STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2017AP2265-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CARRIE E. COUNIHAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR DOOR COUNTY, BRANCH I, THE HONORABLE DAVID L. WEBER, PRESIDING

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

COLLEEN C. NORDIN
District Attorney
Door County, Wisconsin
State Bar No. 1056310

1215 South Duluth Avenue
Sturgeon Bay Wisconsin, 54235
Tel. 920-746-2284
Fax 920-746-2381
colleen.nordin@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES PRESENTED

1. Did the sentencing court's remarks during the sentencing hearing show that eh court relied on an improper sentencing factor when deciding what sentence to impose on Defendant-Appellant Counihan?

   The postconviction-motion court answered "No."

   This Court should affirm the postconviction-motion court's decision and order.

2. Did defense counsel perform deficiently by refraining from objecting to remarks by the sentencing court that, Counihan contends, evinced reliance on an improper factor when deciding what sentence to impose upon her?

   By rejecting Counihan's contention that the sentencing court erroneously exercised sentencing discretion, the postconviction-motion court implicitly answered "No."

   This Court should answer "No."

3. If defense counsel performed deficiently, did Counihan show that the deficiency caused her any prejudice?

   By rejecting Counihan's contention that the sentencing court erroneously exercised sentencing discretion, the postconviction-motion court implicitly answered "No."

   This Court should answer "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the Court's opinion.

STATEMENT OF THE CASE

In April 2015, the Door County District Attorney charged Counihan with twelve criminal charges – one count of Theft in a Business Setting Over $10,000 (a Class G felony), and eleven counts of Unauthorized Use of an Entity's Identifying Information or Documents (a Class H felony). (R. 1.) The district

attorney later filed an information charging Counihan with the same crimes. (R. 6.)

On October 13, 2016, the District Attorney filed an Amended Information charging Counihan with one count of Theft in a Business Setting Over $10,000 (a Class G felony), five counts of Theft in a Business Setting $2,500 and under (a class A misdemeanor), and six counts of Unauthorized Use of an Entity's Identifying Information or Documents (a Class H felony). (R. 23.) On October 13, 2016, Counihan entered a "no-contest" plea to five counts of misdemeanor Theft in a Business Setting. (R. 21.)

On December 2, 2016, the sentencing hearing was held. The District Attorney and Counihan jointly recommended that the Court withhold sentence, and place the defendant on probation for a period of twenty-four months (on each count, concurrent). (R. 77:7, 27.) As a condition of probation, the parties recommended the court impose 60 days jail, stayed, to be used at the discretion of the probation agent. The Court exercised its discretion and did not follow the joint recommendation for sentence. The Court instead sentenced Counihan to nine months jail on each of the five counts, concurrent to each other. The court also imposed a $500 fine on each of the five counts. (R. 28.)

In issuing sentence, the court considered "…three overriding things: First is the character and the rehabilitative needs of the defendants (sic), the second is the nature and gravity of the crime, and the third is the protection of the public." (R. 77: 58, 59.) In particular, the court regarded the nature and gravity of the crime as "very concerning" (R. 77:61.)

The court gave a lengthy statement as to the history of the case, what information was considered at sentencing, and how the court arrived at a sentencing decision. During the colloquy, the court explained that it had reviewed prior similar cases in Door County and their respective sentences. (R. 77:47, 52-54.)

The court set forth a lengthy and detailed explanation for why, in the court's discretion, it was not appropriate to follow the joint recommendation. "The Court rejects probation in this case. To me, probation is appropriate where somebody needs supervision, where they need ongoing supervision, where there's a problem – I have referenced addiction problems, or something like that – and they need to remain compliant. And they need to report to an agent, and that agent needs to report on their progress. Court does not find that type of supervision is necessary." (R. 77: 62-63.) "Again, I'm persuaded, Miss Counihan, that you are not going to do this again, unless I'm mistaken about you. You don't need supervision. You need to be held accountable for what you have done." (R.

77:63.) "I feel that the maximum of nine months in jail is appropriate in this case, given the length and persuasiveness of the criminal activity." (R. 77:63.)

