

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2645-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FAISAL SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Faisal Smith appeals from the judgment entered after he pled guilty to possession of cocaine with intent to deliver, as a second offense, see §§ 961.16(2)(b)(1), 961.41(1m)(cm)(1) and 961.48, STATS., and possession of an electric weapon, see §§ 941.295 and 939.50(1)(a), STATS. Smith also appeals from the trial court's order denying his motion for re-sentencing.

Smith argues: (1) the trial court erred in concluding that he refused to cooperate in the presentence investigation; (2) the trial court erred in placing too much emphasis on Smith's refusal to cooperate in the presentence investigation; (3) the trial court failed to consider the appropriate sentencing factors; and (4) Smith received ineffective assistance of counsel. We affirm.

BACKGROUND

On December 13, 1996, pursuant to a plea bargain, Smith pled guilty to possession of cocaine with intent to deliver, as a second offense, and possession of an electric weapon. After the trial court accepted Smith's pleas, the trial court asked the parties how the case was going to proceed to disposition. Smith's counsel responded, "[T]here are some matters that we're still working on with regards to the possible factors that might affect sentencing, we'll ask that sentencing be put off as long as possible, end of January. I'm not sure if the trial court would like a PSI or not." With the State's acquiescence, the trial court set Smith's sentencing for the end of January. The trial court also ordered a presentence investigation because, as the trial court explained, there was a significant length of time available prior to the sentencing.

On January 13, 1997, probation/parole agent Diane Drake phoned Smith in order to interview him in connection with the preparation of the presentence investigation report. According to the memo that Drake provided to the court, "Mr. Smith stated that without speaking first to his attorney, Carl Chessire [*sic*], he would not give a statement. The presentence [i]nvestigation purpose was explained to Mr. Smith who stated he understood, however, he was planning on speaking to his attorney about the possibility of waiving the [p]resentence [i]nvestigation and appealing his case."

On January 24, 1997, Smith and his counsel appeared for sentencing. At the outset of the proceeding, the trial court said, “My understanding is that the defendant has declined to cooperate with a presentence so we’ll proceed without a presentence.” The parties then presented their sentencing arguments. The State first set forth the terms of the plea bargain, which provided that, in return for Smith’s guilty pleas, the State was recommending a six-year prison sentence, a six-month driver’s license suspension, and a forfeiture of the cash that was found in Smith’s possession at the time of his arrest.¹ The State made no recommendation as to whether the six-year sentence should be served concurrently with or consecutively to Smith’s prior sentence, which he was then serving as a result of the revocation of his parole. The State then set forth the details of the present crimes, informed the trial court of Smith’s prior criminal history, and noted that Smith committed the present crimes while he was under supervision for his previous conviction of possession of cocaine with intent to deliver, while armed. Smith’s counsel then addressed the court, and argued, in essence, that several aspects of Smith’s character should be considered in mitigation of Smith’s sentence.

After the arguments were concluded, the trial court informed Smith that he had the right to address the court and asked Smith if there was anything he wanted to say. Smith responded, “On the presentence investigation, Your Honor, I have nothing to hide. I thought it would be the proper way to go through my attorney whether or not to take the presentence investigation”

¹ Pursuant to § 961.50(1), STATS., upon convicting Smith of the drug offense, the trial court was required to suspend or revoke Smith’s driving privileges “for not less than 6 months nor more than 5 years.”

The trial court then proceeded to impose sentence. The trial court initially explained that although it usually did not exceed the State's sentencing recommendation, it was not going to limit itself to the State's recommendation in Smith's case because Smith "manipulated the sentencing process by refusing to cooperate with the presentence." The trial court further explained that Smith's failure to cooperate with the presentence investigation "tells me something about the defendant and his willingness to assume responsibility, his willingness to reform his conduct. And if we had a presentence, maybe we could corroborate some of the things that the defense has tried to say here today, but we can't." Before imposing sentence, the trial court also noted, although without detail, that it was considering the seriousness of the offense, the need to protect the community from Smith, and Smith's prior record. The trial court then imposed a ten-year sentence for the possession of cocaine with intent to deliver conviction, consecutive to a two-year sentence on the possession of an electric weapon conviction; the court ordered that the sentences be served consecutively to Smith's prior sentence. The trial court also suspended Smith's driving privileges for six months and ordered forfeiture of the cash found in Smith's possession upon his arrest.

On February 4, 1997, Smith filed a notice of intent to seek postconviction relief and requested that counsel be appointed. Counsel was subsequently appointed, and on July 14, 1997, Smith, by counsel, filed a motion for re-sentencing, arguing, among other things, the issues set forth in this appeal. The trial court denied Smith's motion for re-sentencing.

