COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2494-CR **Cir. Ct. No. 2004CF636**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN S. LALE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Glenn S. Lale has appealed from an order denying four motions for postconviction relief. In his motions, Lale sought relief under

WIS. STAT. § 974.06 (2009-10)[1] from a judgment entered in the circuit court in December 2005, convicting him of operating a motor vehicle while intoxicated (OWI), fifth or greater offense.[2] He also challenged an order entered in the circuit court on February 21, 2007, reconfining him after the revocation of his extended supervision.[3] We affirm the trial court's order denying postconviction relief.

¶2 Lale was convicted in this case pursuant to a guilty plea entered by him on December 14, 2005. In exchange for his plea, charges of operating a motor vehicle after revocation and operating a motor vehicle with a prohibited blood alcohol concentration were dismissed, as were four additional traffic cases. In addition, the State agreed to recommend that Lale be placed on probation for an unspecified length of time, with twelve months in jail as a condition of probation.

¶3 Lale requested that he be sentenced on the same day he entered his guilty plea.[4] The prosecutor recommended probation with twelve months in jail as a condition of probation, and Lale's defense counsel also recommended probation.

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[1] All references to the Wisconsin Statutes are to the 2009-10 version.

[2] This was Lale's sixth OWI conviction. It was based on an incident that occurred on May 9, 2004.

[3] As discussed in this court's August 20, 2010 order, Lale's challenge to the order reconfining him after revocation of extended supervision was timely under WIS. STAT. § 974.02 and WIS. STAT. RULES 809.30(2)(h) and 809.82(2)(a).

[4] In addition, he personally agreed that the trial court could rely on a presentence investigation report (PSI) that had been prepared in another county, rather than having a new PSI prepared.

The trial court ultimately sentenced Lale to one year of initial confinement and three years of extended supervision, consecutive to the sentence for his fifth OWI offense in Waukesha county circuit court case No. 2004CF698.[5] The trial court also determined that Lale was ineligible for the earned release and challenge incarceration programs.

¶4 Lale did not appeal from the December 2005 judgment of conviction. He was subsequently released on extended supervision, but was later revoked and reconfined. At a hearing held on February 15, 2007, the trial court ordered Lale reconfined for the maximum permissible period of three years and five days, consecutive to any other time he was then serving. In an amended order for reconfinement entered on July 5, 2007, the trial court clarified that the reconfinement period was consecutive to Lale's sentence in Waukesha county circuit court case No. 2004CF698, the sentence to which this sentence had been made consecutive in 2005 and in which Lale's extended supervision had also been revoked.

[5] The written judgment of conviction as originally entered in this case did not specify whether Lale's sentence was consecutive. However, at the 2005 sentencing hearing, the trial court clearly and unambiguously ordered that the sentence was consecutive. The written judgment of conviction was subsequently amended to correctly state that Lale's sentence was consecutive to the sentence in Waukesha county circuit court case No. 2004CF698. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶15, 17, 239 Wis. 2d 244, 618 N.W.2d 857 (a circuit court has the power to correct a clerical error in a written judgment of conviction at any time to conform to its oral pronouncement of sentence).

¶5 In his postconviction motions, Lale moved to withdraw his guilty plea and for modification of his sentence and period of reconfinement. The trial court denied his motions after a hearing.

¶6 Although Lale raises multiple issues on appeal, none have merit. His first arguments pertain to his claim that he is entitled to withdraw his 2005 guilty plea. He contends that he is entitled to withdraw his plea because the prosecutor breached the plea agreement at sentencing, and his trial counsel rendered ineffective assistance when he failed to object to the breach. Lale also contends that his plea was entered under duress, was coerced by the trial court, and lacked a sufficient factual basis. In addition, he contends that his trial counsel rendered ineffective assistance by failing to file a motion to dismiss for lack of evidence and failing to move for a speedy trial.[6]

¶7 Lale also challenges his 2005 sentence and the trial court's reconfinement decision. He contends that his sentence and the period of reconfinement were unduly harsh and that the trial court relied on inaccurate information and erroneously exercised its discretion when it ordered that he be reconfined for three years and five days. He also contends that his counsel performed deficiently at the reconfinement hearing by failing to investigate and

[6] In his brief on appeal, Lale also contends that his trial counsel rendered ineffective assistance by ignoring his requests for postconviction relief from the 2005 judgment. However, undisputed evidence at the postconviction hearing indicated that Lale wrote to his trial counsel after the 2005 sentencing and stated that he was not asking him to appeal anything.

present recommendations for a concurrent sentence and treatment and that the trial court erred when it refused to allow him to participate in the earned release program.

