COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3161-CR **Cir. Ct. No. 2005CF302**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RALPH A. HOAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Ralph Hoak appeals from a judgment imposing sentence after the revocation of probation and from the order denying his postconviction motion for resentencing. He argues that the sentence was based on

inaccurate information and on information used in violation of his right against self-incrimination, that imposition of the maximum consecutive terms is unduly harsh, that the charges were multiplicitous making consecutive terms inappropriate, and that the sentence was not fully explained. He also claims he was denied the effective assistance of trial counsel to the extent that any of his appellate issues were waived by the failure to object at sentencing.

¶2 We conclude that Hoak is entitled to a ***Machner***[1] hearing on his claim that his trial counsel was ineffective for not objecting to the information used in violation of his right against self-incrimination. We do not address Hoak's claim that counsel was ineffective for not objecting to inaccurate information at sentencing but leave it to the trial court to determine whether the ***Machner*** hearing needs to address that claim. We summarily reject Hoak's other appellate issues as a basis for relief. We affirm the judgment because it is not known whether Hoak is entitled to resentencing. We reverse the order denying his postconviction motion and remand for the purpose of conducting the required hearing.

¶3 In 2004 Hoak was charged with eleven counts of possession of child pornography. He pled guilty to three counts and was placed on probation for five years. Probation was revoked in 2008. Hoak describes the revocation summary as including "grossly inflammatory accusations regarding his past sexual history." The summary was based in part on information elicited from Hoak while on

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

probation and participating in sex offender programming, notably a questionnaire in which he was asked to list past sexually assaultive behavior.[2]

¶4 At the sentencing after revocation hearing no objection was made to the statements in revocation summary. The sentencing court referenced the summary's description of Hoak's self-reported sexual history. The court considered Hoak to represent an "extreme danger" to the community. It sentenced Hoak to the maximum term on each count, eighteen months' initial confinement and twenty-four months' extended supervision to run consecutively.

¶5 Hoak moved for resentencing raising the same claims he presents on appeal, including that trial counsel was ineffective to the extent any of the issues were waived. His motion for resentencing was denied without a hearing. The trial court found that it had relied on the information Hoak claimed was inaccurate and had relied on it in classifying Hoak as an "extreme danger." It found reliance on that information was harmless because the fifteen other violations of probation would have justified the sentence. It determined that the probation revocation and subsequent sentencing were not criminal proceedings so use of the information disclosed to the probation agent was not a violation of the Fifth Amendment right against self-incrimination. It found that the charges were not shown to be multiplicitous. It rejected the claim of ineffective counsel for lack of prejudice. It

[2] Hoak characterizes his disclosures to include various instances of childhood sexual experimentation and innocent adult contacts with children. He posits that his cognitive deficits and paranoia, his religious beliefs, and advisements on how to comply with probation requirements caused him to distort his answers in the direction of reporting innocent conduct as if it were offensive. This forms the basis for Hoak's claim that the sentence was based on inaccurate information.

determined it had demonstrated a proper exercise of sentencing discretion and no grounds for modification existed.

¶6 We start with the claim that information Hoak was compelled to give during probation was allegedly used at sentencing in violation of his Fifth Amendment right against self-incrimination. "A defendant is entitled to resentencing when a sentence is affected by a circuit court's reliance on an improper factor." ***State v. Leitner***, 2002 WI 77, ¶42, 253 Wis. 2d 449, 646 N.W.2d 341. Hoak's failure to object at sentencing results in forfeiture of the issue.[3] ***State v. Leitner***, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 253 Wis. 2d 477. The trial court did not impose forfeiture and directly addressed the merits of the claim. The trial court made an error of law in concluding that consideration of the compelled disclosures did not violate Hoak's Fifth Amendment right against self-incrimination.

¶7 ***State v. Peebles***, 2010 WI App 156, ¶20-21, ___ Wis. 2d ___, ___ N.W.2d ___, holds that statements made in sex offender counseling and under supervision rules requiring the probationer to cooperate with treatment and be truthful are compelled for purposes of the Fifth Amendment and the statements should be excluded at a subsequent sentencing proceeding. Peebles was sentenced after the revocation of probation and the agent's revocation summary repeated various admissions Peebles made in sex offender counseling, including an admission that he had in excess of twenty child victims throughout his adult life.

[3] In ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612, the supreme court determined that "forfeiture" is the more appropriate term in the context presented here. The circuit court ruled on Hoak's postconviction motion without any response from the State. Consequently, the State did not argue forfeiture in the trial court. We do not consider whether the State forfeited its right to impose forfeiture. *See* ***id.***, ¶¶36-38.

Id., ¶¶6-7. The sentencing court observed the admissions and found them significant because at the original sentencing the court believed Peebles had no prior record of aberrant sexual behavior. ***Id.***, ¶8. Peebles sought resentencing on the ground that consideration at sentencing of admissions made in treatment violated his right against self-incrimination and his trial counsel was ineffective for failing to challenge the use of those statements. ***Id.***, ¶9. The statements were held to be compelled because Peebles was ordered both by the trial court and probation agent to attend sex offender counseling, he was under supervision rules requiring him to be truthful, to submit to lie detector tests, and to fully cooperate with and successfully complete sex offender counseling, and he had been informed that he could be revoked for failure to comply with any conditions. ***Id.***, ¶20.

