

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2009

David R. Schanker
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. 2008AP795-CR
2008AP796-CR
STATE OF WISCONSIN**

Cir. Ct. Nos. 2001CF186
2004CF6036

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DERRELL R. PICKETT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Derrell R. Pickett appeals from two reconfinement orders, and a related consolidated postconviction order denying his motion for a new reconfinement hearing. The issues are whether the trial court relied on inaccurate information when it imposed Pickett's reconfinement terms, and

whether Pickett was denied the effective assistance of counsel because his reconfinement counsel was allegedly denied access to the presentence investigation report filed at Pickett's original sentencing.¹ We conclude that Pickett has not established that the information on which the reconfinement court relied was inaccurate, and there was no denial of access to the presentence investigation report. Therefore, we affirm.

¶2 In 2001, Pickett was convicted of delivering no more than five grams of cocaine, possessing no more than 500 grams of marijuana with intent to deliver, and possessing a firearm as a felon ("cocaine-marijuana-firearm" case).² For the cocaine and marijuana convictions, the trial court imposed four- and two-year respective consecutive sentences, and for the firearm conviction, the trial court imposed a three-year concurrent sentence. All of the sentences were divided into equal periods of initial confinement and extended supervision. In 2004, Pickett was released to extended supervision. While on extended supervision, Pickett was charged with and convicted of possessing no more than three grams of heroin with intent to deliver ("heroin" case).³ The trial court imposed a four-year consecutive sentence, comprised of eighteen- and thirty-month respective periods of initial confinement and extended supervision.

¹ We refer to the trial court that imposed the reconfinement periods challenged in these consolidated appeals as the reconfinement court, or simply as the court.

² Pickett was convicted of these three offenses in a single judgment of conviction. The cocaine-marijuana-firearm case is Milwaukee County Circuit Court Case No. 2001CF186, and is Appeal No. 2008AP795-CR.

³ The heroin case is Milwaukee County Circuit Court Case No. 2004CF6036, and is Appeal No. 2008AP796-CR. The cocaine-marijuana-firearm and heroin cases were consolidated for the reconfinement and postconviction proceedings. The appeals were consolidated for briefing and dispositional purposes.

¶3 Before Pickett began serving the four-year heroin sentence however, his extended supervision from the cocaine-marijuana-firearm case was revoked, and he was reconfined for five months. In 2006, Pickett was again released to extended supervision, and was later revoked in both cases. It is the consolidated reconfinement hearing for these offenses that is the subject of these appeals.

¶4 The reconfinement court imposed a two-year reconfinement period for the cocaine-marijuana-firearm revocation, and a three-year reconfinement period for the heroin revocation. Pickett moved for a new consolidated reconfinement hearing, contending that: (1) the reconfinement court relied on inaccurate information when it imposed the reconfinement periods; and (2) he was denied due process of law and effective representation because his reconfinement counsel did not have access to the presentence investigation report that the court had reviewed prior to imposing the reconfinement periods. The reconfinement court denied the motion. Pickett appeals, raising these same two issues.

¶5 Pickett contends that the reconfinement court imposed the reconfinement periods in reliance on inaccurate information. The alleged inaccuracy is that, according to the prosecutor handling the sentencing hearing for the cocaine-marijuana-firearm convictions, Pickett told “law enforcement officers on the night of his arrest ... that he did a deal last week. He [stated to the officers that he] was an intermediary for an 18 ounce cocaine deal.” Defense counsel responded by explaining that:

[h]e told the officers that he had purchased 18 ounce deals because he thought if he held himself out as a big drug dealer that we would allow him to cooperate and he would get a break. He said he never purchased an 18 ounce deal, and he informed me that he just told them that, thinking he could work with them and they would allow him a break at sentencing.

....

He just informed the officers [of] that so they could wire him up and let him go on the street and try to get some deals for the officers so he could get a break at sentencing.

During his allocution, Pickett explained to the trial court: “I admit that I was selling drugs. I wasn’t selling a large amount or anything like that. I ... did an intermediary for a drug deal before. It wasn’t this [eighteen-ounce] amount.” The alleged inaccuracy is that the court that imposed the reconfinement periods relied on Pickett’s previous involvement in an eighteen-ounce sale of cocaine when Pickett denied that involvement and was actually convicted for selling no more than five (actually two) grams of cocaine, a considerably lesser amount.

¶6 Pickett is entitled to be sentenced on true and correct information.⁴ See *Bruneau v. State*, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977), *clarified on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

“A defendant who requests resentencing due to the [trial] court’s use of inaccurate information at the sentencing hearing ‘must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.’”

State v. Tjepelman, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (citations omitted).

¶7 Pickett told law enforcement officials that he facilitated the sale of eighteen ounces of cocaine. When standing before the trial court to be sentenced for selling two grams of cocaine, his counsel and then he claimed that he was not

⁴ For purposes of this challenge, we consider the reconfinement proceeding as a sentencing hearing. See *State v. Brown*, 2006 WI 131, ¶20, 298 Wis. 2d 37, 725 N.W.2d 262.

involved in a drug sale of such a large amount of cocaine. His defense counsel explained that Pickett had claimed he was involved in a drug deal of that magnitude because he had hoped to persuade law enforcement of the value of his cooperation in order to obtain the benefit of a lesser sentence.

¶8 Pickett has not met his burden of establishing that his first admission regarding the eighteen-ounce sale was inaccurate. All Pickett has established is that he made two inconsistent statements and provided an explanation to reconcile them. That explanation does not establish which statement was true, or if either statement was true. It simply provides a reason, which may or may not be true, for why he later contradicted himself, providing explanations that favored each statement at the time it was made.

¶9 Pickett's second challenge is that his reconfinement counsel was denied access to the presentence investigation report that was expressly reviewed by the reconfinement court.⁵ This denial allegedly compromised his reconfinement counsel's presentation because she was unable to respond to information in the report that may have influenced the court to impose a lengthier reconfinement period. WISCONSIN STAT. § 972.15(2) (2007-08) requires the trial court to disclose to counsel the contents of the presentence investigation report before imposing sentence.⁶

⁵ Pickett's reconfinement counsel was not the same lawyer who represented him at the sentencing incident to which the presentence investigation report had been filed.

⁶ The trial court's obligation extends to the defendant if he or she is unrepresented at sentencing. All references to the Wisconsin Statutes are to the 2007-08 version.

¶10 During the reconfinement hearing, the court announced that, in preparation for the hearing, it had reviewed a number of documents, including the presentence investigation report filed in the cocaine-marijuana-firearm case. Reconfinement counsel did not mention to the court that she had not reviewed the report, or that she sought to do so. Reconfinement counsel was not denied access to the report; it should have been in the trial court record for several weeks prior to the reconfinement hearing. The reconfinement court did not know that counsel had not read the report, or had sought to read it. The trial court allowed the defense additional time on the day of sentencing to review the report “more in depth with the client.” It was not obliged to inquire whether Pickett and/or his (admittedly different) counsel had already read that same report in preparation for the reconfinement hearing.⁷

¶11 The reconfinement court alerted counsel by announcing the materials it had reviewed in preparation for this hearing. In the absence of an objection or even a mere mention that reconfinement counsel sought to review that same material, the trial court was not obliged, as it was at the original sentencing, to affirmatively inquire whether reconfinement counsel had reviewed the report that the court had recently reviewed in preparation for the reconfinement hearing.

By the Court.—Orders affirmed.

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

⁷ WISCONSIN STAT. § 972.15(6) allows the use of a presentence investigation report by others, including the court, the State’s counsel, and defense counsel for subsequent proceedings. See § 972.15(6)(a)-(f).