¶8 We address these issues seriatim. This court reviews a trial court's decision granting or denying a motion to withdraw a guilty plea under an erroneous exercise of discretion standard. ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. When a defendant moves to withdraw a guilty plea after sentencing, he has the burden of establishing by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***Id.***, ¶16. The manifest injustice test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). Under a manifest injustice standard of review, the trial court's exercise of discretion will be affirmed if the record shows that legal standards were correctly applied to the facts and a reasoned conclusion was reached. ***Id.*** at 381.

¶9 One way a defendant may meet his burden of establishing a manifest injustice is by showing that he did not knowingly, intelligently and voluntarily enter the plea. ***State v. Lopez***, 2010 WI App 153, ¶7, 330 Wis. 2d 487, 792 N.W.2d 199. The manifest injustice test is also met if the defendant was denied effective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548

N.W.2d 50 (1996). In addition, a manifest injustice arises when a guilty plea lacks a factual basis. ***Thomas***, 232 Wis. 2d 714, ¶17.

¶10 Lale's first argument is that the prosecutor breached the plea agreement by not recommending that he receive the minimum sentence and by stating that his recommendation of probation was unusual, thus signaling to the court that the recommendation was too light. Lale also contends that his trial counsel rendered ineffective assistance by failing to object to the breach at the sentencing hearing.

¶11 By failing to object to the State's alleged breach of the plea agreement at sentencing, Lale waived his right to directly challenge the alleged breach. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. However, we may review the issue in the context of his claim of ineffective assistance of counsel. ***Id.*** To prevail on a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that such deficient performance prejudiced the defendant. ***Id.***, ¶22. Failure to prove either component of this inquiry defeats a defendant's claim. ***Id.***

¶12 A prosecutor who does not present the negotiated sentencing recommendation at sentencing breaches the plea agreement. ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. In addressing a claim that trial counsel rendered ineffective assistance by failing to object to the prosecutor's

alleged breach of the plea agreement at sentencing, we first consider whether the State breached the plea agreement. *See* ***Howard***, 246 Wis. 2d 475, ¶12. To be actionable, a breach must be material and substantial. ***Williams***, 249 Wis. 2d 492, ¶38. A material and substantial breach is a violation of the terms of the plea agreement that defeats the benefit for which the defendant bargained. ***Id.***

¶13 When the terms of the plea agreement and the historical facts surrounding the prosecutor's alleged breach are not in dispute, whether the prosecutor's conduct constituted a material and substantial breach of the plea agreement is a question of law that this court reviews de novo. *See* ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. As stated in the guilty plea questionnaire executed by Lale and at the plea hearing by both the prosecutor and defense counsel, the terms of the plea agreement required the prosecutor to recommend probation for an unspecified length of time, with twelve months in jail as a condition of probation. This is precisely what the prosecutor recommended at sentencing.

¶14 We reject Lale's argument that the prosecutor breached the plea agreement by stating at sentencing that his recommendation was "unusual." When a prosecutor has agreed to make a certain sentence recommendation, he may not render less than a neutral recitation of the terms of the agreement or covertly convey to the trial court that a more severe sentence is warranted than what is recommended. ***Williams***, 249 Wis. 2d 492, ¶42. The prosecutor did not do so

here. He merely acknowledged that it was unusual for him to recommend probation with jail time for a person who had been convicted of five OWI's. He then explained that this case was different than the normal OWI conviction since Lale had already served fifteen months in prison based on the sentence imposed in another Waukesha county OWI case after his commission of this offense. The prosecutor thus provided a reasonable explanation for why he was making the recommendation he was. Nothing in his statements can be read as conveying a message that he believed the recommendation was too lenient, or that a more severe sentence was warranted. Consequently, Lale's trial counsel cannot be deemed to have rendered ineffective assistance by failing to object to the prosecutor's sentencing statements.