¶8 ***Peebles*** establishes that here the sentencing court had information before it that it should not have had. Although forfeiture is a rule of judicial administration and appellate courts have the authority to ignore a forfeiture, ***Leitner***, 247 Wis. 2d 195, ¶42, no grounds for ignoring the forfeiture are presented here. *See* ***Olmsted v. Circuit Court for Dane County***, 2000 WI App 261, ¶12, 240 Wis. 2d 197, 622 N.W.2d 29 (exception to waiver rule for a question of sufficient public interest to merit a decision and one that is likely to recur); ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (exception to waiver rule where questions of law are presented). Thus, the error is reviewable only in the context of a claim that counsel was ineffective for not objecting. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶9 In ***Peebles*** the claim was also in the posture of an ineffective assistance of counsel claim because no objection had been made at sentencing. ***Peebles***, 2010 WI App 156, ¶27. The ***Peebles*** court held that counsel's performance was deficient because the statements were inadmissible. ***Id.*** The

court held, "Reasonably competent counsel would have known, or discovered, that the Fifth Amendment privilege applies to probationers, including those required to provide admissions in sex offender counseling." ***Id.***, ¶28. It also determined that counsel's deficient performance prejudiced Peebles because the trial court significantly relied on the statements when determining the sentence. ***Id.***, ¶27. Peebles was afforded resentencing before a new judge. ***Id.***, ¶1.

¶10 Hoak's case presents strikingly similar facts. However, here no ***Machner*** hearing was held. A hearing is essential to every case where a claim of ineffective assistance of counsel is raised. ***State v. Curtis***, 218 Wis. 2d 550, 555, 582 N.W.2d 409 (Ct. App. 1998).

¶11 We turn to consider whether Hoak's postconviction motion established his right to a ***Machner*** hearing.

> Whether a defendant's postconviction 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. If the motion raises such facts, the circuit court must hold an evidentiary hearing.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

¶12 The State argues that Hoak's motion is insufficient because it does not identify particular statements he made, when he made them, who he made them to, or what he was told when he made them and thus has failed to establish that the statements were compelled. We do not agree.

¶13 The revocation summary itself establishes that Hoak's sexually deviant behaviors were discussed at appointments with the probation agent and in his sex offender groups. The summary states that the history information repeated in the summary was disclosed by Hoak and utilized as part of his probation case planning and sex offender programming. The statements made are identified in the summary. Additionally, Hoak attached to his motion one page of a "Disclosure Questionnaire" on which he indicated how many children he had some form of sexual contact with and children groomed prior to the date of conviction. It lists certain information about the contacts. The revocation summary also indicates that Hoak was court ordered to follow through with any and all treatment deemed appropriate, including sex offender treatment. It indicates that Hoak was subject to a sex history polygraph in July 2007 and then, after he was found deceptive, he was given every opportunity to gain compliance by updating his sex history disclosure questionnaire. The summary details how Hoak was repeatedly asked to make disclosure of past deviant behaviors. It reported that Hoak had been involved in intensive sex offender programming throughout his supervision. Hoak's motion indicates the date he received supervision rules. It quotes rule three as requiring "every effort to accept the opportunities and counseling offered by supervision." Rule 4 of the Standard Sex Offender Rules provided to Hoak requires full cooperation in treatment and states that information revealed in treatment concerning conviction offenses cannot be used against him in criminal proceedings. The motion also sets forth that as part of sex offender treatment and counseling Hoak was required to give detailed information beyond the conviction offenses and was told that the failure to disclose past acts would constitute a failure to cooperate with his program.

¶14 Hoak's motion states sufficient facts, if true, to establish that Hoak was compelled to make the disclosures repeated in the revocation summary. Hoak is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for not challenging the compelled disclosures. *See* ***State v. Liukonen***, 2004 WI App 157, ¶19, 276 Wis. 2d 64, 686 N.W.2d 689.

¶15 We recognize that the trial court found that its reliance on the compelled statements, to the extent they were inaccurate, was harmless error. We recognize that the harmless error test is "essentially consistent with the test for prejudice in an ineffective assistance" claim. ***State v. Harvey***, 2002 WI 93, ¶41, 254 Wis. 2d 442, 647 N.W.2d 189. However, whether counsel's performance prejudiced the defendant is a question of law, which we review de novo without deference to the trial court's conclusion. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶16 The inquiry in determining ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). The ***Strickland*** test is not an outcome determinative test. *See* ***State v. Smith***, 207 Wis. 2d 258, 279, 558 N.W.2d 379 (1997). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Strickland***, 466 U.S. at 694. Thus, the proper inquiry is not simply whether a different sentence would have resulted had the court not heard the objectionable evidence. That inquiry necessarily involves speculation and calculation. *See* ***Smith***, 207 Wis. 2d at 280.

