COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP700-CR **Cir. Ct. No. 2013CF706**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER MICHAEL SALINAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Christopher Michael Salinas appeals the judgment entered on his guilty plea to one count of second-degree sexual assault of a child.

See WIS. STAT. § 948.02(2) (2011-12).[1] He also appeals the order denying his motion for resentencing. We affirm.

BACKGROUND

¶2 Salinas was charged with repeated sexual assault of a child. The complaint alleged that Salinas had sexual intercourse with the victim "upwards of 100 times."

¶3 Pursuant to plea negotiations, Salinas pled guilty to an amended charge of second-degree sexual assault of a child. At the plea hearing, the circuit court, without objection from the parties, used the criminal complaint as a factual basis for the plea.

¶4 At the sentencing hearing, the circuit court received a letter from the victim. In the letter, the victim—who was fourteen when she first met Salinas—indicated that the two had been in a "relationship." The circuit court relayed that in the letter, the victim further stated that she and Salinas had vaginal, oral, and anal sex hundreds of times over a year.[2] The victim detailed harassing and threatening statements made by Salinas when she tried to leave him.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] In its order denying Salinas's postconviction motion for resentencing, the circuit court quoted the victim's letter, which stated that she and Salinas had "'vaginal, oral, anal sex over 600 times in a year.'" While we did not need the actual letter for purposes of resolving this appeal given the thorough record the circuit court made at sentencing, we nevertheless note that it is not in the appellate record. *See* ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (It is the appellant's duty to ensure that the record is complete.).

¶5 The circuit court sentenced Salinas to fifteen years in prison, bifurcated as ten years of initial confinement and five years of extended supervision.

¶6 In his postconviction motion for resentencing, Salinas alleged that prior to the start of the sentencing hearing, he told his trial counsel that most of what was written in the victim's letter was false. Salinas claimed he told the attorney that he had sex with the victim a total of four times. According to Salinas, his trial counsel advised him not to object to anything in the victim's letter because it would enrage the judge if he did. Salinas asserted that based on this advice, he did not dispute the victim's claim as to the number of times they had sex, as set forth in her letter, nor did he object to the allegations in the criminal complaint to the effect that Salinas had sex with the victim hundreds of times in 2012.

¶7 Salinas argued that trial counsel had no strategic reason for permitting the circuit court to rely upon inaccurate information at sentencing, particularly where the inaccurate information suggests that the crime was more serious than it actually was. He claimed trial counsel's advice that he not object to the victim's letter was ineffective assistance.

DISCUSSION

¶8 At issue is whether the circuit court erred when it denied Salinas's postconviction motion without holding a ***Machner*** hearing.[3] Salinas argued that

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

he was sentenced on the basis of inaccurate information concerning the gravity of the offense and that his trial counsel was ineffective for failing to object.

¶9 According to Salinas, the allegations in his postconviction motion were sufficient to warrant a hearing. Specifically, he submits that the sentencing hearing transcript establishes that the circuit court relied upon the victim's claim that she had sex with Salinas six hundred times. Salinas asserts that this information is untrue—he actually had sex with the victim on four occasions. Salinas claims he told his trial counsel the information was inaccurate but she refused to object because she did not want to "enrage the judge."

¶10 A defendant is not automatically entitled to a hearing on his postconviction motion. *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48. "[A] defendant must 'allege [ ] facts which, if true, would entitle the defendant to relief.'" ***Id.*** (citation omitted; second set of brackets in original). Our supreme court has explained:

> "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [postconviction] court may in the exercise of its legal discretion deny the motion without a hearing."

State v. Bentley, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). "If the defendant's motion and the record fail to meet these requirements, a [postconviction] court in its discretion may grant or deny an evidentiary hearing." ***Howell***, 301 Wis. 2d 350, ¶75.

¶11 On appeal, we determine independently whether a motion "'on its face alleges facts which would entitle the defendant to relief,' and whether the

record conclusively demonstrates that the defendant is entitled to no relief." ***Id.***, ¶78 (citation and footnote omitted). When a "motion fails to allege sufficient facts entitling the defendant to relief or presents only conclusory allegations, or the record, as a matter of law, conclusively demonstrates the defendant is not entitled to relief," then this court considers whether the postconviction court erroneously exercised its discretion when it decided to grant or deny a hearing. ***Id.***, ¶79.

¶12 Additionally, we consider the standards applicable to resentencing. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews *de novo*." ***Id.*** (italics added). ***Tiepelman*** explained:

> "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" Once actual reliance on inaccurate information is shown, the burden then shifts to the [S]tate to prove the error was harmless.