¶15 Lale's argument that he was entitled to withdraw his guilty plea based on duress and coercion also fails. He contends that he entered the plea under duress as a result of emotional, psychiatric, and financial problems, alleging that he suffers from depression and was anxious and depressed because of family members' health problems. He also asserts that his attorney pressured him to accept the plea and that he entered it in the expectation that he would receive probation with home confinement. In addition, he contends that the trial court coerced his guilty plea when it raised his bail, causing him to remain incarcerated, first in a medium security prison where he was serving the Waukesha county sentence and later in jail awaiting resolution of this matter. Lale contends that as a

result of these pressures, his guilty plea was not knowingly, voluntarily and intelligently entered.

¶16 This argument fails for multiple reasons. Lale's guilty plea cannot be deemed coerced and involuntary merely because the trial court ruled adversely to him on motions or bail requests.[7] Moreover, nothing in the record supports a claim that his attorney engaged in improper coercive behavior. Standing alone, his attorney's recommendation that he accept the plea was not coercive and does not support a claim of ineffective assistance of counsel. *See* ***State v. Goyette***, 2006 WI App 178, ¶26, 296 Wis. 2d 359, 722 N.W.2d 731; ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272.

¶17 The record provides no other basis for concluding that Lale's guilty plea was unknowing, involuntary or unintelligent. Lale's self-imposed concern for family members was not the type of pressure that renders a plea involuntary. *See* ***Goyette***, 296 Wis. 2d 359, ¶¶30-31. Moreover, even accepting that he felt anxious and depressed when he entered his plea, the record establishes that the trial court thoroughly discussed his depression and medication with him prior to accepting his guilty plea and ascertained that he understood the proceedings, including the charge and penalties and the rights he was waiving. The trial court also personally

[7] We also note that Lale entered his guilty plea on the morning of trial and after the selection of the jury. The fact that Lale could have proceeded with the trial instead of entering a guilty plea on December 14, 2005, belies any claim that the trial court's bail rulings induced him to enter a guilty plea instead of proceeding to trial.

informed Lale that it was not bound by the sentencing recommendation as set forth in the plea agreement and could sentence him to the maximum penalties, which were detailed by the trial court. Lale responded that he understood. At the postconviction hearing, he again admitted that when he entered his guilty plea, he knew that the trial court was not bound by the terms of the plea agreement.[8]

¶18 Because Lale was informed and understood that the trial court was not bound by the plea agreement and could sentence him to the maximum penalties, he was not entitled to withdraw his guilty plea based on his hope or subjective expectation that he would be given probation and jail time. Because nothing in the remainder of the record supports Lale's contention that his guilty plea was the result of coercion and duress, or that it was otherwise unknowing, involuntary or unintelligent, the trial court properly denied his motion to withdraw his plea on those grounds.

¶19 Lale's contention that there was no factual basis for his plea is also without merit. Prior to entering his plea, he executed a guilty plea questionnaire acknowledging that the trial court could find him guilty based on the facts alleged in the complaint. At the plea hearing, he admitted that he drove a motor vehicle while under the influence of an intoxicant in Racine county on May 9, 2004, as

[8] Lale's admission was consistent with his trial counsel's postconviction testimony. Counsel denied telling Lale that the sentence as recommended in the plea agreement was guaranteed. He testified that he informed Lale of the minimum and maximum penalties and told him that the trial court was not bound by the plea agreement.

alleged in the information. He also admitted that he had been convicted of five prior OWI offenses as detailed by the trial court at the plea hearing. A factual basis for his plea therefore clearly existed.

