COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP94-CR **Cir. Ct. No. 2013CF191**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL S. UPTHEGROVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Calumet County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Samuel Upthegrove appeals *pro se* from a judgment convicting him of robbery with use of force and false imprisonment both as party to the crime and from a circuit court order denying his postconviction motion without a hearing. We affirm.

¶2 Upthegrove pled guilty. In his postconviction motion, he sought (1) resentencing because the circuit court relied upon erroneous information and did not properly exercise its sentencing discretion; (2) dismissal of the complaint for failure to comply with the prompt disposition rules applicable to Intrastate Detainer cases; and (3) vacation of the DNA surcharge, fees and costs and restitution imposed by the circuit court at sentencing. The circuit court denied the postconviction motion without a hearing.

¶3 A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. ***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 all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

Intrastate Detainer

¶4 Upthegrove was incarcerated in Wisconsin at the time the charges in this case were filed. Therefore, Upthegrove was subject to the Intrastate Detainer

Act, WIS. STAT. § 971.11 (2015-16).[1] Once notice seeking prompt disposition of the case is given to the District Attorney, the case must be tried within 120 days or the charges must be dismissed. Sections 971.11(2) and (7). There is no dispute that Upthegrove gave the required notice and that the case was not tried within 120 days. Postconviction, the circuit court found that it extended the 120-day deadline for good cause.

¶5 Although the circuit court found that it extended 120-day deadline for good cause shown, we conclude that Upthegrove's guilty pleas waived the prompt disposition issue for appeal. ***State v. Asmus***, 2010 WI App 48, ¶¶5-6, 324 Wis. 2d 427, 782 N.W.2d 435; *see* ***State v. Rognrud***, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990) (we may affirm a correct decision of circuit court even though that court relied on other grounds).

¶6 The circuit court did not misuse its discretion when it rejected this claim without a hearing because the record conclusively shows that Upthegrove is not entitled to relief.

Resentencing

¶7 Upthegrove sought resentencing because the circuit court did not adequately explain its sentencing rationale and allegedly relied upon inaccurate information.

¶8 At the outset of the sentencing hearing, the circuit court observed that Upthegrove did not cooperate with the presentence investigation report author,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

resulting in a presentence investigation report lacking his input. In contrast, Upthegrove cooperated with a social worker retained by the defense to create a presentence report. Through counsel, Upthegrove informed the court that he wanted to counter statements in the presentence investigation report attributed to Dr. Andrade, a mental health professional at Upthegrove's institution, the Wisconsin Resource Center. Upthegrove's counsel stated that Upthegrove believed Ashley Quinn, his Wisconsin Resource Center therapist, did not agree with Dr. Andrade's conclusions. Despite being given the opportunity at sentencing to do so, Upthegrove declined to offer testimony from Quinn or other evidence to support his challenges to Dr. Andrade's statements.

¶9 In sentencing Upthegrove to a total of eight years of confinement and five years of extended supervision, the circuit court considered the very severe offenses Upthegrove committed, the impact on and injuries suffered by the victim during the violent home invasion, Upthegrove's culpability and his apology to the victim, Upthegrove's cooperation in the investigation of the crimes, Upthegrove's lengthy history of prior offenses, the fact that Upthegrove was on supervision when he committed the crimes in this case, Upthegrove's pattern of manipulation evidenced by his refusal to cooperate with the presentence investigation report author while cooperating with the author of a defense sentencing report, Upthegrove's refusal to meet with mental health professionals assigned to work with and evaluate him, and the significant risk the public faced from Upthegrove's inability to conform himself to the requirements of the law. The court found that Upthegrove's rehabilitative needs could be met in confinement.

¶10 Upthegrove's postconviction motion alleged that the circuit court misused its sentencing discretion because it did not adequately explain its rationale

for the sentence. The circuit court rejected this claim because it adequately explained the sentence. We agree with the circuit court.

¶11 The circuit court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Upthegrove. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court was not bound to impose a sentence in line with the recommendations of the parties or the presentence investigation report. ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

¶12 The circuit court also declined to resentence because Upthegrove cooperated with a social worker hired by the defense to submit a presentence investigation report, but he did not cooperate with the court-ordered presentence investigation report author. The court found that this was an attempt to manipulate the court at sentencing. The court also cited Upthegrove's failure to substantiate his opposition to opinions expressed in the presentence investigation report as another basis to deny resentencing. That Upthegrove disputes the opinions of health care providers does not mean that the information in the presentence investigation report from those providers was erroneous. Upthegrove did not substantiate his disputes either at sentencing or in his postconviction motion.[2]

[2] Upthegrove's affidavit in support of his postconviction motion explains his disagreements with the opinions and statements of Dr. Andrade and makes representations about the opinions of his therapist, Ashley Quinn. None of this is sufficient to have warranted a hearing on the postconviction motion. Furthermore, the affidavit contains inadmissible hearsay. ***State v. Lass***, 194 Wis. 2d 591, 599, 535 N.W.2d 904 (Ct. App. 1995). Under the circumstances of this case, the affidavit was not sufficient to warrant a hearing on the postconviction motion.