Id., ¶26 (citations omitted). "'An error is harmless if there is no reasonable probability that it contributed to the outcome.'" ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted); *see also* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶13 With these standards in mind, we conclude that Salinas is not entitled to relief. Salinas offers only his unsupported and conclusory allegation that he assaulted the victim four times. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (The circuit court may deny a postconviction motion for a hearing if one or more key factual allegations in the motion are

conclusory.); *see also* ***id.***, ¶21 (A conclusory allegation is one which provides insufficient information to allow the court to meaningfully assess a claim.). Additionally, we agree with the State's assessment that the record conclusively demonstrates Salinas is not entitled to relief. For instance, the record indicates that Salinas was in a sexual "relationship" with the victim, and he had her refer to him as her husband. Salinas lived in the victim's bedroom at the victim's mother's home for a period of time. The relationship lasted approximately thirteen months and in Salinas's words, he had "broken the law several times over, and [he] need[ed] to be punished." Consequently, we are not convinced that the circuit court used inaccurate information.

¶14 However, even if we were to assume that the information before the circuit court was inaccurate, Salinas has not proved that the court actually relied upon it. The circuit court's sentencing remarks made clear that this was an aggravated case—not based on the number of occurrences—but based on the way Salinas preyed upon the victim. The court emphasized:

> What [Salinas] did in this case is highly, highly aggravated, more aggravated than the actual normal sexual assault that I see because of, again, the intimidation, the domestic violence, control issues, the threats, the threats from jail, the comments, which I have now said three or four times on the record about the girl[,] calling her a whore.

Moreover, we note that even if a factual dispute had been raised between Salinas's version of events and the victim's version, the circuit court—in fulfilling its fact-finding role—would have resolved the dispute at sentencing. *See* ***State v. Anderson***, 222 Wis. 2d 403, 412, 588 N.W.2d 75 (Ct. App. 1998) ("[T]he [circuit] court has an important fact[-]finding role to perform if facts relevant to the

sentencing decision are in dispute. In that setting, the sentencing court must resolve such disputes.").

¶15 In its decision and order denying Salinas's resentencing motion, the circuit court elaborated on the reasoning behind its sentence:

> Whether the victim believed it was a hundred times or six hundred times that the defendant had sex with her was not highly relevant to the court. The court considered it relevant only as far as what it said about *her perception* of how often the defendant had sex with her. The court considered that she was a fifteen-year-old, vulnerable victim and probably had no actual or accurate tally of the times that she and the defendant had sex, but the court gathered that she perceived it to be *a lot of times* as opposed to just once or twice. That is all the court considered as far as her statement was concerned regarding the number of times they had sex, and it certainly did not rely on a figure of six hundred times when it fashioned its sentence. Due to the length of time the relationship lasted, the court would have placed more weight on the victim's perception that it was multiple times that the defendant had sex with her (rather than one to four times—or none at all—as the defendant claimed different times throughout the proceedings). Consequently, even if trial counsel had objected, the court would still have considered the victim's statement for this limited purpose.

¶16 The circuit court specifically rejected Salinas's contention that the victim's letter citing six hundred sexual encounters was a significant factor driving its sentence. It highlighted the numerous factors it considered when it imposed sentence:

> [T]he first was the vulnerability of the victim. Another was how long the relationship had continued between a 39 year old and a 14/15 year old. Another was the defendant's use of heroin as an excuse for his actions. Another was the defendant's contact with the victim from the jail asking her to drop the charges. Another consisted of the calls the defendant made to the victim's teacher or friends and calling her a nasty whore and a girl with a "loose pussy." Another was his highly manipulative nature, attempts to control the victim, and attempts to intimidate the victim.

> Another consisted of his threats of revenge, his threat to kill her. Another was his blaming the victim for his arrest and prosecution. This is all, of course, in addition to the actual act of having sex with a fourteen/fifteen-year-old girl who was approximately 25 years younger than the defendant, a girl whose brother had been convicted of sexually assaulting her previously.

See ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (sentencing court has additional opportunity to explain sentence when challenged by postconviction motion). While the circuit court's postconviction assertion declaring its non-reliance on allegedly inaccurate sentencing information is not dispositive, *see* ***State v. Groth***, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163, *overruled on other grounds by* ***Tiepelman***, 291 Wis. 2d 179, ¶2, here the assertion is supported by the record.

¶17 Salinas has not shown that the information was inaccurate or that the circuit court relied on it. As such, we need not even consider whether the purported error was harmless. Furthermore, counsel's actions in not objecting to the information provided to the court at sentencing cannot be deemed deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit."); *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To show ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced him.). We affirm the order denying Salinas's motion for resentencing.

By the Court.—Judgment and order affirmed.

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