¶17 In ***State v. Anderson***, 222 Wis. 2d 403, 411, 588 N.W.2d 75 (Ct. App. 1998), this court rejected the trial court's determination that Anderson was not prejudiced by trial counsel's deficient performance with respect to potentially inaccurate information at sentencing. First this court determined that in fact the trial court had relied on the potential misinformation. ***Id.*** at 410. Turning to the State's argument that reliance was harmless error because unchallenged portions of the presentence investigation report described similarly despicable child sexual abuse this court determined:

> [W]e reject the State's contention that the unchallenged portions of the PSI demonstrate that any error was harmless. From the trial court's sentencing remarks, it is clear that some of the PSI's allegations which Anderson did challenge influenced the court's assessment of Anderson's character and the gravity of his offenses and its conclusion that a very lengthy sentence was necessary. We are not confident that the PSI did not contribute to the substantial sentence Anderson received.
>
> We do not make light of the offenses of which Anderson has been convicted. They represent serious criminal offenses against child victims. However, the allegations in the PSI report demonstrate far more serious and aggravating conduct. Trial counsel's failure to pursue this matter by fully litigating the accuracy of those allegations, coupled with the trial court's reliance on those allegations, shakes our confidence in the outcome of this sentencing proceeding.

Id. at 411 (citations omitted).

¶18 Here the trial court specifically recited the inadmissible information. It found that it had relied on the information concerning the prior sexual assaults. It further found that it had relied on that information to classify Hoak as an "extreme danger." It proceeded to impose the maximum sentence. Although the trial court found that the probation violations justified the sentence, the court's view of Hoak's noncompliance with the terms of probation could have been

skewed by the substantial background information revealed by the compelled disclosures of prior sexual contact with children. *See* ***Anderson***, 222 Wis. 2d at 411 (allegations in PSI influenced the court's assessment of Anderson's character and the gravity of his offenses). Given the nature of the disclosures, the bell once struck cannot be unrung. Our confidence in the integrity and reliability of the sentencing proceeding is undermined by the reliance on the inadmissible information. *See* ***State v. Mosley***, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996) ("To protect the integrity of the sentencing process, the court must base its decision on reliable information."). Hoak was prejudiced by counsel's conduct, if that conduct is deficient. But for the lack of a ***Machner*** hearing, we would conclude that Hoak was denied the effective assistance of counsel and remand for rensentencing before a different judge. Instead we remand for the required evidentiary hearing on the claim of ineffective assistance of counsel.

¶19 Hoak's claim that inaccurate information was presented at sentencing was also forfeited by the failure of trial counsel to object. That claim is subsumed in Hoak's claim that counsel was ineffective for not objecting to and excluding the compelled information in the revocation summary. If compelled, that information was inadmissible. ***Peebles***, 2010 WI App 156, ¶27. On remand, if Hoak is denied resentencing on his claim that counsel was ineffective for not objecting to compelled information, the trial court shall consider whether the ***Machner*** hearing should address trial counsel's failure to object to inaccuracies in admissible information.

¶20 We need only give summary treatment to the remaining issues since none of them provide an additional basis for reversal of the order denying postconviction relief. Hoak argues that his conviction of three counts could possibly be based on the same picture downloaded inadvertently three times by a

single act on his part. He claims consecutive sentences violate the principles of multiplicity and double jeopardy. A claim of multiplicity at sentencing comes too late. It was waived by Hoak's guilty plea. *See* ***State v. Kelty***, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2d 886. Hoak offers nothing requiring concurrent terms simply because the crimes were similar in character and committed in a successive period of time. The trial court acted within the scope of its discretion in imposing consecutive sentences for separate and distinct crimes. *See* ***State v. LaTender***, 86 Wis. 2d 410, 432, 273 N.W.2d 260 (1979).

¶21 Whether the sentence is unduly harsh and a proper exercise of discretion requires consideration of the sentencing court's expressed rationale. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (appellate review of a sentence is limited to determining whether there was an erroneous exercise of discretion); ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995) (we review a trial court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion). On this record, including the unobjected to information from the revocation summary, we cannot conclude that the sentence was an erroneous exercise of discretion. The sentencing court stated why it believed Hoak to be a severe risk to the public and why the maximum terms were appropriate. Enough was said to provide an explanation of the sentence. We have noted that as long as the sentencing court considers the proper factors and the sentence is within the statutory limitations, the sentence will not be reversed unless it is so excessive as to shock the public conscience. *See* ***State v. Owen***, 202 Wis. 2d 620, 645, 551 N.W.2d 50 (Ct. App. 1996). The imposition of the maximum does not, standing alone, mean that the sentence was unduly harsh. *See* ***State v. Peters***, 192 Wis. 2d 674, 697-98, 534 N.W.2d 867 (Ct. App. 1995).

By the Court.—Judgment affirmed, order reversed and cause remanded with directions.

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