COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1514 **Cir. Ct. No. 1999CF97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN E. WEIDNER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kevin Weidner appeals pro se from orders denying his WIS. STAT. § 974.06 (2007-08),[1] motion and motion for sentence modification. He contends the circuit court erred in concluding that he had previously raised the issues in his motions and waived those issues when he withdrew his 2000 postconviction motion. We affirm the orders.

¶2 In 1999, Weidner entered a no contest plea to physical abuse of a child and sexual contact by use of force or violence. After sentencing, Weidner filed a pro se request for sentence modification but withdrew it so he could pursue other issues with the assistance of counsel. In 2000 Weidner's postconviction counsel filed a motion to withdraw Weidner's plea. As reflected by the docket entries, Weidner's postconviction counsel was subsequently allowed to withdraw[2] and Weidner, acting pro se, withdrew the pending postconviction motion and cancelled the hearing on the motion set for December 13, 2000.

¶3 On May 8, 2009, Weidner filed his WIS. STAT. § 974.06 motion and alternative motion for sentence modification. By his § 974.06 motion Weidner moved to withdraw his no contest plea on the ground of ineffective assistance of trial counsel and because during the plea colloquy the circuit court did not make a record that Weidner understood the elements of the offenses. He also alleged that there was a breach of the plea agreement because the prosecutor had not fulfilled

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Appointed postconviction counsel's motion to withdraw was filed in this court on October 18, 2000. WISCONSIN STAT. RULE 809.30(4)(a), which requires a motion to withdraw as counsel to be filed in the circuit court if filed before a notice of appeal is filed, was not yet the law. This court required Weidner to confirm his desire to proceed pro se. Counsel's motion to withdraw was granted November 9, 2000.

the promise to further investigate evidence of the physical abuse charge and dismiss it if the physical evidence did not support the charge. Those portions of Weidner's motion were nearly a carbon copy of the motion postconviction counsel filed. Weidner further alleged that he had been sentenced on the basis of inaccurate information because the presentence investigation report (PSI) indicated that he had previously been convicted of a hate crime, was on probation for a fight, and had two sexual assault complaints against him, the sentencing court mistakenly believed that there were two victims of his crime, and his trial counsel mistakenly represented that a child had witnessed the assault. He also claimed the prosecutor made inflammatory remarks at sentencing that had no factual basis. Weidner's alternative motion for sentence modification suggested it sought resentencing based on new factors but repeated verbatim the claims in the § 974.06 motion.

¶4 The circuit court denied Weidner's motions. It concluded:

> The defendant is raising the same issues he raised ten years ago in his direct appeal and his motion for sentence modification and motion to withdraw his no contest pleas. Defendant had the opportunity to pursue those issues, and withdrew his motions. The Court finds that the defendant has previously waived those grounds for relief by withdrawing his motions and appeal.

¶5 Weidner filed a motion for reconsideration. He listed issues "A-F" regarding sentencing information that had not been raised in any previous motions. Weidner explained that he had not previously raised issues A-F because he had not

been provided the PSI[3] and discovery by his postconviction counsel until November 2000, and his postconviction counsel was ineffective in not raising them in the postconviction motion. He suggested that his postconviction counsel had given him materially false advice which scared him to withdraw his postconviction motion for plea withdrawal. He believed it was not his fault that all issues were not brought in the two previous motions since he could barely read when he filed his pro se motion for sentence modification, he had no control over what issues his postconviction counsel raised, and he lacked intelligence and reading skills to challenge postconviction counsel at that time.

¶6 On appeal Weidner contends that issues A-F had not previously been raised and they constitute new factors for sentence modification. He contends that he was plagued with ineffective assistance of counsel at all levels and only wants the chance to be sentenced upon accurate information.[4] The State does not defend the circuit court's determination that Weidner waived claims related to inaccurate

[3] Weidner's repeated references to having obtained the PSI is disturbing. WISCONSIN STAT. § 972.15(4) (1999-2000), provided that after sentencing, the PSI shall remain confidential and shall not be made available to any person except upon specific authorization of the court. The record does not contain a circuit court order authorizing release of the PSI to Weidner. If Weidner is in fact in possession of a copy of the PSI, it was not legally obtained.

