STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2021AP000375CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. CARROLL, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction entered in Jefferson County Circuit Court, Case No. 2015CF000254, The Honorable William Hue, Presiding, and the Order Denying Postconviction Relief, The Honorable William V. Gruber, Presiding.

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This case may be resolved by applying well-established legal principles, and the parties' briefs should adequately present the underlying facts.

STANDARD OF REVIEW

Whether a plea was entered knowingly, voluntarily and intelligently is subject to independent review. *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). A reviewing court should uphold the circuit court's findings of evidentiary and historical facts unless they are clearly erroneous. *Id.*

Whether an attorney's actions constitute ineffective assistance is a mixed question of fact and law, and a trial court's determination regarding facts will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990) (citations omitted). The determination of whether trial counsel's conduct constitutes ineffective assistance of counsel is a question of law and is subject independent review. *Id.*

On appeal, a circuit court's sentence determination will only be reviewed for whether its discretion was erroneously exercised. *State v. Klubertanz*, 2006 WI App 71, ¶ 20, 291 Wis. 2d 751, 713 N.W.2d 116 (citing *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197).

ARGUMENT

I. THE CIRCUIT COURT'S FACT FINDING AND CREDIBILITY DETERMINATIONS WERE NOT CLEARLY ERRONEOUS, AND MR. CARROLL FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HE ENTERED HIS PLEA BECAUSE HE WAS COERCED BY COUNSEL INTO DOING SO.

Mr. Carroll cannot meet his burden in showing that his plea was involuntary due to what he claims was Attorney De La Rosa's coercive conduct. The trial court found Mr. Carroll's testimony at the Post-conviction Motion hearing was not credible, and the remaining facts on the record do not demonstrative Attorney De La Rosa was coercive.

"To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice, that is, that there are 'serious questions affecting the fundamental integrity of the plea.'" *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44 (quoting *State v. Denk*, 2008 WI 130, ¶ 71, 315 Wis. 2d 5, 758 N.W.2d 775). A plea results in a manifest injustice if a defendant does not enter into it knowingly, voluntarily or intelligently. *Dillard*, 2014 WI 123 at ¶ 37.

A guilty plea that has been obtained as a result of coercion is an involuntary plea. *See State v. Basley,* 2006 WI App 253, ¶ 9, 298 Wis.2d 232, 726 N.W.2d 671. *See also State v. Rhodes,* 2008 WI App 32, ¶ 14, 307 Wis.2d 350, 746 N.W.2d 599. Coercion cannot be established by showing defense counsel was enthusiastic about the plea offer. *State v. Goyette,* 2006 WI App 178, ¶ 26, 296 Wis.2d 359, 722 N.W.2d 731 (citation omitted). Further, an attorney's effort to convince a client that a plea is in the client's best interest is not coercion that invalidates a plea. *State v. Rock*, 92 Wis. 2d 554, 563-64, 285 N.W.2d 739 (1979).

At the Post-conviction Motion hearing, Mr. Carroll testified that Attorney De La Rosa told Mr. Carroll he was guilty, and that pleading was his best option. (R.100 10:19-23, 11:11-16, 15:16-24 43:3-8) (Pet-App.A362, A363, A367, A384). However, Mr. Carroll could not recall whether Attorney De La Rosa told him that he had to plead guilty. (R.100 30:22-24) (Pet-App.A382). Mr. Carroll testified that because Attorney De La Rosa felt Mr. Carroll was guilty, Mr. Carroll felt coerced into pleading. (R.100 10:24-25, 15:14-24. 16:8-11) (Pet-App.A362, A367, A368).

Mr. Carroll stated that he was not feeling well at the time of the plea hearing, which also contributed him feeling coerced into pleading. (R.100 15:25, 16:1-5) (Pet-App.A367, A368). However, Mr. Carroll could not recall telling the court he was not feeling well. (R.100 28:22-25, 29:1-11) (Pet-App.A380, A381).

Mr. Carroll also testified that Attorney De La Rosa told him he would not be able to get new counsel if he did not accept the plea. (R.100 22:9-15) (Pet-App.A374).

