COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP413-CR **Cir. Ct. No. 2007CF982**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN J. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Nathan J. White, acting pro se, appeals from a judgment of conviction and an order denying his motion for postconviction relief. White argues that the circuit court erred when it denied his motion to suppress evidence obtained as a result of an illegal entry into his home; that he is entitled to

sentence modification because the court relied on inaccurate information when it sentenced him; his trial counsel was ineffective for allowing the sentencing hearing to continue even though there were substantial unresolved questions of fact; and that he is entitled to sentence credit. We conclude that the circuit court properly decided that White did not have a reasonable expectation of privacy in his front porch; he has not established that the trial court relied on inaccurate information when it sentenced him; he did not receive ineffective assistance of trial counsel; and that his motion for sentence credit appears to have been decided after the notice of appeal was filed in this case and, therefore, is not properly part of this appeal.

¶2 White was charged with having battered his wife, Irma White, and with possessing a shotgun. On the day of the incident, September 1, 2007, the police went to the Whites' home three times. The first time was early in the morning in response to a report that someone had broken into the home. At this time, the police spoke with White. The second time was about an hour later when the police went to the Whites' home to investigate a domestic violence dispute and talked with Irma. Irma told the police that her husband had hit her and then had left in a black Cadillac. Irma signed a seventy-two-hour restraining order against White.

¶3 The officer who investigated this battery returned to work for his next shift late in the evening of the same day. At that time, the officer learned that White had not been arrested, but that White had pointed a shotgun at someone earlier in the day. He and another officer then went back to the Whites' home to investigate. When the officers arrived at the home, they saw a black Cadillac parked in the driveway. The police went into the porch of the house and knocked on an inner door. Irma answered and initially denied that White was there. The

officer, however, had seen White through a window on the porch. Eventually, Irma admitted that White was inside. Another officer then came into the porch and saw a loaded shotgun leaning against "some stuff" on the porch. The officers arrested White.

¶4 White, by his trial counsel, moved to suppress the shotgun the police officers found in the front porch of his home.[1] The court denied the motion. White then pled guilty to felon in possession of a firearm and battery as an act of domestic abuse. The court sentenced White to two years of initial confinement and three years of extended supervision on the felon in possession of a firearm charge and nine months in jail on the battery charge. After sentencing, White, acting pro se, filed a motion for postconviction relief in which he asked again that the shotgun evidence be suppressed and alleged that the circuit court relied on inaccurate information when it sentenced him. The circuit court held a brief hearing on the motion, in which the court explained to White that it was too late in the process to have the evidence suppressed. The court did not specifically address his argument on sentencing at this hearing. The court then issued an order that denied the motion on both grounds.

¶5 White first argues that the circuit court erred when it denied his motion to suppress the shotgun the police found in his front porch. White argues

[1] The State exercised its option not to include a Statement of the Case in its brief. Given that the appellant's brief was not written by an attorney and does not include citations to the record, as well as the unusual and somewhat complicated procedural posture of this case, it would have been useful to the court if the State had included a brief Statement of the Case that included the procedural history as well as a short summary of the facts the State argues are relevant to understanding the issues on appeal.

that the gun should have been suppressed because the gun was obtained as a result of the police officers' warrantless and unlawful entry into his front porch.

> In reviewing a motion to suppress, we engage in a two-step inquiry. First, we apply a deferential standard to the trial court's findings of historical fact, and will "thus affirm the [trial] court's findings of fact, and inferences drawn from those facts, unless they are clearly erroneous. Second, we review the [trial] court's application of constitutional principles to the evidentiary facts. This second step presents a question of law that we review independently."

State v. Gralinski, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448 (citations omitted). The exclusionary rule applies only to evidence seized as the result of an illegal search or seizure. ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994). Whether police conduct constitutes an unreasonable search and seizure "depends, in the first place, on whether the defendant had a legitimate, justifiable or reasonable expectation of privacy that was invaded by the government action." ***State v. Rewolinski***, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990). Whether a person has a legitimate expectation of privacy depends on: (1) whether the individual by his or her conduct showed an actual, subjective expectation of privacy and (2) whether society recognizes the expectation as reasonable. ***Id.*** at 13. Under the plain view doctrine:

> "[O]bjects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." A person has no reasonable expectation of privacy in an item that is in plain view. A seizure following a plain view is not the product of a search.

