

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 30, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1154-CR

Cir. Ct. No. 2002CF4

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT FEINER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Robert Feiner appeals an order denying him WIS. STAT. § 974.06 (2003-04)¹ relief from a criminal conviction. The issue is whether the trial court properly denied his claim of ineffective trial counsel. We affirm.

¶2 The State charged Feiner with repeated sexual assaults of a child, as a person responsible for her welfare. The assaults allegedly occurred over approximately eighteen months, while the victim was fourteen and then fifteen years old. Pursuant to a plea bargain, Feiner entered a guilty plea to one count of second-degree sexual assault of a child. The trial court accepted the plea, and sentenced Feiner to five years of initial confinement followed by seven years of extended supervision.

¶3 Feiner appealed, contending that the trial court erroneously exercised its sentencing discretion. We affirmed. This appeal concerns Feiner's subsequent postconviction motion alleging that trial counsel ineffectively represented him at sentencing. Specifically, he alleged that counsel allowed the trial court to consider sentencing information that was inaccurate. The trial court denied the motion without a hearing, concluding that Feiner could have raised the issue when he pursued postconviction relief as a matter of right.

¶4 We agree that Feiner is procedurally barred from pursuing his claim. Absent sufficient reason, issues that were raised, or could have been raised in an earlier postconviction proceeding are barred. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Feiner provided no reason why he did not raise the issue presented here in his first postconviction proceeding.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 Even were Feiner not procedurally barred, he failed to develop his arguments sufficiently to warrant a hearing on his claim. Feiner's motion explained that the victim gave police the following false statements: (1) Feiner touched her breasts in May 2000; (2) he told her not to report him because "they wouldn't understand" and he would end up incarcerated; (3) after a camping trip there were two incidents of sexual contact at Feiner's house, one of which occurred in his basement; (4) after one of the contacts, Feiner told her he could more easily stop the contact if they had one more encounter; and (5) she answered 50 to the question "how many times do you think it happened at his house."

¶6 The trial court need not hold a hearing on an ineffective assistance of counsel claim unless the defendant's motion contains sufficient facts that, if true, would entitle the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Here, Feiner's motion failed to present facts showing that the court considered the victim's alleged false statements when it sentenced Feiner. See *State v. Tjepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant must show that the sentencing court relied on the allegedly false information). Nor did he explain the significance of the alleged misstatements. For example, he was charged with and admitted repeated sexual contacts with the victim, but the only contact described in the victim's disputed statements is touching her breasts on one occasion. Feiner provided no explanation why, in view of the other sexual contacts he admitted, reference to that one incident, even if it never occurred, is prejudicial to him. He also does not explain why the number, location or timing of other contacts mattered at sentencing, or why the statements attributed to him might be considered aggravating.

¶7 Overlooking the deficiencies in the motion, we also conclude that the record conclusively shows that a reasonable attorney might reasonably have

decided not to challenge the victim's statements in question. We measure counsel's effectiveness by the objective standard of what a reasonably prudent attorney would do under the circumstances. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Here, a prudent attorney might reasonably have avoided the opportunity at sentencing to challenge the victim's credibility. At every stage of the proceeding Feiner readily admitted repeated sexual contacts with the victim. His alleged statement to her that he would get in trouble if she told anyone was innocuous, because any adult in his situation might say the same thing, and because there was no hint of any threat or coercion in his alleged statement. Additionally, challenging the victim ran counter to one of Feiner's principal arguments at sentencing, which was his assertion that he accepted full responsibility for the assaults. A reasonable attorney might deem it counter-productive to argue responsibility while disputing the victim's version of what the defendant was accepting responsibility for.

¶8 Additionally, counsel had no means of disproving the statements other than by Feiner's statements, and again, counsel might reasonably deem it counter-productive to engage in a he said/she said dispute at sentencing.

¶9 The record also conclusively shows that the alleged inaccuracies did not prejudice Feiner because they played no part in the sentencing decision. All the misstatements Feiner alleges are recorded in transcripts of police interviews attached to the complaint, with some referenced in the complaint. But the record gives no indication that the court ever read the interview transcripts, or had recently read the complaint. Additionally neither counsel mentioned the victim's disputed statements at sentencing, the presentence investigation report made no mention of the statements or information contained in them, and the reasons for the court's sentence were not remotely connected to specific things Feiner told the

victim, or the victim's description of the number, timing and location of her sexual encounters with Feiner.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