On September 5, 2017, Counihan filed an Amended Motion for Postconviction Relief (R. 55.) On October 30, 2017, an evidentiary hearing was held to address Counihan's Amended Motion for Postconviction Relief. (R. 61.) The postconviction motion court addressed several issues raised in Counihan's Amended Motion for Postconviction Relief, all of which are not at issue in Counihan's appeal. The issues relevant to Counihan's appeal fall under a broader ineffective assistance of counsel claim. Counihan argued that defense counsel was ineffective because he failed to object and seek an adjournment of the sentencing hearing to review cases cited by the court and because he failed to ask the court for what information the court was reviewing, and because he failed to present characteristics that distinguished Counihan's case from the cases cited by the court. (R. 55:2, R. 80:88-89.) The postconviction motion court denied Counihan's ineffective assistance of counsel claim. (R. 80:93)

STANDARDS OF REVIEW

I. Sentencing discretion.

When reviewing a sentencing decision, an appellate court presumes that the circuit court acted reasonably. An appellate court "will not interfere with the circuit court's sentencing decision unless the circuit court erroneously exercised its discretion." *State v. Lechner*, 217 Wis.2d 392, 418-19, 576 N.W.2d 912 (1998). "A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis.2d 225, 880 N.W.2d 659 (citation omitted). On appeal, a reviewing court will search the record for reasons to sustain a circuit court's exercise of sentencing discretion. *McCleary v. State*, 49 Wis.2d 263, 282,182 N.W.2d 512 (1971).

II. Sentencing based on allegedly irrelevant or improper factors.

Because sentencing decisions are left to the sound discretion of the trial court, we review those decisions only to determine whether the trial court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis.2d 535, 678 N.W.2d 197. When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion. *McCleary*, 49 Wis.2d 263 at 277.

III. Ineffective assistance of counsel.

"The standard of review for ineffective assistance of counsel's components of deficient performance and prejudice present mixed questions of law and fact. A circuit court's findings of historic fact, 'the underlying findings of what happened,' will not be overturned unless clearly erroneous." *State v. Fonte*, 2005 WI 77, ¶ 11, 281 Wis.2d 654, 698 N.W.2d 594 (citations omitted). Questions of whether counsel's performance was deficient and prejudicial are questions of law we review de novo." *Id*. *See also State v. Lemberger*, 2017 WI 39, ¶ 14, 374 Wis.2d 617, 893, N.W.2d 232.

ARGUMENT

I. When sentencing Counihan, the court did not rely on an improper factor.

A. Legal principles regarding sentencing based on allegedly irrelevant or improper factors.

A sentencing court erroneously exercises its discretion when the court imposes a sentence "based on or in actual reliance upon clearly irrelevant or improper factors. *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis.2d 685, 786 N.W.2d 409. A postconviction motion claiming the circuit court relied on an improper factor at sentencing must show that the court relied on an irrelevant or improper factor in imposing sentence. *Id.* ¶ 33; *Gallion*, 270 Wis.2d 535, ¶ 72 ("The defendant has the burden of showing that the 'sentence was based on clearly irrelevant or improper factors.'"). The defendant must then prove by clear and convincing evidence that the court actually relied on the irrelevant or improper factor. *Harris*, 326 Wis.2d 685, ¶¶ 30-35. If the defendant does so, the State can demonstrate the harmlessness of the court's reliance by proving beyond a reasonable doubt that the court would have imposed the same sentence if the court had not considered the factors. *See In re Commitment of Harrell*, 2008 WI App 37, ¶ 37, 308 Wis.2d 166, 747 N.W.2d 770.

B. The sentencing court did not rely upon irrelevant or improper factors when it sentenced Counihan, therefore, Counihan's due process right was not violated.

The State does not dispute that the sentencing court considered information regarding prior similar cases when fashioning the sentence in this case. Here, Counihan asserts that the because the sentencing court failed to give Counihan prior notice that the court considered prior similar cases, that Counihan's due process right was violated. However, Counihan fails to establish that the information relied upon by the court was either irrelevant or improper for the purposes of determining an appropriate sentence.

"…[I]n sentencing, a trial judge may appropriately conduct an inquiry broad in scope and largely unlimited either as to the kind of information considered or the source from which it comes." *Handel v. State*, 74 Wis.2d 699, 703, 247 N.W.2d 711 (Wis., 1976).

Throughout Counihan's brief, great emphasis is placed on a single statement made by the sentencing court – "most significantly" which Counihan takes out of context. Following arguments from the State, defense, and community members, the sentencing court began to make its sentencing remarks. The court began by identifying the numerous sources of information the court reviewed in preparation for sentencing.