[4] Not until his reply brief does Weidner suggest that this court consider his claims that his no contest plea was not voluntarily, knowingly and intelligently made and that there was a breach of the plea agreement. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). Weidner does not develop any issue related to those claims and instead urges the court to consider the issues briefed in his WIS. STAT. § 974.06 motion and memorandum. We need not consider arguments not developed. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). We need not decide issues raised only by incorporation by reference the arguments made in a circuit court brief. The practice of incorporating portions of a circuit court brief by reference is unacceptable. ***Id.*** at 58. Such a practice does not comport with WIS. STAT. RULE 809.19(1)(e). We deem Weidner's request for only resentencing as a concession that he no longer seeks to withdraw his no contest plea. He has now twice abandoned his claims for plea withdrawal.

sentencing information because he withdrew his earlier postconviction motions. The State does not argue that Weidner's WIS. STAT. § 974.06 is barred under § 974.06(4), and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), which require that all claims of error that a criminal defendant can bring be consolidated into one motion or appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not previously raised.[5] ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. The State concedes that Weidner's claim that he was sentenced on the basis of inaccurate information is cognizable under § 974.06, because a defendant has a constitutional right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. The State argues that Weidner has not met his burden of proof. We agree.

¶7 We consider de novo whether a defendant has been denied his due process right to be sentenced upon accurate information. ***Id.*** A defendant who requests resentencing must show that specific information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***Id.***, ¶26. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***,

[5] For this reason, it is not necessary to consider whether Weidner presents a sufficient reason for not previously raising his claims. Since Weidner suggests ineffective postconviction counsel is his reason for not previously raising the claims, we need not address his arguments that postconviction counsel was ineffective, including the contention that postconviction counsel gave him false advice.

¶14 (citation omitted). If actual reliance is shown, the State's burden is then to show that the inaccuracy was harmless. ***Id.***, ¶26.

¶8 We address Weidner's A-F issues seriatim.

¶9 Issue A. The PSI contained inaccurate information that Weidner was convicted of a hate crime and was on probation for a fight in Texas. We first set forth the sentencing court's remarks related to this claim of inaccurate information:

> You do have a history of undesirable conduct; you don't come in the court with clean hands; violent assault on a gay individual; it says you were on probation for that but also on probation for a fight. Even though you are 25 years old evidently you have two prior situations when you been [sic] placed on probation; I am unclear whether those were felonies or misdemeanors but there is a history of violence obviously, a history of drinking.

¶10 The PSI indicated that Weidner had been convicted of a hate crime in Outagamie County and was placed on probation. A May 4, 1999 memo, filed May 7, 1999, from the PSI author informed the court that the hate crime charge was reduced to felony criminal damage to private property. Weidner was sentenced June 3, 1999. Weidner contends the circuit court ignored the corrective memo. Even if that is true, the sentencing court did not refer to Weidner having been convicted of a hate crime. Rather the court noted that Weidner had assaulted a gay individual. The PSI set out Weidner's own version of the Outagamie County offense as involving a fight with a gay man and the breaking of the man's car window. The sentencing court's observation that Weidner assaulted a gay individual was not based on inaccurate information. The court did not rely on inaccurate information that Weidner had been convicted of a hate crime.

¶11 With respect to the Texas fight, again the PSI reported Weidner's own version of the offense. Weidner told the PSI author that he had fought with an off-duty police officer who picked on Weidner's younger brother and that he was arrested. Weidner admitted to the PSI author that he had successfully served probation. The sentencing court's reference to Weidner being on probation for a fight was not inaccurate because the court could consider the underlying conduct resulting in probation. The circuit court's assessment that Weidner had a history of violence was not based on inaccurate information.

