury was not required to accept the defense's allegation that C.S. was not supposed to die. Bennett's behavior under the circumstances was practically certain to cause C.S.'s death, and there was a very real probability that Bennett would have been found guilty of first-degree intentional homicide. *See* Wis. Stat. § 939.23(3) (defining criminal intent).

Bennett, nonetheless, argues on appeal that Attorney Anderson was deficient because Anderson told him that Bennett had zero chance of prevailing at trial. (Bennett's Br.

---

[6] Likely admissible evidence under Wis. Stat. § 908.045(3).

[7] This allegation is disputed by the crime scene photographs alone. (R. 18:1–3.)

19.)[8] The record establishes that Anderson discussed with Bennett, at length, how Bennett's actions related to culpability. (R. 39:17–20.) Anderson's comment at the sentencing hearing that this case "was not going to go to trial" does not mean that Anderson told Bennett that he had zero chance at trial. Rather, that comment was about Bennett's character. (R. 39:22–23.) Anderson was arguing that Bennett should get credit for not going to trial and accepting responsibility. (R. 39:22–23.) But, again, even if Anderson had told Bennett that Anderson believed there to be zero chance of success at trial, he was required to do so. *Felton*, 110 Wis. 2d at 506.

Bennett's postconviction argument for plea withdrawal is entirely conclusory. It fails to develop his theory that the jury would have been presented with a lesser included charge, it ignores that Bennett was facing a first-degree intentional homicide charge, and it admits that going to trial might not have been prudent. Attorney Anderson did not perform deficiently in investigating a possible defense and then counseling Bennett to accept the State's plea offer when that did not pan out. There was no need for a hearing. And there was no manifest injustice that warrants plea withdrawal.

---

[8] The citation to *United States v. Bui*, 795 F.3d 363, 367 (3rd Cir. 2015), is perplexing since that case involves sentencing exposure and has nothing to do with counseling a defendant on the sufficiency of the State's case.

II. Bennett's disagreements with the sentencing court's consideration of sentencing factors are not new factors for sentence modification.

A. The legal principles for sentence modification based upon alleged new factors.

Circuit courts have inherent authority to modify criminal sentences in limited circumstances. *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828. A motion for sentence modification seeks to correct an existing sentence without vacating the sentence. *State v. Carter*, 208 Wis. 2d 142, 146, 560 N.W.2d 256 (1997), *abrogated on other grounds by Harbor*, 333 Wis. 2d 53, ¶ 47 n.11. A court may modify a sentence to account for the existence of a new factor. *State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis. 2d 57, 681 N.W.2d 524.

When alleging a new factor warrants modification, the "defendant must establish: (1) that a new factor exists; and (2) that the new factor justifies sentence modification." *State v. Norton*, 2001 WI App 245, ¶ 8, 248 Wis. 2d 162, 635 N.W.2d 656. The Wisconsin Supreme Court defined a new factor as "a fact . . . highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because . . . it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The defendant must establish by clear and convincing evidence that a new factor exists and then the circuit court has the discretion to decide if that new factor warrants modification. *Harbor*, 333 Wis. 2d 53, ¶¶ 36–37.

B. The pleading burden is clear and convincing evidence.

Bennett alleges that he is entitled to an evidentiary hearing on his claim for sentence modification as long as he makes a prima facie showing in his motion that a new factor may exist. (Bennett's Br. 28–30.) That is not how sentence modification works. Bennett must establish, in his motion, the right to sentence modification by clear and convincing evidence. *State v. Franklin*, 148 Wis. 2d 1, 9–10, 434 N.W.2d 609 (1989).

C. Bennett failed to meet his burden and did not allege any fact that would amount to a new factor.

Bennett's sentence modification argument amounts to a disagreement about how the sentencing court weighed sentencing factors. He presents no new facts, just subjective opinions and disagreements. He does not explain why his alleged new factors would be highly relevant to the court's sentencing decision. Thus, his claims fail.

First, Bennett disagrees with the court's comment that "[t]his had to go on for a long period of time with the defendant looking the victim right in the eyes as he struck her, slapped her, punched her, choked her, as she fell to the ground and begged, I'm sure, for him to stop." (R. 39:32.)

That comment is supported by Bennett's own comments that the argument and violence spanned hours. The criminal complaint contained an account of Bennett's statement that the argument and violence began around 8:30 p.m. and ended around 1:30 a.m. (R. 1:2–3.) And the presentence investigation contained Bennett's admission that he was "arguing" with C.S. for two to three hours. (R. 14:9.) The criminal complaint also established that C.S. was begging, pleading for forgiveness and that Bennett looked her in the face and saw that she was in pain. (R. 1:2–

3.) Bennett presented no new fact that would suggest that the circuit court relied on inaccurate information.