Edgeberg, 188 Wis. 2d at 345 (citations omitted).

¶6 White argues that the police should not have entered his porch. The officer testified at the suppression hearing that he first went to White's home on

the morning of September 1, 2007, in response to a call that someone had broken into the house. The officer said that the entrance to the home was through an enclosed porch that ran the length of the house. The outside entrance to the porch consisted of two doors, a storm door and a wooden door. There was then about four to five feet to the entrance of the house, which consisted of another wooden door. The officer also testified that, in his experience, many of the homes in Kenosha have similar enclosed porches and that, when he wants to talk to people inside a home with a porch such as this one, he will enter and knock on the inner door because most people will not hear him knocking on the outside door.

¶7 The first time the officer went to the Whites' home, he spoke with White. The officer went back a second time that morning in response to a domestic violence call. At this time, he walked through the porch to the inner door and spoke to Irma, who was standing in the doorway. Irma told the officer that White had hit her and thrown her cell phone. Irma's face was swollen where she said White had hit her. Irma said that White had driven off in his black Cadillac and she signed a seventy-two-hour restraining order against White.

¶8 The officer further testified that when he returned to work that evening, he learned that White had not yet been arrested. He and another officer returned to the Whites' home and saw a black Cadillac in the driveway. One of the officers went to the front porch, which is where he had gone both times he went to the home earlier that day. There was no doorbell at this door. The other went to where he could see the back entrance to the house. The screen door and first wooden door to the porch were both open. This concerned the officer because he thought that White might have forced his way into the house. The officer was concerned for Irma's safety. The officer entered the porch to knock on the inner door. He also looked through a window on the porch and saw White

inside the house. He then contacted the officer at the back and said he had seen White inside the home. The officer knocked on the door and Irma answered. She at first told the officer that White was not there. In the meantime, the other officer came around to the front porch and saw the shotgun leaning up against some stuff on the front porch.

¶9 In ***Edgeberg***, we considered a situation very similar to the one presented here. The officer there was sent to investigate a complaint at Edgeberg's house. ***Id.*** at 342. The house had a porch which appeared to be the main entrance to the home. ***Id.*** at 342-43. The porch had an outside door and an inside door that led into the home. ***Id.*** at 343. There was no doorbell at either door. The officer opened the screen door, entered the porch, and knocked on the inner door. ***Id.*** at 344. The officer saw through the window of the interior door that there were marijuana plants growing. The officer subsequently obtained a warrant to search the house. ***Id.*** We concluded that the porch was an entryway and, under these circumstances, "there was no reasonable expectation of privacy that should bar the officer's approach to the inside door of the residence." ***Id.*** at 346. We said that police with "legitimate business may enter the areas of the curtilage which are impliedly open to use by the public," and are free to keep their eyes open. ***Id.*** at 347 (citation omitted). "This means that if police use normal means of access to and from the house for some legitimate purpose, it is not a fourth amendment search for police to see from that vantage point something in the dwelling." ***Id.***

¶10 We conclude, as did the circuit court, that the police acted reasonably under the circumstances when they entered the porch at White's home. In the early morning hours of that same day, the police had investigated an allegation that White had beaten his wife and she told them White had left in a

black Cadillac. His wife also signed a restraining order against him. When the police returned to White's home later that same evening, a black Cadillac was parked in the driveway. The restraining order was still in effect. As the circuit court noted, the officers did not barge into the home, but went to the inner door, knocked, and waited. The circuit court also found that the porch was the main entrance to the home and that the porch was not a place where someone would have an expectation of privacy.

¶11 We agree with the circuit court that the police officers acted extremely reasonably under these circumstances. We also conclude, as we did in ***Edgeberg***, that the porch was not a place where someone would have an expectation of privacy. Because the police acted reasonably and were lawfully in the front porch when they saw the shotgun, we also conclude that the circuit court properly denied the motion to suppress the shotgun.

¶12 White next argues that he was sentenced on the basis of inaccurate information. White argues that the circuit court incorrectly considered that he was a member of a gang when it sentenced him. White admits that he had been a member of a gang, but asserts that he is no longer.

