COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1193-CR **Cir. Ct. No. 2002CF3032**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. TROTTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. David D. Trotter appeals from an order denying relief from a reconfinement order imposing the maximum available time for reconfinement. The issues are: (1) whether the trial court relied on inaccurate information in imposing the reconfinement period; (2) whether reconfinement counsel was ineffective in: (a) failing to object to the allegedly inaccurate

information; (b) failing to investigate the violations; and (c) proffering "character" witnesses both in Trotter's favor and to refute the alleged inaccurate information; (3) whether the trial court erroneously exercised its discretion in imposing the maximum available period for reconfinement; and (4) whether Trotter is entitled to a new reconfinement hearing in the interest of justice. We conclude that Trotter has not shown that: (1) the information was inaccurate; or (2) how an investigation or "character" witnesses would have been consequential to the duration of the reconfinement period. We further conclude that the trial court properly exercised its discretion in explaining why it imposed the maximum available period for reconfinement, and that our rejection of these claims compels our rejection of an interest of justice claim. Therefore, we affirm.

¶2 Trotter pled guilty to conspiring to misappropriate personal identifying information ("identity theft"). The trial court imposed a nine-year sentence, comprised of four- and five-year respective periods of initial confinement and extended supervision, to run consecutive to another sentence. The trial court also ordered Trotter and his co-defendants to jointly and severally repay restitution in the amount of $159,009.45.

¶3 Trotter's release to extended supervision was revoked for eight violations of the conditions of his supervision. The alleged violations were his absconding from supervision, his fleeing from police to avoid arrest, his repeated use of marijuana, and his use of alcohol and cocaine. Trotter stipulated to all of the alleged violations except for the fleeing, which the Department of Corrections ("Department") proved, predicated on Trotter's admission in a statement to his agent that he bailed out of the car because he knew he was subject to an outstanding warrant. The Department recommended a reconfinement period of two years, ten months and nine days to run consecutive to another reconfinement

period. Trotter's reconfinement counsel recommended a twelve- to eighteen-month reconfinement period, recognizing the other fifty-four-month reconfinement period that would presumably run consecutive to that imposed in this case. The prosecutor recommended the maximum available reconfinement period, which the trial court imposed: four years, nine months and four days.

¶4 Trotter challenged the reconfinement period, alleging the ineffective assistance of reconfinement counsel for failing to: (1) present "character" evidence; (2) "[u]tilize [s]upporting [d]ocuments" he allegedly provided to his counsel; (3) present alternatives to revocation; and (4) timely seek an appeal. Trotter also challenged the trial court's exercise of discretion in imposing the maximum available period for reconfinement. The trial court summarily denied the motion, ruling that: (1) failing to present "character" witnesses "wouldn't have made a difference because the facts spoke loud and clear"; (2) without proffering the supporting documents, it could not evaluate their significance; (3) the alternative-to-revocation argument "cannot be raised" incident to the procedure Trotter has pursued; and (4) extending Trotter's appellate deadlines rendered moot his claim that an appeal could not be timely pursued. The trial court rejected the erroneous exercise of discretion argument, referring to the transcript of its reasoning, and explaining that Trotter cited no legal authority to support his dissatisfaction with the duration of the period imposed.

¶5 Trotter appeals, pursuing his ineffective assistance claims in the context of failures to investigate and present character witnesses, while abandoning his alternative-to-revocation and timely appeal claims. He also challenges the accuracy of the information on which he claims the trial court relied, and contends that the interest of justice warrants a new trial.

¶6 Preliminarily, to demonstrate entitlement to an evidentiary hearing, Trotter must meet the following criteria:

> Whether a … motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Trotter has not alleged sufficient material facts to warrant relief. Although in his appellate brief he refers to an affidavit, no affidavit is included in his motion. Consequently, he alleges conclusory allegations at best, and in some instances not even in his motion, but belatedly in his appellate brief.

¶7 Trotter contends that the trial court relied on inaccurate information, and that his reconfinement counsel was ineffective for failing to object to, investigate, and present character witnesses to refute those inaccuracies. A defendant has a constitutional right to be sentenced or reconfined on accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "A defendant who requests resentencing due to the [trial] court's use of inaccurate information at the [reconfinement] hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information.'" ***Id.***, ¶26 (citations omitted).

¶8 Notwithstanding Trotter's claim, he stipulated to seven of the eight violations, and his admission in a statement to his agent that he "bailed" to avoid an arrest proved the eighth violation. He confirmed to the trial court that the information in the Department's court memorandum was correct.[1]

¶9 Trotter's claim that he had not committed the same crime for which he was originally convicted while on extended supervision is technically correct, although highly misleading. Trotter was charged with and pled guilty to identity theft, the same crime that underlies this appeal, within weeks of his release to extended supervision for having again committed that offense while in prison. As the trial court stated, "while [Trotter] was in the institution he recommitted a new offense of misappropriating personal identifying information ['identity theft']." The trial court was factually accurate in its rendition of Trotter having committed another identity theft while in prison (as opposed to during his release on extended supervision).

