COURT OF APPEALS DECISION DATED AND FILED

December 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal Nos. 2015AP1132-CR
2015AP1133-CR

Cir. Ct. Nos. 2014CF414
2014CF527

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE J. STEVENSON,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. In these consolidated appeals, Jesse Stevenson challenges his sentence stemming from two Brown County crime sprees, which primarily involved thefts. He also challenges the denial of his motion to modify

his sentence. We conclude that by failing to request a ***Machner***[1] hearing, Stevenson has forfeited any claim that his attorney performed deficiently at his sentencing hearing. We also conclude the circuit court properly exercised its sentencing discretion and correctly rejected Stevenson's motion for sentence modification. Consequently, we affirm.

BACKGROUND

¶2 The present appeals arise from two Brown County Circuit Court cases. In 2014CF414, Stevenson was charged with three counts of theft, all as party to a crime.[2] The offenses occurred between March 12 and May 5, 2013. In 2014CF527, Stevenson was charged with two counts of burglary, both as party to a crime, with one of the offenses involving his becoming armed with a dangerous weapon during the burglary. He was also charged in that case with four counts of theft, all as party to a crime.[3] The offenses in 2014CF527 occurred between November 1 and December 24, 2013. Stevenson was also charged with similar offenses in Kewaunee County.

¶3 Stevenson reached a global plea agreement whereby he agreed to plead no contest to each of the Brown County charges. Eleven additional offenses, including additional theft and burglary crimes, were dismissed and read in at sentencing. At sentencing, the circuit court stated it had reviewed the presentence investigation report (PSI) prepared in connection with the Kewaunee

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

[2] The theft charges were classified as a class A misdemeanor, a class I felony, and a class G felony, based upon the dollar value of the stolen goods.

[3] These were all class H felonies.

County offenses, which contained information regarding Stevenson's positive family associations, employment history, and lack of prior offenses.

¶4 The State's sentencing argument emphasized the number of offenses and victims, the lengthy time span over which they occurred, and the high dollar value of the goods stolen. The State requested two-and-one-half years' initial confinement and "lengthy extended supervision with the restitution being joint and several." Defense counsel focused on mitigating circumstances that included Stevenson's lack of a prior criminal record, positive family relationships, positive employment history, low reoffense risk, and cooperation with law enforcement. Defense counsel urged the circuit court to impose a lengthy period of probation.

¶5 Emphasizing the gravity of the offenses and the effect of Stevenson's crimes on his victims, the circuit court rejected defense counsel's probation recommendation and concluded justice required that Stevenson serve prison time. In 2014CF414, the court sentenced Stevenson to five years' initial confinement and five years' extended supervision on the first theft count. The court withheld sentence on counts two and three and placed Stevenson on three years' probation. In 2014CF527, the court sentenced Stevenson to five years' initial confinement and five years' extended supervision on count one, concurrent to the sentence in 2014CF414. For the burglary charge involving the dangerous weapon modifier, the court imposed and stayed a fifteen-year sentence and placed Stevenson on ten years' probation. The court withheld sentence on the remaining counts in 2014CF527 and imposed a three-year probation term.

¶6 In the aggregate, then, Stevenson received a ten-year sentence, with five years' initial confinement and five years' extended supervision. The court

explained that all probation terms were to be served consecutively to deter Stevenson from committing further crimes.

¶7 Following appointment of postconviction counsel, Stevenson filed a motion for sentence modification. Stevenson alleged: (1) the State presented "inaccurate and misleading information" to which his sentencing counsel failed to object; and (2) his sentencing counsel presented an "incomplete" description of Stevenson's character. The circuit court held a non-evidentiary hearing at which the court repeatedly asked postconviction counsel to articulate the new factor or factors warranting sentence modification. When postconviction counsel mentioned the matters alleged in the postconviction motion as "new factors," the court responded that Stevenson had the benefit of a plea bargain and his sentence was well below what he could have received. The court ultimately concluded Stevenson had failed to demonstrate the matters raised in the postconviction motion would have been relevant to Stevenson's sentence, which was primarily based on the "multitude of offenses here." Stevenson appeals.