Attorney De La Rosa could not recall telling Mr. Carroll that he was guilty or that he should plead. (R.100 40:3-6) (Pet-App.A392). Attorney De La Rosa maintained that the decision to plead guilty or go to trial was Mr. Carroll's choice. (R.100 40:13-15) (Pet-App.A392). Attorney De La Rosa did not feel there had been a breakdown of the attorney/client relationship. (R.100 46:18-22) (Pet-App.A398). Attorney De La Rosa stated that he had no concerns about Mr. Carroll's physical or mental health. (R.100 47:16-22) (Pet-App.A399). Attorney De La Rosa testified that he thought Mr. Carroll knew what he was doing when he entered his plea, and that "ultimately it was his call." (R.100 54:23-25, 55:1-3) (Pet-App.A406, A407).

In its ruling, the court found that Mr. Carroll's testimony was not credible. (R.100 58:9-10) (Pet-App.A410). The court found that Mr. Carroll

equivocated on questions where the court expected straight answers. (R.100 58:10-11) (Pet-App.A410). The court concluded Mr. Carroll's allegations regarding coercion were mostly conclusory. (R.100 59:1-10) (Pet-App.A411). The court also indicated it did not believe Mr. Carroll's claim that Attorney De La Rosa told him he would not be able to get another attorney. (R.100 60:10-19) (Pet-App.A412).

Mr. Carroll has not shown that the court's evidentiary and factual determinations were clearly erroneous. The court made clear that it found Mr. Carroll's testimony was not credible, and that Attorney De La Rosa's testimony was credible. Reviewing courts generally defer to the trial court on questions of credibility because the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *See State v. Trecroci*, 2001 WI App 126, ¶2 & n.1, 246 Wis. 2d 261, 630 N.W.2d 555 and *Johnson v. Merta*, 95 Wis. 2d 141, 151–52, 289 N.W.2d 813 (1980) (citation omitted). In assessing credibility, a trial court is not required to set forth what aspects of the witness's demeanor it relied on to find the witness's testimony credible or why it found one witness more credible than another. *See State v. Young*, 2009 WI App 22, ¶¶18–19, 316 Wis. 2d 114, 762 N.W.2d 736.

Nothing in Attorney De La Rosa's testimony regarding Attorney De La Rosa's actions during the case qualifies as coercive conduct. The court gave a detailed explanation for why it believed Mr. Carroll was not credible. As such, Mr. Carroll has failed to show, by clear and convincing evidence, that his plea was involuntary.

II. MR. CARROLL HAS FAILED TO SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT OR THAT HE WOULD HAVE GONE TO TRIAL HAD IT NOT BEEN FOR COUNSEL'S DEFICIENT PERFORMANCE.

Another way a guilty plea results in a manifest injustice is if a defendant received ineffective assistance of counsel. *Dillard*, 2014 WI 123, ¶¶ 83-84. To prevail on a Sixth Amendment claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If a defendant fails to show one prong of the *Strickland* test, the court need not address the other. *Id.* at 697.

To establish deficient performance, the defendant must identify "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. There is a "strong presumption that counsel's performance falls within a wide range of reasonable professional assistance." *Id.* at 689. The defendant must overcome the presumption that counsel's actions were the result of "sound trial strategy." *Id.* As such, "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

The Seventh Circuit has found that the failure to call an expert witness, by itself, is not sufficient to establish counsel's performance was deficient. *Ellison v. Acevedo,* 593 F.3d 625, 633-34 (7th Cir. 2010) Rather, the court stated that, "[T]he defendant must demonstrate that an expert capable of supporting the defense was reasonably available at the time of trial." *Id.* at 634.

To satisfy the prejudice prong, a defendant must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Dillard*, 2014 WI 123, ¶ 139 (citation omitted).

At the Plea and Sentencing hearing, Mr. Carroll indicated he was accepting the sentence partly because the other misdemeanor cases were dismissed and because he knew he could be found guilty for the offenses. (R.93 19:13-15, 20:8-16) (Pet-App.A222, A223). Mr. Carroll expressed his

dissatisfaction with the attorney he had prior to Attorney De La Rosa. (R.93 20:23-25, 21:1-12) (Pet-App.A223, A224). Mr. Carroll stated, "If Mr. Gonzalez had better explained, if he even had spent half the time that Mr. De La Rosa has in the last couple weeks with me, had that happened we probably wouldn't be here today." (R.93 20:23-25, 21:1-2) (Pet-App.A223, A224).