DISCUSSION

Smith argues that the trial court erred in finding that he refused to cooperate in the presentence investigation. He asserts that the trial court should not have construed his request to speak to his attorney before deciding whether or not to speak with the presentence investigator as a refusal to participate in the presentence process. He also argues that the trial court erred in relying on this erroneous conclusion to depart from its normal practice of imposing a sentence within the bounds of the State's recommendation.

Sentencing is left to the sound discretion of the trial court, and we are limited on review to determining whether the trial court erroneously exercised discretion. *See State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). We presume that the trial court acted reasonably in imposing sentence, and the defendant has the burden to show some unreasonable or unjustified basis in the record for the sentence of which the defendant complains. *See id.*, 119 Wis.2d at 622–623, 350 N.W.2d at 638–639.

Based upon the information before the trial court at Smith's sentencing, the trial court's finding that Smith refused to cooperate in the presentence investigation is not clearly erroneous. *See* § 805.17(2), STATS. The trial court had before it the presentence writer's memorandum, which indicated that Smith would not give a statement until he had spoken to his attorney "about the possibility of waiving the [p]resentence [i]nvestigation and appealing his case." Smith did not dispute the accuracy of the presentence writer's memorandum, but merely offered the trial court his explanation that he felt it was proper to speak to his attorney before deciding to participate in the presentence investigation. This information supports the inference that Smith chose not to cooperate with the presentence investigation because he wanted, instead, to appeal his conviction and avoid the consequences of his guilty pleas. Further, the trial

court had ordered the presentence investigation in open court a full month before the presentence writer contacted Smith; in this light, the trial court could reasonably have concluded that Smith had had ample time to discuss the presentence investigation with his attorney. Based on the foregoing information, the trial court reasonably concluded that Smith refused to cooperate with the presentence investigation, and that Smith's refusal evidenced his unwillingness to accept responsibility for his crimes.

Moreover, it is well established that "the sentencing court is not in any way bound by or controlled by a plea agreement between the defendant and the state." *State v. McQuay*, 154 Wis.2d 116, 128, 452 N.W.2d 377, 382 (1990). Thus, regardless of whether or not Smith cooperated with the presentence investigation, the trial court was free to impose a sentence that exceeded the State's recommendation.

Smith further argues that the trial court placed too much weight on his failure to cooperate with the presentence investigation. He also argues that the trial court failed to consider the relevant sentencing factors, and that the court failed to consider mitigating factors.

The primary factors to be considered in imposing sentence are the gravity of the offense, the character and rehabilitative needs of the defendant, and the protection of the public. See *State v. Curbello-Rodriguez*, 119 Wis.2d 414, 433, 351 N.W.2d 758, 767 (Ct. App. 1984); *State v. Patino*, 177 Wis.2d 348, 385, 502 N.W.2d 601, 616 (Ct. App. 1993). The trial court may also consider the defendant's criminal record; history of undesirable behavior patterns; personality and social traits; degree of culpability; demeanor at trial; remorse, repentance and cooperativeness; age, educational background and employment record; the results

of a presentence investigation; the nature of the crime; the need for close rehabilitative control; and the rights of the public. *See Curbello-Rodriguez*, 119 Wis.2d at 433, 351 N.W.2d at 767. The weight afforded to each of the relevant factors is particularly within the wide discretion of the trial court. *See id.*, 119 Wis.2d at 434, 351 N.W.2d at 768. “Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered.” *Id.* (citation omitted).

As noted, the trial court may properly consider a defendant’s cooperativeness in determining the appropriate sentence. *See id.*, 119 Wis.2d at 433, 351 N.W.2d at 767. Here, the trial court considered Smith’s failure to cooperate with the presentence investigation as an indication that Smith was unwilling to accept responsibility for his actions or reform his conduct. This was a proper exercise of the trial court’s sentencing discretion. We reject Smith’s argument that the trial court placed too much emphasis on his refusal to cooperate because, as noted, the weight afforded to each sentencing factor is within the trial court’s wide discretion. *See id.*, 119 Wis.2d at 434, 351 N.W.2d at 768.

Likewise, we reject Smith’s argument that the trial court failed to consider mitigating factors. The record reveals that the trial court based Smith’s sentence largely on Smith’s character and rehabilitative needs. Contrary to Smith’s argument, the trial court considered the mitigating character evidence that Smith offered, but gave it little weight because it was self-serving and uncorroborated. The trial court also expressed that Smith’s character was reflected by his refusal to cooperate in the presentence investigation and his unwillingness to accept responsibility for his crimes. It was within the trial court’s discretion to conclude that Smith’s character was not a mitigating factor. *See State v. Thompson*, 172 Wis.2d 257, 265, 493 N.W.2d 729, 733 (Ct. App. 1992)

(“Whether a particular factor or characteristic relating to a defendant will be construed as either a mitigating or aggravating circumstance will depend upon the particular defendant and the particular case.”).