DISCUSSION

¶8 Stevenson initially argues his sentencing counsel was ineffective in four ways. First, Stevenson asserts his sentencing counsel did not advise him or his family that they could or should submit supportive letters to the sentencing court on Stevenson's behalf. Second, Stevenson claims his sentencing counsel failed to object to "inaccurate or misleading assertions made by the State" that "tended to reflect poorly" on Stevenson's character. Third, Stevenson argues his sentencing counsel failed to adequately advise the court of the extent of Stevenson's cooperation with law enforcement after he was identified as a suspect.

Finally, Stevenson argues his sentencing counsel was ineffective by his failing to advise the court that Stevenson was employed on a full-time basis.

¶9 Stevenson's ineffective assistance of counsel arguments are procedurally barred. "[A] postconviction ***Machner*** hearing is a prerequisite to a claim of ineffective assistance of counsel." ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). Without defense counsel's testimony, we cannot determine whether his or her actions were the result of incompetence or deliberate trial strategies. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). As a result, Stevenson cannot establish that his attorney performed deficiently, the first prong of the ineffective assistance inquiry. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶10 Here, Stevenson does not argue, nor does the record demonstrate, that he requested a ***Machner*** evidentiary hearing. Stevenson's postconviction motion was denominated a motion for sentence modification. Such a motion requires the defendant to demonstrate the existence of a "new factor." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. While Stevenson's motion alluded to his attorney's alleged errors as some of the "new factors," the authorities cited in his motion primarily concerned sentence modification.[4] At the motion hearing, postconviction counsel did not attempt to correct the circuit court

[4] Stevenson cited the following cases: ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828; ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Franklin***, 148 Wis. 2d 1, 434 N.W.2d 609 (1989); ***Cresci v. State***, 89 Wis. 2d 495, 278 N.W.2d 850 (1979); and ***Klimas v. State***, 75 Wis. 2d 244, 249 N.W.2d 285 (1977). ***Harbor*** was the only of these authorities to involve an ineffective assistance of counsel claim in addition to a sentence modification claim. *See* ***Harbor***, 333 Wis. 2d 2, ¶¶2-3. However, Stevenson's citation to ***Harbor*** did not include pinpoint citations so as to alert the circuit court he was also raising an issue regarding his sentencing counsel's constitutional effectiveness.

when it addressed Stevenson's motion as one for sentence modification, and in fact Stevenson argued that a number of "new factors" were established in the postconviction motion. Stevenson's failure to comply with the ***Machner*** procedure, including his affirmatively presenting his motion as one for sentence modification, renders his ineffective assistance of counsel claims incapable of adjudication at this time.

¶11 Next, Stevenson argues the circuit court erroneously exercised its sentencing discretion and, later, erroneously denied his motion for sentence modification. With respect to the former argument, Stevenson contends the court failed to consider all of the ***Gallion*** factors on the record during the sentencing hearing. With respect to the latter argument, Stevenson asserts the circuit court failed to adequately consider whether he had established the existence of a new factor so as to warrant sentence modification.

¶12 We begin with the circuit court's exercise of its sentencing discretion. Judges must provide a rational and explainable basis for their sentences. ***Gallion***, 270 Wis. 2d 535, ¶39. "Circuit courts are required to specify the objectives of the sentence on the record." ***Id.***, ¶40. These objectives can include protection of the community, deterrence of others from engaging in similar conduct, and punishment and rehabilitation of the defendant. ***Id.*** Ultimately, the sentencing court must impose a sentence calling for "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." ***Id.***, ¶44 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)).

¶13 Stevenson asserts the circuit court failed to consider his rehabilitative needs, his lack of a prior record, the contents of the Kewaunee

County PSI, or his "expressions of remorse and apology." Stevenson characterizes the sentencing as an "angry colloquy" after which the circuit court imposed a sentence that "likely violates the ***McCleary*** court's directive that a court imposes the minimum confinement possible." In Stevenson's view, his argument that the court failed to consider the proper sentencing factors is buttressed by the circuit court's observation during his motion hearing that its "total focus here was on the multiplicity of the offenses and the enormity of the crimes and the … repetitive nature of the behavior."