¶13 Upthegrove argued in his postconviction motion that the presentence investigation report referred to confidential material from his health care records. Upthegrove did not make this argument at the time of sentencing, and even though the issue is raised in the postconviction motion, the time to make the record on this matter was at sentencing.[3] In other words, Upthegrove did not object at the time the objection was due. *See* ***United States v. Brown***, 715 F.2d 387, 389 (8th Cir. 1983) ("where the defendant is given a full and fair opportunity to reveal inaccuracies in the information relied upon by the sentencing court and fails to do so," "reconsideration [of the sentence] is not constitutionally mandated").

¶14 Upthegrove alleged in his postconviction motion that he was sentenced on the basis of inaccurate information relating to his juvenile offense record. A defendant has a due process right to be sentenced based upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To obtain resentencing, a defendant must establish that the information was inaccurate and the court actually relied upon it. ***Id.***, ¶31. Whether the circuit court relied upon inaccurate information at sentencing presents a question of law we decide independently of the circuit court. ***Id.***, ¶9.

¶15 The circuit court found that it did not rely upon inaccurate information relating to Upthegrove's history of prior offenses as an adult and as a juvenile. The circuit court's sentencing remarks largely focused on the severity of the crimes, the impact on the victim and Upthegrove's lengthy history of adult

[3] The presentence investigation report repeated information included in a previous presentence investigation report (dated May 23, 2013) and added updated information describing the current crimes and Upthegrove's current circumstances.

offenses. There is no evidence that the circuit court relied upon inaccurate information. ***Tiepelman***, 291 Wis. 2d 179, ¶31.

¶16 We conclude that the circuit court did not misuse its discretion when it rejected Upthegrove's request for resentencing without a hearing. The record conclusively shows that Upthegrove is not entitled to resentencing.

Restitution

¶17 After the circuit court imposed sentence, Upthegrove's counsel advised that Upthegrove did not dispute the $3,069 restitution request. Postconviction, Upthegrove sought to vacate the restitution award. The circuit court found no merit to this claim. Upthegrove stipulated at sentencing to the restitution request. He cannot take an inconsistent position in this court. ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987). The circuit court did not err in denying this claim without a hearing.

Fees and Costs

¶18 Upthegrove offers no legal authority to support his postconviction claim that the $20 fine and the $326 in court costs were inappropriately assessed. Therefore, we do not consider this argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

DNA Surcharge

¶19 Finally, Upthegrove challenges the imposition of a single $250 DNA surcharge. The circuit court did not state any reasons for imposing the surcharge. Under the law in effect in 2012 when Upthegrove committed the crimes in this case, imposition of the WIS. STAT. § 973.046 DNA surcharge was discretionary

with the circuit court. WIS. STAT. § 973.046(1g) (2011-12); ***State v. Radaj***, 2015 WI App 50, ¶5, 363 Wis. 2d 633, 866 N.W.2d 758. In ***State v. Scruggs***, 2017 WI 15, ¶¶49-50, 373 Wis. 2d 312, 891 N.W.2d 786, the court held that imposing a single $250 DNA surcharge in a felony case without an exercise of discretion was not an ex post facto violation. ***Scruggs*** disposes of any ex post facto claim.

¶20 The circuit court had discretion under WIS. STAT. § 973.046(1g) (2011-12) to impose the DNA surcharge for the robbery and false imprisonment convictions. "[R]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). We may examine the court's entire sentencing rationale to determine if imposition of the DNA surcharge was a proper exercise of discretion. ***State v. Ziller***, 2011 WI App 164, ¶¶11-13, 338 Wis. 2d 151, 807 N.W.2d 241.

¶21 We conclude that the circuit court's entire sentencing rationale supports the discretionary decision to impose the DNA surcharge. Upthegrove cannot show that the surcharge was unreasonable. ***Id.***, ¶12. At sentencing, Upthegrove expressed remorse, took responsibility for his conduct, and did not object to restitution on any grounds, including inability to pay. ***Id.***, ¶11. The DNA surcharge was substantially less than the $3,069 in restitution to which Upthegrove did not object. In this sentencing environment, imposing the DNA surcharge was a proper exercise of discretion. The circuit court did not misuse its discretion in rejecting this claim without a hearing.

Conclusion

¶22 We conclude that the circuit court did not misuse its discretion when it denied Upthegrove's postconviction motion without a hearing. The record conclusively demonstrates that Upthegrove is not entitled to relief. ***Allen***, 274 Wis. 2d 568, ¶12.

By the Court.—Judgment and order affirmed.

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