We further reject Smith’s argument that the trial court failed to consider the relevant sentencing factors. As noted, the trial court may base a sentence on any of the primary sentencing factors after it has considered all of the relevant factors. *See Curbello-Rodriguez*, 119 Wis.2d at 433, 351 N.W.2d at 767. Here, the trial court explicitly based Smith’s sentence on its finding that Smith was unwilling to accept responsibility for his crimes or reform his conduct. The trial court also noted that it was considering Smith’s prior record, the nature of Smith’s offenses, and the need to protect the community from Smith. Although the trial court did not explain in detail how these factors affected Smith’s sentence, the sentencing record sets forth the necessary detail to support the trial court’s exercise of discretion.

When the sentencing court fails to specifically set forth the reasons for the sentence imposed, “we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512, 522 (1971). “It is not only our duty not to interfere with the discretion of the trial judge, but it is, in addition, our duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act.” *Id.*

The record reveals that Smith’s present convictions were based upon his possession of 1.9 grams of cocaine and an electric stun gun. The police arrested Smith after he fled from a vehicle that they had stopped because of a traffic violation. At the time of his arrest, Smith possessed seventeen individually-

wrapped packets of cocaine, a pager, \$158 in cash, a cell phone and the stun gun. The record further reveals that Smith had a prior conviction for possession of cocaine with intent to deliver, while armed, and that Smith committed the current offense while on parole from this prior conviction. The facts of Smith's prior conviction closely resembled the current offense; Smith had been arrested while in possession of both a large quantity of cocaine and a weapon. After being presented with the foregoing information, the trial court sentenced Smith to a total sentence of twelve years, consecutive to Smith's prior sentence; this sentence was far less than the twenty-two-year total potential sentence that Smith faced. *See* §§ 961.16(2)(b)(1), 961.41(1m)(cm)(1), 961.48, 941.295, and 939.50(1)(a), STATS. The record as a whole, including the trial court's findings that Smith was unwilling to accept responsibility for his crimes and reform his conduct, supports the trial court's exercise of sentencing discretion.

Lastly, Smith argues that he received ineffective assistance of counsel, and that the trial court, therefore, erred in denying his postconviction motion for re-sentencing. He asserts that his counsel was deficient in failing to request an adjournment to give Smith the opportunity to cooperate with the presentence investigation. Smith further argues that his counsel was deficient in failing to offer the trial court an explanation of Smith's failure to cooperate with the presentence investigation. Smith asserts that he was prejudiced by these deficiencies because the trial court penalized him for not cooperating in the presentence investigation by imposing a longer sentence than it otherwise would have imposed. The trial court rejected Smith's postconviction motion without a hearing.

If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary

hearing. *See State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See id.*

[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (citations omitted). We will reverse the trial court’s discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See id.*, 201 Wis.2d at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel’s performance was deficient and that the deficient performance produced prejudice. *See State v. Sanchez*, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, the defendant must demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Ineffective assistance of counsel claims present mixed questions of law and fact. *See State v. Pitsch*, 124 Wis.2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court’s factual findings must be upheld unless they are clearly erroneous. *See State v. Harvey*, 139 Wis.2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel’s performance was deficient and, if so, whether the

deficient performance prejudiced the defendant are questions of law, which we review *de novo*. See *Pitsch*, 124 Wis.2d at 634, 369 N.W.2d at 715.

We conclude that the trial court properly rejected Smith's ineffective-assistance-of-counsel claims without a hearing. With respect to Smith's allegation that his counsel was deficient in failing to request an adjournment so that Smith could cooperate with the presentence investigation, Smith has failed to set forth any information that the presentence investigation would have yielded that would have benefited Smith.² Thus, he has failed to set forth sufficient facts to raise a question of fact regarding whether counsel's performance was prejudicial.³ See *Bentley*, 201 Wis.2d at 309–310, 548 N.W.2d at 53. With respect to Smith's allegation that his counsel was ineffective in failing to offer the trial court an explanation for Smith's refusal to cooperate with the presentence investigation, we conclude that the record clearly refutes Smith's claim. See *id.* Smith was not prejudiced by his counsel's performance because

² Indeed, the record supports an inference that Smith would not have benefited from the presentence investigation; the trial court, *sua sponte*, ordered the presentence investigation, and Smith thereafter at least contemplated waiving the presentence investigation.

³ Further, Smith presents no authority to establish that he was entitled to an adjournment. We, therefore, must reject his contention that his counsel was ineffective for failing to request an adjournment. See *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994) (counsel is not ineffective for failing to pursue feckless arguments).

Smith personally presented the court with his reasons for not cooperating with the presentence investigation.

By the Court.—Judgment and order affirmed.

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