Next, Bennett disagrees with the court's assessment of C.S.'s injuries. As the circuit court concluded: "While the defendant may believe that the court overstated [C.S.'s] appearance, a claim of hyperbole is not a viable argument for sentence modification. Nor is speculation." (R. 79:8.) Moreover, the court's consideration of the crime scene photographs is not a new factor for modification. The court's assessment of the photographs is not new and that assessment involved the court's determination that this was the worst beating the court had seen. Bennett offers nothing to dispute that.

Next, Bennett faults the court for positing that C.S. died an agonizing death. The fact that C.S. suffered great pain is directly supported by Bennett's confession. Bennett said C.S. looked "horrible." (R. 1:2.) She was slouched over and hurting. (R. 1:2.) He was well aware that he was injuring C.S.; he could see it in her face. (R. 1:2.) Bennett's own admission established that C.S.'s physical state worsened over hours. (R. 1:3.) He offered no new fact that would make the court's consideration of C.S.'s agony inaccurate.

Next, Bennett faults the court for not fully considering his character, specifically facts that he believes suggest that he had some good qualities. The consideration of a secondary sentencing factor, like Bennett's character, is entirely discretionary. *Harris v. State*, 75 Wis. 2d 513, 519–20, 250 N.W.2d 7 (1977); *State v. Echols*, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). Not considering that type of information is not an erroneous exercise of discretion, *id.*, and Bennett does not present clear and convincing evidence that his family life and involvement in the community would have been highly relevant to the court's sentencing determination.

The same is true of any consideration of C.S.'s character, how her character would potentially relate to Bennett's culpability, and how C.S.'s death impacted her family. *Harris*, 75 Wis. 2d at 519–20; *Echols*, 175 Wis. 2d at 683. Bennett's argument also ignores that C.S. did have surviving family and fails to address why the effect of her death on her brother was not relevant.

Finally, Bennett offered no new fact to dispute the court's determination that Bennett was dangerous. He only states that court should have also considered "all aspects of [his] life." (R. 61:17.)

As the circuit court concluded, none of these "facts" qualify as a new factor. Bennett had not established how any of his alleged new factors were significant enough to warrant sentence modification. As such, the circuit court properly denied his claims.

III. Bennett is not entitled to postconviction discovery to go on a fishing expedition for information "relevant to his sentence."

On appeal, Bennett clarifies that his postconviction discovery motion was not to investigate a defense to a charge, but to find relevant sentencing information. (Bennett's Br. 41.) Now that Bennett has been held responsible for his horrendous crime, he wants to rummage through the victim's records in hopes of painting the deceased in a bad light.

A defendant has a right to postconviction discovery if he can establish that the desired evidence is relevant and material to an issue of consequence. *State v. O'Brien*, 223 Wis. 2d 303, 320–21, 588 N.W.2d 8 (1999). "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine

confidence in the outcome.'" *Id.* at 320–21 (citations omitted) (footnote omitted).

Bennett has not identified with any specificity or certainty the existence of information that might be relevant to his sentence. It is undisputed that Bennett brutally attacked C.S. and that the attack was one-sided. Whether she was susceptible to bruising or had a prior head injury is irrelevant. Bennett was aware of that information so C.S.'s alleged fragility does nothing to mitigate Bennett's culpability. Similarly, C.S.'s prior history of violence is irrelevant. Bennett readily admitted that C.S. did not fight back. She was a petite woman, begging for forgiveness, attempting to hug Bennett while he was beating her to death.

Bennett needed to establish that the information he sought would have undermined the court's sentencing determination. Bennett did not do so. As addressed in the sentence modification argument, secondary sentencing factors like the personal characteristics of C.S. and how those characteristics relate to Bennett's culpability are discretionary considerations that the court was free to dismiss without consideration. *Harris*, 75 Wis. 2d at 519–20; *Echols*, 175 Wis. 2d at 683. Given the widely accepted rule of law that the court did not have to consider or place weight on this type of information and Bennett's failure to establish a reasonable probability sufficient to undermine confidence in the outcome, it was not an erroneous exercise of discretion to deny his motion for postconviction discovery.

CONCLUSION

For the foregoing reason, this Court should affirm the circuit court's decision to deny relief.

Dated this 12th day of January, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

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 7987 words.

TIFFANY M. WINTER
Assistant Attorney General

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 12th day of January, 2018.

TIFFANY M. WINTER
Assistant Attorney General