COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP347-CR **Cir. Ct. No. 2000CF1937**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SOUVANNASENG BORIBOUNE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Souvannaseng Boriboune, *pro se*, appeals an order denying his motion for reconsideration of an order denying his motion for postconviction relief. The issues are: (1) whether Boriboune's motion to modify his sentence based on the circuit court's alleged misuse of sentencing discretion is

untimely; (2) whether the circuit court violated Boriboune's constitutional rights when it increased his term of initial incarceration on resentencing; and (3) whether Boriboune received ineffective assistance of postconviction or appellate counsel. We affirm.

¶2 Boriboune was convicted of one count of first-degree sexual assault and one count of armed robbery in 2000. He was sentenced to thirty-four years of imprisonment on each count, with fourteen years of initial confinement and twenty years of extended supervision, to be served concurrently. Boriboune was allowed to withdraw his plea two years after sentencing because the Wisconsin Supreme Court decided ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, which held that a defendant may withdraw his or her plea if the defendant is not warned that he or she may be deported as a result of entering a plea.

¶3 After withdrawing his plea, Boriboune decided to again plead guilty to the same charges. On resentencing, the circuit court imposed thirty-four years of imprisonment on each count, with eighteen years of initial confinement and sixteen years of extended supervision, to be served concurrently. Nearly seven years later, Boriboune moved for sentence modification. The circuit court denied the motion as untimely. Boriboune then moved for reconsideration. The circuit court denied the motion for reconsideration.

¶4 The State argues that Boriboune's motion to modify his sentence is untimely. Boriboune's motion was not brought within the time limits provided by

WIS. STAT. § 973.19 (2009-10),[1] which allows motions for sentence modification within ninety days of sentencing. Nor was it brought within the time limits provided for direct appeal by WIS. STAT. RULE 809.30(2). Boriboune did not bring his motion until nearly seven years after he was sentenced, long after expiration of the time limits. Because Boriboune's motion to modify his sentence is untimely, we will not consider his arguments pertaining to the circuit court's alleged misuse of sentencing discretion.

¶5 Turning to Boriboune's constitutional arguments, he first contends that the circuit court violated his constitutional right to due process when it resentenced him because it increased his sentence. "[W]hether an increased sentence following an offender's successful postconviction motion violates a person's due process rights presents a question of law that we review de novo." ***State v. Sturdivant***, 2009 WI App 5, ¶7, 316 Wis. 2d 197, 763 N.W.2d 185. Due process prohibits a defendant from being vindictively sentenced to a longer sentence for having successfully attacked a prior sentence. ***Id.***, ¶8. "The underlying concern of all vindictiveness case law is that a defendant could be punished by a resentencing court for exercising postconviction rights to challenge a conviction or a sentence." ***Id.***, ¶9.

¶6 The State contends that Boriboune's sentence was not increased because his total term of imprisonment, including both initial confinement and extended supervision, remained the same. The first time Boriboune was sentenced, he received thirty-four years of imprisonment on each count, with

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

fourteen years of initial confinement and twenty years of extended supervision, to be served concurrently. The second time Boriboune was sentenced, he again received thirty-four years of imprisonment on each count, to be served concurrently, but his term of initial confinement was increased to eighteen years and his term of extended supervision was reduced to sixteen years. The State argues that the sentence was not increased because the Wisconsin statutes define the term "imprisonment" to include "both the time of confinement (in prison) and the time following the confinement spent on extended supervision." ***State v. Jackson***, 2004 WI 29, ¶5 n.4, 270 Wis. 2d 113, 676 N.W.2d 872; WIS. STAT. § 973.01.

¶7 We need not decide whether a more lengthy term of initial confinement constitutes an increase in sentence where the total term of imprisonment remains the same because we conclude that even if it did, the circuit court did not act vindictively in imposing a longer sentence. Reviewing courts often apply a presumption that a sentencing court acted vindictively if it imposes a longer sentence on resentencing, but that presumption is not applicable in this case. The presumption of vindictiveness does not apply where, as here, new law prompts the resentencing, rather than circuit court error, and the new sentencing hearing is conducted before a different judge. *See* ***Sturdivant***, 316 Wis. 2d 197, ¶¶13-16.

¶8 More importantly, the longer term of initial confinement was more than justified by information the resentencing court had before it. According to information in the presentence investigation report, Boriboune's conduct in prison between the first and second sentencing hearings was abysmal. He received multiple conduct reports for violating prison rules, with seven minor violations and six major violations, including battery to staff. In addition, the circuit court

was informed that the victim had been threatened by Boriboune's mother after he was allowed to withdraw his plea and the victim remained absolutely terrified of retaliation from Boriboune after his release. When questioned by the circuit court, Boriboune told the circuit court there were no mistakes or factual errors in this information. This new information provided ample reason for the circuit court to increase Boriboune's term of initial confinement. The circuit court based its sentence on Boriboune's conduct, not on a desire to punish Boriboune for successfully moving to withdraw his plea. Therefore, we reject the argument that the increased term of initial confinement violated Boriboune's right to due process.

¶9 Boriboune next argues that he received ineffective assistance from his postconviction attorney because she should have informed him that his sentence could be increased on resentencing if he withdrew his plea. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Assuming for the sake of argument that Boriboune's attorney did not inform him that his sentence could be increased on resentencing, Boriboune has not shown that he was prejudiced. He does not allege that he would not have moved to withdraw his plea had he known that his sentence could be increased. Instead, he states that "it is unlikely he would have allowed [his attorney] to withdraw his original plea." An allegation that it is "unlikely" that he would have moved to withdraw his plea is not sufficient to show prejudice. Boriboune's claim of ineffective assistance of postconviction counsel fails because he has not shown he was prejudiced by his lawyer's alleged failure to inform him that his sentence could be increased on resentencing if he withdrew his plea.

¶10 Boriboune next argues that he received ineffective assistance of postconviction counsel because his attorney should have challenged evidence of threats made to the victim presented at the resentencing hearing. The prosecutor mentioned in her sentencing remarks that the victim had been contacted by Boriboune's mother after he was allowed to withdraw his plea and offered money to "keep quiet." This information was also provided in the presentence investigation report. Boriboune's lawyer was not ineffective for failing to challenge this information because Boriboune told the circuit court at the outset of the resentencing hearing that the information in the presentence investigation report was correct. Moreover, the circuit court's sentencing comments do not suggest that it relied on this information in increasing Boriboune's term of initial confinement on resentencing. We reject this argument.

¶11 Finally, Boriboune argues that he received ineffective assistance of appellate counsel because his attorney did not pursue an appeal after he was resentenced. He contends that his attorney should have argued that his due process rights were violated when his sentence was increased. We have rejected the argument that Boriboune's due process rights were violated when he was resentenced; therefore, this argument cannot serve as the basis for a claim of ineffective assistance of counsel. Boriboune also appears to argue that his attorney abandoned him by failing to file an appeal on his behalf, but provides no factual basis for this claim, such as basic information about who was appointed to represent him and when they were appointed. Therefore, we reject this argument.

By the Court.—Order affirmed.

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