> "I have read the file in detail, including the criminal complaint and Information. I have read the police report in detail. Perhaps most significantly, I pulled all files that we could find in Door County where somebody has pled to theft in a business-type setting. There were about six or seven of them that we could find, and I have reviewed those files in detail.
>
> I read all victim impact statements. There's at least 25 of them. Twenty-five people at least wrote in, and I reviewed those, each and every one of those letters carefully. There were at least five or six or seven other letters that came in that were not in a victim impact-type letter, but were written to the Court. And I've read those.
>
> Mr. Wimberger also submitted letters on behalf of Miss Counihan. I think there were 15 or 16, and today this probably makes 17. And I've read each and every one of those.
>
> Mr. Wimberger also sent me some credit card entries, and I've reviewed those.
>
> And finally, I have reviewed a letter from Wilber and Associates dated August 30th of 2016; that's a law firm."
>
> (R. 77:47-48.)

What a sentencing court says or does not say at a motion challenging a defendant's sentence can be used by a reviewing court in determining the legality

of the defendant's sentence – a circuit court has an additional opportunity to explain its sentence when challenged by a postconviction motion. *State v. Alexander*, 360 Wis.2d 292, ¶ 30, 858 N.W.2D 662 (Wis. 2015). Accordingly, on review, it is appropriate to take into consideration comments made by the sentencing court both during the original sentencing hearing, and at the postconviction motion hearing.

On review, it is also essential to look at the sentencing court's comments in the context of the whole sentencing transcript. The mere fact that the sentencing court mentions having reviewed the prior similar cases does not result in a violation of Counihan's due process rights. At the original sentencing hearing, the sentencing court detailed the numerous factors it took into consideration when fashioning the sentence. The court began its recitation of the factors it considered by specifically stating "The significant facts that this Court has relied on in this matter and will rely on is that…" (R. 77:55.) These factors included the character and rehabilitative needs of the defendant, the nature and gravity of the offenses, and the protection of the public. *Id*. As it relates to the prior similar cases that the court reviewed, the sentencing court specifically stated, "Every case has a nuance. So these prior cases, these other cases in Door County, have provided this Court guidance, but I am not relying solely on these other cases." (R. 54.)

Here, the court's remarks at the postconviction motion hearing further demonstrate that the sentencing court did not improperly rely on the prior similar cases. The court stated "I came to a conclusion independently of any of these cases, but I wanted to use the cases to make sure they supported what I was going to do." (R. 80:90.) "I didn't, again, use this as some sort of a recipe as so much as did they confirm with what I thought was appropriate. And they (sic) I felt like they did." (R. 80:91.)

Upon review of the sentencing court's comments both at sentencing and at the postconviction motion hearing, it is clear that the court actually based its sentence on proper, rather than improper, factors. Counihan fails to establish that the court would not have sentenced Counihan in the same manner without the information.

Upon review of the sentencing court's comments both at the original sentencing hearing and at the postconviction motion hearing, it is abundantly clear that the sentencing court properly considered the primary sentencing factors, determined that probation would not be an appropriate disposition, and crafted a sentence that was well within the maximum statutory term allowed. Counihan has not shown an erroneous exercise of discretion by the sentencing court, but instead disagrees with the way in which the sentencing court exercised its discretion.

"First, sentencing decisions are left to the sound discretion of the circuit court." *State v. Travis*, 2013 WI 38, ¶ 15, 347 Wis.2d 142, 832 N.W.2d 491. A defendant who seeks resentencing based on inaccurate information at the sentencing hearing must prove both that the information was inaccurate and that the trial court relied on it. *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis.2d 179, 717 N.W.2d 1.

The Defendant suggests that the trial court may have incorrectly interpreted a sentence for one defendant with a prior similar case, however the Defendant fails to establish that the information relied upon by the court was in fact inaccurate. It is the State's position that the information was accurate, and that any inaccuracy was harmless.

The Defendant fails to set forth facts to support a finding that the circuit court fashioned a sentence based on materially untrue information that would render the sentencing proceedings lacking in due process. *See State v. Travis*, 2013 WI 38, ¶¶ 17-18, 347 Wis.2d 142, 832 N.W.2d 491. "Proving that information is inaccurate is a threshold question. *State v. Travis*, 2013 WI 38, ¶ 22, 347 Wis.2d 142, 832 N.W.2d 491.

Although the Defendant disagrees with the circuit court's analysis, and contends that a different judge may have reached a different conclusion, that is not the standard of review.