¶20 Lale's remaining challenges to his guilty plea also lack merit. When he entered his guilty plea, he waived his right to raise several arguments made by him in his appellant's brief.[9] Moreover, while Lale attempts to circumvent waiver by contending that his trial counsel rendered ineffective assistance by failing to file a motion to dismiss for lack of evidence and failing to move for a speedy trial, Lale indicated at the postconviction hearing that he entered his guilty plea after requesting that his counsel file a speedy trial motion and a motion to dismiss for lack of evidence. Since he entered his guilty plea with the knowledge that his trial counsel had not filed such motions and his guilty plea was knowingly, voluntarily and understandingly entered, Lale waived his right to have counsel file these

[9] This includes Lale's claims that he was denied his right to a speedy trial, that the evidence against him was insufficient, that all appropriate witnesses were not subpoenaed for trial, and that the traffic stop that led to his arrest in this case was invalid. When a defendant knowingly, intelligently and voluntarily enters a guilty plea, he or she waives his or her right to challenge nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986); ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984).

motions, and counsel's failure to file the motions prior to entry of his guilty plea provides no basis for withdrawing the plea.[10]

¶21 Lale's remaining arguments pertain to his sentence and period of reconfinement. He appears to contend that the trial court erroneously exercised its discretion when it imposed a sentence of one year of initial confinement and three years of extended supervision in 2005 and made that sentence consecutive to his sentence in Waukesha county circuit court case No. 2004CF698. However, Lale waived his right to raise these issues when he failed to pursue postconviction relief or an appeal from the 2005 judgment of conviction and sentence pursuant to WIS. STAT. § 973.19 or WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30(2). Postconviction review under WIS. STAT. § 974.06 applies only to jurisdictional or constitutional matters or errors that go directly to the issue of the defendant's guilt. ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). A § 974.06 motion cannot be used to challenge a sentence based on an erroneous exercise of

[10] In his reply brief, Lale contends that the State has conceded that his speedy trial rights were violated because, in its respondent's brief, it did not respond to his contention that he was denied his right to a speedy trial. We disagree. In its respondent's brief, the State argued that Lale knowingly, voluntarily and intelligently entered his guilty plea and that he therefore was not entitled to withdraw it. Implicit in this argument is the contention that Lale was not entitled to withdraw his plea based on his trial counsel's failure to move for a speedy trial.

discretion when, as here, the sentence is within the statutory maximum and within the power of the court.[11] *See* ***id.***

¶22 Lale challenges the trial court's decision to reconfine him for a consecutive period of three years and five days on several grounds. He contends that the period of reconfinement was unduly harsh and inconsistent with ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. He contends that he was reconfined based on inaccurate information and that his reconfinement counsel rendered ineffective assistance by failing to inform the trial court of the department of corrections recommendation and by failing to investigate and present recommendations for a concurrent reconfinement term and treatment. He also contends that he should have been found to be eligible for the earned release program.

¶23 A reconfinement decision involves the exercise of discretion by the trial court and is reviewed on appeal to determine whether discretion was erroneously exercised. ***State v. Brown***, 2006 WI 131, ¶22, 298 Wis. 2d 37, 725

[11] A defendant may seek relief from his sentence based upon "new factors" even though the time limits set forth in WIS. STAT. § 973.19(1)(a) and WIS. STAT. RULE 809.30 have expired. *See* ***State v. Noll***, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895. However, Lale's challenge to the length of the 2005 sentence and the trial court's decision to make it consecutive was not based upon a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (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.).

N.W.2d 262. An erroneous exercise of discretion occurs when discretion is not exercised, or is exercised without the underpinning of an explained judicial reasoning process. ***Id.*** A trial court's decision will not be disturbed when it considered relevant factors and ordered a period of reconfinement that is within statutory limits and not so excessive or disproportionate to the offense as to shock the public sentiment or violate the judgment of reasonable people as to what is right and proper under the circumstances. ***Id.***

¶24 Although there is no checklist for reconfinement decisions, in exercising its discretion the trial court should consider and explain on the record those factors which are relevant to the particular case. ***Id.***, ¶45. Relevant factors include the nature and severity of the original offense, the defendant's institutional conduct record, his conduct during extended supervision, the recommendation of the department of corrections and the amount of incarceration necessary to protect the public from the risk of further criminal activity. ***Id.*** Relevant factors also include the defendant's prior record, attitude, and capacity for rehabilitation, and the rehabilitative goals to be accomplished by reconfinement in relation to the time left on the original sentence. ***Id.*** The trial court should impose the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense and the defendant's rehabilitative needs. ***Id.***

