COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2120 **Cir. Ct. No. 1991CF913794A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMY SMITH, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS and JOSEPH R. WALL, Judges.[1] *Affirmed*.

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

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[1] The Honorable Jeffrey A. Kremers presided at the trial and entered the judgment of conviction. The Honorable Joseph R. Wall heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Tommy Smith, Jr. appeals from an order denying his motion for postconviction relief. He argues that: (1) the trial court lacked jurisdiction to sentence him because a court commissioner conducted his preliminary hearing; (2) the circuit court erred during sentencing when it considered read-in offenses; and (3) his trial counsel was ineffective for allowing him to enter a plea when the preliminary examination was improper, and for not informing him about the read-in charges. We conclude that the claims are either waived or barred, and we affirm the order of the circuit court.

¶2 In 1992, Smith pled no contest to one count of armed robbery with the use of force. Under the terms of the plea agreement, a charge of false imprisonment and two charges of sexual assault were dismissed and read in. Smith was charged along with another man for having robbed a man and a woman at gun point, forcing the woman into a car, and driving her to an alley where they both raped her. Smith was sentenced to nine years in prison. He is currently serving a consecutive sentence for an unrelated offense.

¶3 In 2007, Smith filed the postconviction motion that is the subject of this appeal. In the motion, he alleged that the court commissioner who conducted his preliminary examination did not have the authority to do so, that the circuit court improperly considered the sexual assault charges when it sentenced him, and that his trial counsel was ineffective for failing to advise him about these two issues. The circuit court denied the motion, concluding that the issues were all barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶4 Smith renews his arguments to this court. First, he argues that he was never properly bound over for trial because a court commissioner presided at the hearing where he waived his right to a preliminary examination and was bound over for trial. He claims that the then-chief judge had not specifically delegated judicial authority to conduct preliminary examinations to court commissioners, and that since a court commissioner presided at his hearing, the court lost jurisdiction over him. When Smith entered his no-contest plea, however, he waived the right to challenge the court's personal jurisdiction over him. *See* ***State v. Higgs***, 230 Wis. 2d 1, 8-9, 601 N.W.2d 653 (Ct. App. 1999).

¶5 Even if he had not waived the issue, however, we conclude that the issue lacks merit. Under WIS. STAT. § 757.69(1)(b) (1989-90), "[o]n authority delegated by a judge," court commissioners may conduct preliminary hearings. In support of his argument that the court commissioners did not have authority to conduct preliminary hearings, Smith cites to a letter dated March 27, 1989, from then-chief judge Michael Barron. This letter, however, supports the opposite conclusion. The letter states that preliminary hearings "will be presided over by a full-time court commissioner as of August 1, 1989." Smith waived his preliminary hearing and was bound over after this date. Consequently, the court commissioner had the statutory authority to conduct the hearing.

¶6 Smith next argues that the sentencing court erred when it increased his sentence because he had committed a sexual assault. He argues that the sexual assault charges had been dismissed as a result of the plea agreement, and that the sentencing court should not have considered them. In 1994, Smith, represented by counsel, moved to modify his sentence. One ground for this motion was this same issue. Because Smith previously litigated this very issue, he cannot raise it again

in a motion for postconviction relief. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); ***Escalona***, 185 Wis. 2d at 181-82.

¶7 Further, we conclude that Smith would also not succeed on the merits of this issue. A sentencing court may consider read-in sentences, and it is expected that these crimes will influence the length of the sentence imposed. *See* ***Austin v. State***, 49 Wis. 2d 727, 730, 183 N.W.2d 56 (1971). And in this case, the sentence the court ultimately imposed was less than the potential maximum he faced on the crime to which he pled.

¶8 Smith's last argument is that his trial counsel was ineffective because he did not move to dismiss on the grounds that the court commissioner did not have jurisdiction to conduct the preliminary examination, and because the court improperly considered the read-in offenses. To establish an ineffective assistance of counsel claim, 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); ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶9 We have concluded that neither of the issues Smith raised has merit. Because the issues are meritless, Smith's trial counsel was not ineffective for failing to raise them. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).