At the Post-conviction Motion hearing, Mr. Carroll stated that he and Attorney De La Rosa had only one substantive meeting before the plea and that they argued during most of the meeting. (R.100 10:19-24) (Pet-App.A362). Mr. Carroll was dissatisfied because Attorney De La Rosa failed to contact or subpoena an expert witness his prior attorney consulted. (R.100 11:17-24) (Pet-App.A363). Mr. Carroll stated that the expert was going to testify about how individuals can function normally when they are intoxicated. (R.100 14:11-16) (Pet-App.A366). Mr. Carroll was also upset that Attorney De La Rosa failed to investigate his cell phone, which showed a prior relationship with the victim. (R.100 17:9-15, 22-25, 18:1-9) (Pet-App.A369, A370). Mr. Carroll stated that he and Attorney De La Rosa never discussed a trial strategy, and that he wished they had. (R.100 16:18-24) (Pet-App.A368).

Attorney De La Rosa testified that in preparing the case, he spoke with Mr. Carroll and performed case analysis and document review. (R.100 39:5-9) (Pet-App.A391). Attorney De La Rosa testified that he discussed going to trial with Mr. Carroll but could not recall the specifics of what they discussed. (R.100 40:7-12) (Pet-App.A392) Attorney De La Rosa could not recall why he did not contact an expert witness but provided a lengthy explanation of the process he would use to make that decision. (R.100 48:25, 49:1-25, 50:1-15) (Pet-App.A400-A402). Attorney De La Rosa could not recall whether Mr. Carroll asked Attorney De La Rosa to hire an expert or find his cell phone. (R.100 55:4-25, 56:1-4) (Pet-

App.A407-408). Attorney De La Rosa testified that if Mr. Carroll told him the cell phone would assist in his defense, Attorney De La Rosa would have investigated it. (R.100 55:13-25, 56:1) (Pet-App.A407-408).

Attorney De La Rosa testified that he proceeded as if the case were going to trial, but he did not prepare as much as he would have closer to the trial date. (R.100 41:19-25, 42:1-6) (Pet-App.A393-394). While Attorney De La Rosa could not recall exactly why Mr. Carroll chose to plead guilty, he did recall that the State's offer was a good offer that allowed Mr. Carroll to avoid a felony conviction. (R.100 41:4-18) (Pet-App.A393).

The Court found Attorney De La Rosa's implication that he would have used an expert if he found it necessary convincing. (R.100 59:16-22) (Pet-App.A411). The court noted Attorney De La Rosa's answer that he would have investigated the cell phone if he thought it would help. (R.100 59:23-25, 60:1-3) (Pet-App.A411-412).

Mr. Carroll has shown neither deficient performance nor prejudice. Mr. Carroll has failed to show with any specificity how the contents of his cell phone would have assisted his defense. Similarly, Mr. Carroll has not shown how an expert witness would have helped his case. Further, the trial court found Attorney De La Rosa's testimony that he would have investigated the cell phone and hired an expert if he felt these actions would help Mr. Carroll's case credible. While Mr. Carroll showed dissatisfaction with his prior attorney's handling of the case at the plea hearing, post-conviction, Mr. Carroll indicated Attorney De La Rosa should have handled the case the same as his prior attorney.

Similarly, Mr. Carroll fails to make a sufficient showing that he would have taken his case to trial had Attorney De La Rosa subpoenaed an expert or investigated his cell phone. Mr. Carroll's behavior at the Plea and Sentencing hearing gave no indication of this, and Attorney De La Rosa was not aware Mr. Carroll felt this way. Rather, Mr. Carroll's own

statements at the Plea and Sentencing hearing indicated he was happy with the outcome. Finally, the trial court did not find Mr. Carroll's testimony at the Post-conviction Hearing to be credible. Given these factors, Mr. Carroll's claims, made in hindsight, that he would have taken his case to trial had Attorney De La Rosa's performance not been deficient, are insufficient to establish prejudice.

III. MR. CARROL'S PLACEMENT ON THE SEX OFFENDER REGISTRY IS NOT A NEW FACTOR, AND THE COURT'S REFUSAL TO MODIFY HIS SENTENCE WAS NOT AN ERRONEOUS EXERCISE OF DISCRETION.