¶25 No basis exists to conclude that the trial court erroneously exercised its discretion in ordering reconfinement of three years and five days. The trial

court judge who presided at the reconfinement hearing was the same judge who originally sentenced Lale, and he indicated that he reviewed the transcript of the original sentencing before the reconfinement hearing. The revocation record filed in the trial court included the recommendations of the department of corrections and the division of hearings and appeals, recommending that Lale be reconfined for the entire time remaining on this sentence, which was three years and five days. The trial court considered that this was Lale's sixth offense OWI and that he was arrested for a new OWI less than two months after being released on extended supervision. While acknowledging Lale's positive attributes and stating that Lale was not being punished for being an alcoholic, it indicated that its primary concern was that Lale had again chosen to drink and drive, putting innocent people at risk. It concluded that Lale could not be rehabilitated without confinement, that his offenses were very serious and that the overriding concern based on his history of re-offending was public safety, necessitating reconfinement for the entire period remaining on Lale's sentence.

¶26 Because the weight to be given to the relevant sentencing factors is for the trial court, ***State v. Washington***, 2009 WI App 148, ¶17, 321 Wis. 2d 508, 775 N.W.2d 535, the trial court acted within the scope of its discretion when it gave greatest weight to public safety in determining the length of reconfinement. While a trial court should impose the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and

the rehabilitative needs of the defendant, ***Gallion***, 270 Wis. 2d 535, ¶23, this does not mean "exiguously minimal," or insufficient to accomplish the goals of the criminal justice system. ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483. Based on Lale's lengthy history of OWI offenses and the need for protection of the public, the trial court was not obligated to impose a shorter period of reconfinement. Because the period of reconfinement was also not so excessive or disproportionate to the offense as to shock the public sentiment or violate the judgment of reasonable people as to what is right and proper under the circumstances, no basis exists to conclude that the reconfinement period was unduly harsh.

¶27 We also reject Lale's contention that the trial court relied on inaccurate information at the reconfinement hearing. A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the trial court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.

¶28 Lale contends that the trial court mistakenly believed that he had never worked for a Lincoln-Mercury dealership. However, the record indicates that Lale corrected the trial court's information when the matter was discussed at the reconfinement hearing, and the trial court answered, "Very good." Because

Lale corrected the trial court, there was no inaccurate information before the trial court in this regard.

¶29 Lale also contends that at the reconfinement hearing, the prosecutor erroneously asserted that he gave law enforcement authorities a fake name at the time of his 2005 arrest. Although this question was not conclusively resolved, it provides no basis for relief because nothing in the record indicates that the trial court relied on this information in reconfining Lale. The trial court's concern was clearly with Lale's repeated acts of driving while intoxicated and putting the public at risk, not Lale's conduct at the time of his 2005 arrest.

¶30 Lale also contends that the trial court relied on erroneous information regarding the treatment he had received for his alcohol problems, citing the trial court's statement that he had received "every possible program." However, regardless of whether the trial court's statement that he had received "every possible program" was hyperbole, the record indicated that Lale had received treatment in the past and that, as noted by the trial court, he had continued to offend. The trial court's conclusion that Lale posed a risk to the public because he continued to offend, despite past participation in treatment and Alcoholics Anonymous, therefore was accurate. Consequently, no basis exists to conclude that it relied on inaccurate information in determining that reconfinement for the maximum period was warranted.

¶31 We also reject Lale's argument that the trial court erroneously exercised its discretion by failing to determine that he was eligible for the earned release program at the reconfinement hearing. At a reconfinement hearing, a trial court has no authority to determine a revoked supervisee's eligibility for the earned release program.[12] ***State v. Hall***, 2007 WI App 168, ¶1, 304 Wis. 2d 504, 737 N.W.2d 13.