¶10 Trotter's claim of inaccurate information is nothing more than his allegations on appeal that the trial court was unimpressed with his work ethic, his failures to report to his agent, and his rehabilitation efforts, when, according to Trotter, he had volunteered his time at a Christian Youth Center and in Milwaukee's Project Return. First, had Trotter sought to correct these alleged inaccuracies, he could have done so at the conclusion of the hearing when it should have been clear to him that his reconfinement counsel was not going to do so. Second, Trotter did not proffer an affidavit or any evidence to refute the

[1] The trial court asked Trotter if he had "gone over the court memo," to which Trotter responded that he had. The trial court asked Trotter, "[i]s there anything else you see that needs to be corrected," to which Trotter responded, "[n]o, sir."

alleged inaccuracies, other than his conclusory allegations. Third, regarding his claimed participation in these programs, these were not inaccuracies. Trotter's participation in these programs arguably demonstrates that he used some of his time on extended release in a more positive context. However, the trial court imposed the maximum available reconfinement period predicated on Trotter's violations of the conditions of his extended supervision, all of which he stipulated or admitted to.

¶11 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). For a number of reasons, Trotter is unable to prove either deficient performance or resulting prejudice, much less both. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990). Trotter has not shown that the information was inaccurate, much less consequential to the length of the reconfinement period imposed. Consequently, Trotter's correlative ineffective assistance claim necessarily fails.

¶12 Trotter also contends that his reconfinement counsel was ineffective for failing to investigate these arguably positive circumstances and to present "character" witnesses to demonstrate how he was using his time while on extended supervision. As is required however, Trotter does not "allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [proceeding].'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted; first alteration by ***Flynn***); *see* ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Consequently, Trotter has not provided the requisite specificity required to

maintain an ineffective assistance claim for failure to investigate. *See* ***Arredondo***, 269 Wis. 2d 369, ¶40.

¶13 Trotter has not alleged with specificity who these "character" witnesses are, other than his "family and friends," the substance of their purported testimony, and how that testimony would have been consequential to the trial court.[2] *See* ***Strickland***, 466 U.S. at 687. Furthermore, the trial court itself explained how the alleged inaccurate information and the "character" witnesses, presumably portraying Trotter in a more favorable context, would have been inconsequential to its decision. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion.). As the trial court explained in its order denying relief from its reconfinement order:

> [T]rial counsel could have brought five witnesses – or ten witnesses – attesting to the defendant's good character at the reconfinement hearing. It wouldn't have made a difference because the facts [at the reconfinement hearing] spoke loud and clear…. An attorney has no obligation to call character witnesses to a reconfinement hearing. The facts are before the court from the revocation hearing. Here, the presence of "character witnesses" would not have influenced the court in reducing the reconfinement term.

¶14 Trotter also contends that the trial court erroneously exercised its discretion in imposing the maximum available period for reconfinement, four years, nine months and four days. We disagree.

[2] These allegations must be alleged in the motion to allow the trial court to evaluate them; it is too late to allege them in an appellate brief.

¶15 Determining the duration of the reconfinement period is within the trial court's discretion. *See* ***State v. Brown***, 2006 WI 131, ¶22, 298 Wis. 2d 37, 725 N.W.2d 262. The trial court emphasized that Trotter "continue[d] with this conduct" by committing another identity theft. Despite Trotter's claims at the original sentencing hearing that he regretted being "involved with the wrong people, but as far as continuing my behavior, that's not true," Trotter did continue his behavior by committing another identity theft, this time, from prison. The trial court recognized that Trotter had mental health, alcohol and other drug abuse issues and required cognitive intervention. Rather than focusing on treatment for these issues, Trotter instead committed another identity theft, drank alcohol, and used marijuana and cocaine. As the trial court noted, the public was not even protected when Trotter was in prison, from where he "reoffend[ed] with a similar offense." The trial court properly exercised its discretion; the fact that it did so differently than Trotter had hoped does not constitute a misuse of that discretion. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶16 Lastly, Trotter claims that the interest of justice compels his entitlement to a new reconfinement hearing, essentially contending that the cumulative effect of all of the foregoing errors warrants a new hearing. Combining unsuccessful claims does not construct a successful consolidated claim. Stated otherwise, "[a]dding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). The interest of justice was served; Trotter identifies nothing to warrant modification, much less a new reconfinement hearing.

By the Court.—Order affirmed.

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