COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2358

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID SAUTIER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. David Sautier appeals pro se from an order denying his motion to modify his sentence and to strike the presentence investigation report (PSI) due to alleged inaccuracies. We reject Sautier's claims of reversible error and affirm.

In 1987, Sautier was convicted of three counts of burglary on his guilty pleas. At his sentencing hearing, portions of the PSI were read into the record and discussed by the trial court with Sautier and his counsel. The court sentenced Sautier to consecutive sentences totaling twenty-five years. He filed a pro se sentence modification motion in 1992. The trial court's denial of the motion was affirmed by this court in summary fashion. *See* ***State v. Sautier,*** Nos. 92-3108-CR, 92-3109-CR and 92-3110-CR (Wis. Ct. App. Nov. 3, 1993).

In a pro se sentence modification motion filed in June 1995, Sautier again sought sentence modification and moved the trial court to strike the PSI. He claimed that he was denied due process because his sentence was based on inaccurate information in the PSI. He alleged that this constituted a new factor warranting sentence modification. The trial court denied the motion after a hearing,[1] and Sautier commenced this pro se appeal.

Sautier's issues on appeal largely relate to use of the PSI at sentencing and whether inaccuracies in the PSI require resentencing. He complains that the trial court considered his prior record which was inaccurately portrayed in the PSI. In particular, he points to incidents in which he ignited Lysol near someone, struggled with a police officer who apprehended him following a burglary, his behavior at a treatment facility and his various offenses as a juvenile.

[1] At an October 18, 1996 hearing on Sautier's request to waive the cost of preparing the transcript of the May 1, 1996 sentence modification hearing, *see* ***State ex rel. Girouard v. Circuit Court,*** 155 Wis.2d 148, 454 N.W.2d 792 (1990), the trial court ordered preparation of the transcript of the October 18 ***Girouard*** hearing. At the October 18 hearing, the trial court restated its reasons for denying the sentence modification motion. It is to the ***Girouard*** hearing transcript we refer when discussing the trial court's ruling on the June 1995 sentence modification motion.

Sautier's complaints are unavailing. He contends that he did not have an adequate opportunity to challenge the PSI at sentencing because he had only "brief access" to the PSI prior to sentencing. Sautier does not contend that he did not have access to the report; rather, he contends that he did not have sufficient time to review it.[2] When Sautier reviewed the PSI in detail at a later date, he discovered many inaccuracies which he alleges require resentencing.

As to the specific circumstances surrounding these incidents, we note that Sautier failed to object to the trial court's description of these events at sentencing. He also did not seek additional time to review the PSI. The trial court reviewed the PSI in detail with the participants at the hearing. The trial court discussed Sautier's history of criminal conduct and the details of some of those acts. Sautier challenged the trial court's interpretation of the facts surrounding the dismissed charge of endangering safety arising out of the struggle with the officer.[3] Sautier disputed the trial court's assessment of his conduct.

As to the other incidents Sautier cites, we conclude that he had an adequate remedy and opportunity to challenge the accuracy of the information the trial court gleaned from the PSI. *See* ***State v. Perez,*** 170 Wis.2d 130, 141, 487 N.W.2d 630, 634 (Ct. App. 1992). Sautier and counsel were present at sentencing and had access to the PSI. Having what Sautier characterizes as more complete access to the PSI several years after sentencing does not give him a further opportunity to challenge the accuracy of the PSI when information, particularly

[2] These facts distinguish this case from cases such as ***State v. Skaff,*** 152 Wis.2d 48, 447 N.W.2d 84 (Ct. App. 1989), and ***State v. Thompson,*** 158 Wis.2d 698, 463 N.W.2d 402 (Ct. App. 1990), which concern trial court policies barring a defendant access to the PSI.

[3] The charge was read in at sentencing.

that which was within Sautier's knowledge by virtue of his participation in the cited conduct, is discussed by the trial court on the record.[4]

As to the alleged inaccuracies in the PSI relating to his juvenile record, we conclude that these do not amount to new factors warranting resentencing. A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing, *see* ***State v. Kaster,*** 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), or which frustrates the sentencing court's intent. *See* ***State v. Michels,*** 150 Wis.2d 94, 99-100, 441 N.W.2d 278, 280-81 (Ct. App. 1989). Whether a fact constitutes a new factor is a question of law which we decide independently of the trial court. *See* ***id.*** at 97, 441 N.W.2d at 279.

At the ***Girouard*** hearing, Sautier reiterated his challenge to the PSI's description of his prior adult and juvenile record. The trial court stated that even if all of the offenses were not juvenile adjudications, they were still available for consideration at sentencing. *See* ***State v. McQuay,*** 154 Wis.2d 116, 126, 452 N.W.2d 377, 381 (1990) (trial court can consider at sentencing offenses which are unproven). The trial court stated that Sautier's challenge to the representations of his prior criminal history in the PSI "had nothing in substance to do with the sentencing at all ...." Clearly, the trial court did not perceive that Sautier's clarification that some of his juvenile adjudications were actually dismissals was something the trial court overlooked or which frustrated the trial court's intent to impose a lengthy sentence on Sautier.