The sentencing court considered the proper factors and explained the goals and basis for its sentence. The circuit court imposed a sentence well within the maximum. It is therefore presumed to be reasonable and not excessive or shocking to the public sentiment. *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis.2d 632, 648 N.W.2d 507. The sentence was legally permissible.

II. Because the sentencing court did not rely on an improper factor when deciding Counihan's sentence, defense counsel did not provide ineffective assistance when he refrained from objecting to the court's statements that, Counihan contends, evinced reliance on an improper factor when deciding what sentence to impose upon her.

A. Legal principles regarding ineffective assistance of counsel.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

To prove ineffective assistance of trial counsel, a defendant bears the burden of proving that trial counsel performed deficiently and that counsel's deficient performance caused prejudice to the defendant. "To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of 'reasonably effective assistance.' *Strickland*, 466 U.S. at 687-88. *State v. Domke*, 2011 WI 95, ¶ 36, 337 Wis2d 268, 805 N.W.2d 364.

"To prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis.2d 369, 674 N.W.2d 647. An appellate court strongly presumes that counsel acts reasonably within professional norms. *Id*.

Ineffective assistance of counsel does not result when an attorney refrains from pursuing a futile course of action or from raising a meritless issue or argument. *State v. Anderson*, 2005 WI App 238, ¶ 29, 288 Wis.2d 83, 707 N.W.2d 159.

If the defendant fails on either prong – deficient performance or prejudice – the ineffective-assistance-of-counsel claim fails. *Strickland*, 466 U.S. at 697. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*

B. Counihan's counsel did not perform deficiently.

The postconviction motion court correctly assessed the statements made by the court at sentencing, on which Counihan relies to establish her counsel's ineffectiveness. The postconviction motion court held that at sentencing, the court did not commit the error alleged by Counihan. By definition, failing to object to a nonexistent error cannot amount to deficient performance, and therefore, cannot amount to ineffective assistance of counsel.

III. Even if defense counsel performed deficiently by not objecting to the trial court's statements during sentencing, Counihan did not prove that counsel's deficient performance caused her any prejudice.

A. Legal principles regarding ineffective assistance of counsel.

Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, "the result of the proceeding

would have been different." *Strickland*, 466 U.S. at 694. The defendant must affirmatively prove prejudice to the defendant. The defendant cannot ask the reviewing court to speculate as to whether counsel's deficient performance resulted in prejudice to the defendant. *State v. Wirts*, 176 Wis.2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

B. Counihan has not shown she incurred any prejudice.

Assuming Counihan's defense counsel performed deficiently by not objecting to the allegedly improper comments by the sentencing court, Counihan has not shown that she incurred any prejudice within the meaning of the *Strickland* standard. Counihan has not established that the sentencing court would have agreed with an objection. In light of the sentencing court's comments both at sentencing and at the postconviction motion hearing, the State doubts the court would have agreed had defense counsel objected.

Further, Counihan has not shown that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The sentencing court made it very clear that it deemed Counihan's crimes as very serious. "In terms of the gravity of the offense, what troubles me, Miss Counihan, is the prolonged nature of it, over many years…to keep doing it over many years is a very serious matter indeed." (R. 77:60-61.) The court goes on to explain its rationale in rejecting the joint recommendation for probation, which is entirely based on the fact that the court determined probation is only appropriate where the individual needs supervision, and in this case, the court determined Counihan did not need supervision. (R: 77:61-62.)

Nothing about the court's remarks at sentencing, or at the postconviction motion hearing suggest that the court would have changed its sentencing decision if defense counsel had made the objection Counihan contends he should have made. Counihan has not shown that defense counsel's failure to object to the sentencing court's remarks caused her any *Strickland* prejudice. Counihan therefore failed to prove she received ineffective assistance of counsel.

CONCLUSION

This Court should affirm the circuit court's decision and order denying Counihan's postconviction motion alleging ineffective assistance of defense counsel and should affirm the judgment of conviction.

Respectfully submitted this 18th day of April, 2018.

_____

Colleen C. Nordin
Door County District Attorney
State Bar No. 1056310
Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(8) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3,337 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains (1) a Table of Contents; (2) relevant trial and record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regrading those issues. I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, a copy of this certificate has been served with the paper copies of this brief filed with eh court and served on all opposing parties.

Respectfully submitted this 18th day of April, 2018.

_____

Colleen C. Nordin
Door County District Attorney
State Bar No. 1056310
Plaintiff-Respondent