¶13 At the sentencing hearing, White's counsel addressed his gang affiliation. Counsel noted that the presentence investigation report (PSI) said that White claimed to no longer be a gang member, but that the author of the report commented that walking away from the gang lifestyle usually was not that easy. White's counsel went on to explain that White had been part of a small neighborhood gang in Kenosha, and argued that White had just walked away. The court imposed sentence, and then asked White if he knew two people who had just left the room. White said: "I don't know." The court then said:

> THE COURT: Now I gave consideration here to possibly stay this and place you on probation on count two, but after I observed that little show of your buddies walking out of the courtroom when they were disgusted when they heard what I had to say, I don't believe your lawyer's assertion that you told him you're not a member of a gang. I think you're still a member of a gang and those were gang members, so there will be no stay. You're going to prison.

The court then engaged in a short discussion with White's mother. His mother claimed that White was not a gang member. The court then asked her who the two "goofballs" were who had been sitting with her and then left. She stated that they were people White knew, but that White was not a gang member.

¶14 White's counsel then said:

> COUNSEL: Your honor, I guess I just am somewhat unsure what to say. Those two gentleman that left the room, there would be no evidence that they are gang members. Mr. White is not involved in any gang. There's been no evidence throughout any of this case that he is a member of a gang other than what happened when he was a juvenile. If that's the—
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> THE COURT: Well first of all, the presentence writer thinks he's a member of a gang, okay? So your client says no, she says yes, I place more emphasis on what the presentence investigation report says, number one. Number two, I have been a judge for 28 years. I was in private practice before that, defended gang people. I was a prosecutor. I prosecuted gang people, and you know, you can—what walks like a duck and looks like a duck in my opinion is a duck, and those were ducks, OK?

The court then asked White who those men were. White said he was not paying attention, but he was sure they were friends of his. The court then noted that another young man in the room flashed a gang sign at White.

¶15 White argues that he is entitled to be resentenced because the circuit court erred when it said he may still be a gang member. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate

interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Secondary factors include:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Spears, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999) (citation omitted).

¶16 In ***State v. Rush***, 147 Wis. 2d 225, 230-31, 432 N.W.2d 688 (Ct. App. 1988), we said:

> The importance of allowing a sentencing judge to consider a broad range of evidence was expressed by Justice Black in ***Williams v. New York***, 337 U.S. 241 (1949):
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> > Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.
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> ***Id.*** at 247 (footnote omitted). Our supreme court has also espoused this principle:
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> > Not only is all relevant information to be brought to the attention of the sentencing judge, but

> considerable latitude is to be permitted trial judges in obtaining and considering all information that might aid in forming an intelligent and informed judgment as to the proper penalty to be imposed.
>
> ***Neely v. State***, 47 Wis. 2d 330, 334-35, 177 N.W.2d 79, 82 (1970)[, *overruled on other grounds by* ***Stockwell v. State***, 59 Wis. 2d 21, 207 N.W.2d 883 (1973)].

Further, a defendant who alleges he or she was sentenced on inaccurate information "must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

¶17 White has not established that the information on which the court relied was inaccurate. In support of his argument, White claims that he is no longer a gang member and asserts that he no longer has gang tattoos. White said both of these things at his sentencing hearing, but the court chose not to believe him. The court chose, instead, to rely on the PSI author's opinion that it was not that easy to walk away from a gang. The court also observed behavior in the courtroom that suggested that White was still associating with gang members. White has not offered any evidence to dispute this. The court was entitled to consider this information because it concerned "the defendant's life and characteristics." Further, White has not established that the information was inaccurate. We conclude that the circuit court properly exercised its discretion, considered all the pertinent information, and imposed an appropriate sentence. White has not established that the circuit court relied on inaccurate information when it sentenced him, and he is not entitled to a new hearing on this issue.

¶18 White argues that his counsel was ineffective for proceeding with the sentencing hearing without correcting the misinformation that was before the

court. The record demonstrates, however, that counsel did tell the court that White was no longer a gang member and that he disputed the information in the PSI to the contrary. The court chose not to believe this information. There is simply nothing more counsel could have done at that hearing. White has not established that he received ineffective assistance of trial counsel.

¶19 White also argues that he is entitled to sentence credit in this case. The motion requesting sentence credit was decided in the circuit court after the notice of appeal was filed in this case. Consequently, that issue is not properly before us in this appeal. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).