¶12 Issue B. The PSI stated that perusal of the district attorney's files revealed two sexual assault complaints filed with the Menasha Police Department that may be pending charges. As proof that this information was inaccurate, Weidner points to a January 5, 2009 letter he received confirming that the Menasha Police Department has only one sexual assault complaint involving Weidner and it is the incident for which he was convicted. Regardless of the accuracy of the PSI's notation, Weidner has not established that the sentencing court relied on the notation. The court did not mention probable sexual assault complaints involving Weidner in imposing the sentence.

¶13 Issue C. The sentencing court mistakenly believed that he had broken into the house and that there was a second victim. The pertinent sentencing remarks are:

> It is probably—you know in reading this over again—probably more than a crime of a very horrifying television horror show in light of the fact that a 15 year old babysitter and the young girl that she was babysitting, 8 or 9 years old at the time, somebody breaking into the house taking them upstairs, screaming, yelling, fighting, asking please don't and I guess fortunately this young lady, this 9 year old calling 911 and having the police there to essentially stop it to a point where it didn't go further….

¶14 Weidner points out that he did not break into the house but merely walked into the house. It is a distinction without a difference because Weidner was not invited into the house. The sentencing court did not rely on inaccurate information because Weidner broke into the house in the sense that he was not invited in.

¶15 Weidner points to the sentencing court's observation that he took "them upstairs" as reflecting an inaccurate picture of the assault involving two victims. He indicates that the child remained downstairs. Although the court made a minor misstatement of fact about the whereabouts of the child while Weidner assaulted the child's babysitter, it does not render the impression that Weidner's crime produced two victims inaccurate. Indeed the child was subjected to an uninvited man entering her home, witnessed her babysitter forced to accompany the unknown man, and heard her babysitter's screams and yelling. The child was subject to trauma as result of Weidner's crime and was victimized. Nothing suggests the sentencing court believed the child to be a victim of the physical and sexual assault. There was not reliance on inaccurate information on this point.

¶16 Issue D. Weidner's defense counsel misstated that the child witnessed the assault when counsel informed the sentencing court that Weidner had written letters of apology to the victim and the child "who witnessed the assault." There is no showing that the sentencing court relied on this information in imposing the sentence. Indeed the sentencing court was well aware that it was the child that called 911 and had the presence of mind to take such action.

¶17 Issue E. At sentencing the prosecutor made inflammatory remarks that had no factual basis in the record. Weidner points to the prosecutor's

description of the offense that "at the time that the police arrived [Weidner] was on top of her without any pants on attempting to have intercourse with her." He contends this is inaccurate because the police officer's written report states Weidner was "fidgeting with his pants in the front, and at this time I could not see if Weidner's penis was exposed." Weidner has not established that the prosecutor's characterization was inaccurate. The victim reported that Weidner's penis made contact on her vagina. Moreover, Weidner has not demonstrated that the sentencing court actually relied on the allegedly inaccurate characterization that Weidner had his pants off. How the assault played out moment by moment was of no import to the sentencing court.

¶18 Issue F. The prosecutor stated at sentencing that the assault took place in the residence where the victim was babysitting when in fact the assault took place in the upstairs apartment. As we just observed, the detailed factual circumstances of the assault had no import to the sentencing court. The sentencing court did not rely on the place where the assault occurred. The driving force behind the sentence was the vile nature of Weidner's drunken behavior and the impact it had on the victim and child.

¶19 In conclusion, Weidner's motion fails to establish that the sentencing court actually relied on any inaccurate information. We affirm the orders denying the postconviction motions albeit for a reason different from the circuit court's reason. *See* ***State v. Sharp***, 180 Wis. 2d 640, 650, 511 N.W.2d 316 (Ct. App. 1993) (we may sustain the circuit court's determination on different grounds).

By the Court.—Orders affirmed.

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