On appeal, this court is limited to determining whether the circuit court exercised erroneous discretion when it imposed the sentence. *Gallion*, 2004 WI 42, ¶ 17 (citation omitted). "[T]he term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). An erroneous exercise of discretion occurs if a court bases its sentence on irrelevant or improper factors. *Gallion*, 2004 WI 42, ¶ 17. A circuit court's sentencing determination carries a strong presumption of reasonability because the circuit court is in the best position to consider the relevant factors and demeanor of the defendant. *Id.* at ¶ 18 (citations omitted).

A court may modify a defendant's sentence on the basis of a new factors and when it concludes its original sentence was unduly harsh or unconscionable. *State v. Wuensch*, 69 Wis. 2d 467, 480, 230 N.W.2d 665 (1975) and *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 73, 797 N.W.2d 828 (citation omitted).

The defendant bears the burden to demonstrate by both clear and convincing evidence the existence of a new factor. *Harbor*, 2011 WI 28, ¶

36. "A 'new factor' is 'a fact or set of facts 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" *State v. Vaughn*, 2012 WI App 129, ¶ 35, 344 Wis. 2d 764, 823 N.W.2d 543 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

Unlike the new factor analysis, in determining whether its sentence was unduly harsh, the sentencing court does not have the authority to reduce its sentence based on events that occurred after sentencing. *Klubertanz*, 2006 WI App 71, ¶ 40. The court shall base its determination of whether it exercised erroneous discretion only on the information it had at the time of sentencing. *Id.*

A court may find an erroneous exercise of sentencing discretion "only where the sentence 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." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (citations omitted). However, "[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) (citing *Ocanas*, 70 Wis. 2d at 183-85).

Mr. Carroll has not shown that a new factor exists. Requiring him to register as a sex offender was discussed extensively at the Plea and Sentencing hearing. (R.93 2:23-25, 13:23-25, 14:23-25, 16:23-25, 22:23-25, 24:4-9) (Pet-App.A205, A216-217, A219, A225, A227). Because this

requirement was known to all parties at the time of the sentence, it cannot be a new factor.

Further, Mr. Carroll has not shown that his sentence was harsh. Mr. Carroll was originally charged with Second Degree Sexual Assault – Victim Incapable of Consent, contrary to §940.225(2)(cm), Wis. Stats., a Class C Felony and plead to 4th Degree Sexual Assault, contrary to §940.225(3m), Wis. Stats., a Class A Misdemeanor. (R.1 1-3) (Pet-App.A107-A109) (R.47 1-5) (Pet-App.A101-105). While a court is not required to order Sex Offender registration for a conviction of 4th Degree Sexual Assault, it has the discretion to do so. Wis. Stat. §§301.45(1d)(b) & (1g)(a), 973.048(1m)(a). The Court indicated its reasons for denying Mr. Carroll's Post-conviction Motion were protection of the public and so that the severity of the offense would not be unduly depreciated. (R.100 60:20-25, 61:1-7) (Pet-App.A412-413). These are proper factors to consider under *Gallion.* 2004 WI 42, ¶¶ 41-44. As such, Mr. Carroll has failed to show that the court exercised erroneous discretion in refusing to modify his sentence.

CONCLUSION

The trial court found Mr. Carroll's testimony regarding coercion lacked credibility, and Mr. Carroll has not demonstrated why this Court should not defer to that finding. Further, Mr. Carroll put forth no evidence to show the trial court relied on improper factors in its decision to order sex offender registration or to deny his Post-conviction Motion to modify his sentence. Mr. Carroll has failed to satisfy the performance or prejudice prong of *Strickland.* As such, the Plaintiff-Respondent respectfully requests that this Court deny Mr. Carroll's requests to withdraw his plea and remove the requirement that Mr. Carroll register as a Sex Offender.

Dated this 27th day of July, 2021 at Jefferson, Wisconsin.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8(b) and (c), Wis. Stats. for a brief produced with proportional serif font. The length of the brief is 17 pages with 2,922 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12), Wis. Stats. and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 27th day of July, 2021 at Jefferson, Wisconsin

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