¶32 Lale also contends that his reconfinement counsel rendered ineffective assistance by failing to inform the trial court that the department of corrections recommended that his reconfinement term in this case be concurrent to his sentence in Waukesha county circuit court case No. 2004CF698 and a sentence imposed after revocation of probation in a Sauk county case.[13] We disagree. Initially, we note that the trial court's decision to make the sentence in this case

[12] We recognize that at the reconfinement hearing, Lale contended that the trial court had mistakenly determined at his 2005 sentencing that he was ineligible for the earned release program. The trial court responded that even if he was technically eligible, placement in the program was inappropriate because of public safety concerns.

If Lale had wished to challenge the trial court's 2005 determination that he was ineligible for the earned release program, he was required to timely appeal from his 2005 judgment of conviction determining that he was ineligible. As discussed earlier, by failing to do so he waived his right to raise this issue. In any event, even if the trial court was entitled to reconsider eligibility for the earned release program, its determination that confinement for the maximum period was necessary for public safety was a valid reason for denying participation in the earned release program. *See* ***State v. Owens***, 2006 WI App 75, ¶11, 291 Wis. 2d 229, 713 N.W.2d 187.

[13] It is unclear whether Lale also believes that the department of corrections recommended that he be confined for only thirty percent of the remaining available time. If so, he is mistaken. The revocation record clearly sets forth the recommendations of the department of corrections and the division of hearings and appeals, recommending reconfinement for three years and five days in this case.

consecutive to the sentence in Waukesha county circuit court case No. 2004CF698 was made at the 2005 sentencing, and was not appealed. Even assuming arguendo that the trial court could reconsider that decision at the time of reconfinement, it is clear that the trial court was in possession of the revocation record, which included the recommendations of the department of corrections and division of hearings and appeals, when it made its reconfinement decision.[14] In addition, Lale's reconfinement counsel recommended to the trial court that the reconfinement period be concurrent rather than consecutive.

¶33 A trial court is not bound by the recommendation of the department of corrections at a reconfinement hearing. ***Brown***, 298 Wis. 2d 37, ¶¶24-25; ***Washington***, 321 Wis. 2d 508, ¶17. At the 2005 sentencing, the trial court acted within the scope of its discretion when it concluded that this offense warranted separate custodial time from the sentence imposed on Lale for his fifth OWI, necessitating a consecutive sentence. The same reasoning supported the trial court's conclusion that the reconfinement sentence in this case should be consecutive to any earlier sentence. Under these circumstances, no basis exists to conclude that Lale was prejudiced by reconfinement counsel's failure to emphasize that the department of corrections recommended a concurrent reconfinement period.

[14] At the beginning of the reconfinement hearing, the trial court asked the parties whether they had any corrections or additions to that record.

¶34 Lale also contends that his reconfinement counsel rendered ineffective assistance by failing to present the trial court with letters written on his behalf. Lale's argument on this issue is unclear. At the reconfinement hearing, counsel referred to a supportive letter from Lale's recent employer and a letter from a Milwaukee county mental health care provider indicating that reconfinement would have limited value. Lale also referred to a letter from his fiancée. Lale's contention that his counsel failed to present relevant information is therefore not supported by the record. In any event, because the trial court clearly concluded, based on Lale's history of offenses, that the protection of the public necessitated Lale's reconfinement for the maximum period available, no basis exists to conclude that Lale was prejudiced by counsel's failure to present additional letters or argument.

¶35 As a final argument, Lale asserts in his reply brief that the trial court's order should be reversed because the trial court failed to make findings of fact at the postconviction hearing, addressing his ineffective assistance of counsel claims. Issues raised for the first time in a reply brief need not be addressed by this court. ***Estate of Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981). In any event, Lale's claims of ineffective assistance of counsel fail for all of the

reasons already discussed. Additional findings of fact were not necessary. The trial court's order denying Lale's postconviction motions is therefore affirmed.[15]

By the Court.—Order affirmed.

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

[15] To the extent we have not addressed an argument raised by Lale on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court may "decline to review issues inadequately briefed").