COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2118-CR **Cir. Ct. No. 2007CF1314**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. GRABOWSKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

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

¶1 FINE, J. Michael J. Grabowski appeals the judgment and amended judgment entered after he pled guilty to one count of theft of movable property with a value of between $2,500 and $5,000. *See* WIS. STAT. § 943.20(1)(a). He also appeals from orders denying his motion for resentencing. Grabowski claims

that: (1) he was sentenced on inaccurate information; and (2) the postsentencing determination of restitution was a new factor. We affirm.

I.

¶2 In March of 2007, Grabowski was charged with theft for stealing equipment from his employer, Aries Scientific. Ryan Faust, the owner of Aries Scientific, told police that Grabowski took approximately $31,500 in equipment. Grabowski pled guilty in July of 2007. The circuit court held a sentencing hearing in August of 2007. At the hearing, according to Grabowski, the State inaccurately described his criminal record by asserting that "in 1991, [Grabowski] had … a drunk driving for violation of 343.44(r). He had a 1991 offense, another offense for the same, drunk driving. And a third offense in 1991." Grabowski also claims that Faust falsely told the sentencing court that Grabowski had a gun on his desk at work, that Grabowski's fiancée threatened "to kill [Faust] and harm my family and my business," and that Grabowski, his fiancée, and her daughter were planning to commit suicide. The fiancée filed an affidavit denying making any threats.

¶3 At the sentencing hearing, the State told the sentencing court that the parties had not been able to reach an agreement on restitution. The victim's documents showed losses totaling $128,147.83. Both sides agreed that a postsentencing restitution hearing was needed. The circuit court sentenced Grabowski to three years, consisting of one year of initial confinement followed by two years of extended supervision. A hearing to determine the proper restitution amount took place in September of 2007. The circuit court found that restitution amounted to $111,363 but set it at $40,000 based on its perception of Grabowski's ability to pay.

¶4 Grabowski sought resentencing, arguing that he was sentenced on inaccurate information, that the circuit court erred when it failed to resolve restitution before sentencing, and that the postsentencing restitution determination was a new factor material to his sentence. The circuit court found that it did not rely on inaccurate information, and that the restitution determination was not a new factor, but it did order a new restitution hearing. A new circuit court set restitution at $27,500.

II.

A. Alleged reliance on inaccurate information.

¶5 Grabowski argues that the circuit court sentenced him based on inaccurate information. A defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. We review *de novo* whether a defendant has been denied the right to be sentenced on accurate information. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶6 Grabowski claims the circuit court relied on two pieces of inaccurate information at sentencing: (1) the prosecutor's statement that he had *three* drunk-driving crimes when he only had two; and (2) the alleged threats by Grabowski's fiancée, which he claims were never made. We address each in turn.

¶7 Although the prosecutor's statement at the start of the sentencing refers to three drunk-driving cases, the court went on to discuss each conviction with Grabowski and was told that one of the drunk-driving convictions was dismissed. It is clear that the circuit court knew Grabowski did not have three

drunk-driving convictions because it said during sentencing: "we have one, maybe two prior OWIs." Further, Grabowski had an extensive history of serious crimes, including six felonies between 1987 and 1994: robbery, false imprisonment, felony escape, two burglaries, and felony theft. The dispute over the number of drunk-driving convictions was *de minimus*.

¶8 With respect to the alleged threats and gun, Grabowski has not proven that the circuit court relied on this information. First, the circuit court did not discuss the gun issue or the threats when it imposed sentence. Second, the circuit court explained in its postsentencing ruling that it did not rely on that information: "the information as supplied, specifically, the gun issue and the threats and things of that nature didn't serve as a basis for the Court's sentencing with regards to this matter." Third, although Grabowski claims the information was inaccurate because of the fiancée's denial, the circuit court could have relied on it because it was the final arbiter of credibility.

B. New Factor.

¶9 Grabowski claims that the postsentencing restitution determination is a new factor requiring sentence modification. He argues that the circuit court's sentence would have been shorter if it had known the final restitution amount and if the sentencing court had resolved the restitution issue concurrent with the imposition of sentence within the sixty days established by WIS. STAT. § 973.20(13)(c). There is no merit to this contention.

¶10 The circuit court has the discretion to modify a sentence if the defendant presents a new factor. *See* ***State v. Macemon***, 113 Wis. 2d 662, 667–668, 335 N.W.2d 402, 405–406 (1983). A new factor is a: "fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at

the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975). A new factor must be an event or development that frustrates the purpose of the original sentence. ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191, 195 (Ct. App. 1997). Whether an event or development constitutes a new factor is a question of law we review *de novo*. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989).

¶11 The postsentencing restitution determination is not a new factor because the sentencing court knew the amount of restitution was in dispute, noting: "Whether it turns out to be $3,000, $31,000 or $115,000, I guess we'll ultimately know when we have a hearing with regards to that matter. But it appears clear to this court at least at some point that there was some kind of economic loss that was suffered as a result of your behavior." Thus, the circuit court did not rely on the specific *amount* of the restitution and, therefore, the final restitution determination did not frustrate the purpose of the sentence. Additionally, as noted earlier, Grabowski consented to the adjournment. Indeed, his appellate brief concedes that "[i]n many cases, adjourning the restitution hearing after the imposition of sentence would amount to harmless error." In light of Grabowski's agreement before the circuit court to a postponement of the restitution hearing until after the sentencing court's imposition of sentence, whatever error Grabowski claims as a result must be analyzed in an ineffective-assistance-of-counsel context. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 374–375 (1986); ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42. Thus, he must show both that the lawyer who represented him at the sentencing hearing gave him below-par representation, and that he was

prejudiced as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 690 (1984). He has shown neither.

By the Court.—Judgments and orders affirmed.

Publication in the official reports is not recommended.