¶14 We reject these arguments. The circuit court considered the proper factors when sentencing Stevenson, including his personal characteristics. This consideration included explicit mention of several topics Stevenson contends the court failed to consider, including Stevenson's lack of a prior criminal record. Other matters relating to Stevenson's personal characteristics were covered in the PSI, which the court stated it had reviewed. In the sentencing court's view, these mitigating circumstances were outweighed significantly by the gravity of the offenses, the need to deter others from committing similar crimes simply because they fall on "tough times," and Stevenson's repeated failure to take responsibility for his crimes prior to sentencing. The court stated this is "among the more aggravated … property crime cases I've ever had in the 17 years I've been a judge," and it focused on the victims' feeling of violation and the fact that Stevenson could never repay the victims for the thousands of dollars in stolen goods.

¶15 Despite these aggravating factors, the circuit court imposed a sentence well below the maximum sentence authorized by law. As such, the sentence was not "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of

reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶16 In a variation of one of his ineffective assistance of counsel arguments, Stevenson argues resentencing is appropriate because the sentencing court relied on inaccurate information. A circuit court erroneously exercises its discretion when it actually relies on clearly irrelevant or improper factors in constructing a sentence. ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662. The defendant bears the burden of proving such reliance by clear and convincing evidence. ***Id.***

¶17 Here, although Stevenson recites a list of information that was allegedly inaccurate, he never explains why that information was inaccurate, nor does he address any circuit court reliance on such information. The closest he comes to doing these things is in his ineffective assistance argument, when he asserts sentencing counsel performed deficiently by failing to object to the State's assertion that Stevenson's children were being raised by their maternal grandmother. Stevenson argued this was inaccurate information because he was "very actively involved in raising his children," as demonstrated by the facts that he and the mother "shared equal placement of their children until [his] arrest and neither party sought support from the other after their relationship ended." As far as we can tell, none of this establishes the inaccuracy of the State's assertion.[5] But more importantly, by addressing the allegedly inaccurate information only in

[5] The record contains a letter from the grandmother, which states that she lives with the children's mother.

terms of his counsel's failure to object to the State's argument, Stevenson has wholly failed to establish any sort of reliance on the circuit court's part.[6]

¶18 Finally, Stevenson contends the circuit court improperly denied his sentence modification motion. Success on such a motion requires that a defendant demonstrate the existence of a "new factor," which is "a fact or set of facts highly relevant to the imposition of sentence," but not known to the original sentencing judge "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." ***Harbor***, 333 Wis. 2d 53, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts satisfies this standard is a question of law. ***State v. Krueger***, 119 Wis. 2d 327, 333, 351 N.W.2d 738 (Ct. App. 1984).

¶19 Here, Stevenson fails to articulate at any point in his briefing what alleged "new factor" justifies modification of his sentence. Instead, Stevenson presents a type of judicial bias claim, arguing that each time his postconviction counsel attempted to explain to the circuit court what new factors were present, counsel was "thwarted by the trial judge who repeatedly said that he already considered everything and that there were no new factors."[7] Reduced to its essence, Stevenson's appellate argument for sentence modification is that the "trial

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[6] Stevenson vaguely hints at a due process challenge based on his being sentenced on inaccurate information. This argument is undeveloped, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and, in any event, fails on the merits for the reasons articulated above, *see* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

[7] Even if this "thwarting" occurred—and we conclude the record does not support such a characterization of that being what happened—it would not explain why Stevenson did not clearly articulate and explain, now on appeal, the alleged "new factor(s)" he is presenting in support of his motion for sentence modification. This omission is particularly noteworthy given that the issue of whether a fact or set of facts is a "new factor" is a question of law. *See* ***State v. Krueger***, 119 Wis. 2d 327, 333, 351 N.W.2d 738 (Ct. App. 1984).

court steam rolled over counsel at the hearing and did not conduct a fair hearing." Stevenson makes a half-hearted attempt at asserting the circuit court demonstrated objective bias under ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385, but he presents no basis to conclude the circuit court was not, or could not be, impartial. His speculation that the circuit court was "likely annoyed" by Stevenson's motion is just that: speculation, which is insufficient to rebut the presumption that a judge has acted fairly, impartially and without prejudice. *See* ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772.

By the Court.—Judgment and order affirmed.

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