[4] In his appellate brief, Sautier states that at the postconviction motion hearing which is not transcribed in this record, the trial court stated that it was the court's policy to give defendants access to their PSIs.

In sentencing Sautier, the trial court considered the extent of his past criminal record, the charges to which he had pled and the three charges which were dismissed as part of the plea agreement. The trial court focused closely on the details of the offenses to which Sautier had agreed to plead guilty. The gravity of the offense and the defendant's history of criminal conduct are appropriate factors in sentencing. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991).

We also reject Sautier's complaint that his due process right to be sentenced on the basis of accurate information was violated by the trial court's reliance on inaccuracies in the PSI. *See* ***Perez***, 170 Wis.2d at 138, 487 N.W.2d at 633. In order to establish a due process violation in the sentencing process, a defendant must prove by clear and convincing evidence that the information was inaccurate and that he or she was prejudiced thereby. *See* ***State v. Littrup,*** 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991).

At the ***Girouard*** hearing, Sautier again argued that the PSI inaccurately portrayed his prior criminal conduct. The PSI cited seventeen felony convictions, fifteen as a juvenile and two as an adult. Sautier stated that he pled guilty to six of those juvenile offenses and that nine were dismissed as part of negotiations. The trial court stated that regardless of the disposition of these juvenile matters, it could consider them at sentencing. The trial court was correct. *See* ***McQuay***, 154 Wis.2d at 126, 452 N.W.2d at 381. What was important to the trial court was Sautier's pattern of criminal conduct, not the exact number of juvenile convictions or adjudications. Sautier has not established by clear and convincing evidence that the trial court relied on inaccurate information at sentencing.

Sautier disputes the trial court's interpretation of his struggle with the officer and the Lysol incident. However, he does not dispute that these incidents occurred. The trial court was entitled to draw inferences regarding Sautier's conduct. *See* ***State v. Friday,*** 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). If the inference is a reasonable one, we may not disregard it. *See* ***id.*** Here, the trial court's interpretation of Sautier's conduct and inferences relative to his character are reasonable.

Sautier also contends that the PSI did not accurately portray his psychological history and overplayed his aggressive behavioral patterns. At sentencing, the trial court briefly referred to psychological evaluations as evidencing that Sautier has "serious problems with control" and then noted Sautier's aggressive conduct in one of the burglaries for which he was being sentenced. The record makes clear that the trial court's assessment of Sautier's aggressive conduct and control problems is adequately based upon inferences drawn from the crimes Sautier committed and not based solely on the psychological evaluations referred to in the PSI.[5]

Sautier next argues that he was under the influence of "mood altering" medication at sentencing which prohibited him from evaluating the accuracy of the PSI at that time. The record does not bear out Sautier's claim. At the plea hearing, Sautier stated that he was taking medication for "nerves." The court ordered a recess during which Sautier's counsel consulted with a registered pharmacist. Counsel then reported to the court that the pharmacist advised him that the drug was designed for intestinal disorders and would have no affect on

[5] Sautier did not object to the trial court's references to the psychological evaluations at sentencing.

Sautier's ability to understand court proceedings. Sautier then agreed on the record that the medication did not impair his judgment or his ability to follow the proceedings. There is no indication in the record that Sautier's medication changed between the plea hearing and sentencing.

Sautier argues that the inaccurate PSI has had negative consequences for parole, security classification and programming in prison. Courts do not exercise jurisdiction to correct PSIs for reasons solely related to Department of Corrections administration. *See* ***State v. Bush,*** 185 Wis.2d 716, 723-24, 519 N.W.2d 645, 647-48 (Ct. App. 1994).

Sautier argues that his sentence was disproportionate to that received by his codefendants. However, Sautier concedes that he has raised this issue previously and it was rejected. He contends, however, that his recent discovery of errors in the PSI revives this argument. We disagree for several reasons. First, even if we accept Sautier's premise regarding the disproportionate sentence he received, Sautier did not raise this argument in his 1995 sentence modification motion which is the subject of this appeal. Therefore, it is not before us to review. *See* ***State v. Rogers,*** 196 Wis.2d 817, 826-27, 539 N.W.2d 897, 900-01 (Ct. App. 1995).

Second, this issue was raised at a hearing on Sautier's 1992 sentence modification motion. We affirmed the trial court's refusal to modify his sentence. *See* ***State v. Sautier,*** Nos. 92-3108-CR, 92-3109-CR and 92-3110-CR (Wis. Ct. App. Nov. 3, 1993). Because Sautier did not raise his disproportionate sentence claim in that appeal, the issue is waived and will not be revisited in this appeal.

Even if we were to address this claim, we would reject it because the trial court conducted an individualized sentencing and considered the appropriate factors in sentencing. *See* ***Paske,*** 163 Wis.2d at 62, 471 N.W.2d at 59.

By the Court.—Order affirmed.

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