

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 25, 1996

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

NOTICE

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

No. 96-0030-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH G. GERING,

Defendant-Appellant.

APPEAL from an order of the circuit court for Florence County:
JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Kenneth Gering appeals an order denying his motion to modify his sentence.¹ As part of a plea agreement, Gering pleaded no

¹ By previous order this court dismissed the appeal from the judgment of conviction because the notice of appeal was not timely filed and the motion to extend the time did not show good cause for the delay.

contest to one count of second-degree sexual assault for which he was sentenced to six years in prison. He also pleaded no contest to two counts of burglary for which he was sentenced to a consecutive five years' probation term. Numerous other counts were dismissed and read in for sentencing purposes. Gering argues that the trial court erroneously exercised its discretion when it considered an inaccurate and misleading presentence report, that he was denied effective assistance of counsel when his attorney failed to challenge aspects of the presentence report, and that regardless of the propriety of his sentence, he is entitled to an accurate presentence report because of other uses of the report by the Department of Correction. We reject these arguments and affirm the order.

Due process entitles a defendant to be sentenced according to accurate information. *State v. Johnson*, 158 Wis.2d 458, 468, 463 N.W.2d 353, 357 (Ct. App. 1990). Absent a clear showing that discretion was erroneously exercised, this court will not interfere with the trial court's sentencing. *State v. Thompson*, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). This court presumes that the trial court acted reasonably in determining the sentence. *State v. Scherreiks*, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989).

The record does not support Gering's argument that the court considered any of the allegedly false or misleading information contained in the presentence report. For that reason, Gering has also failed to establish that he was prejudiced by his counsel's failure to correct any of these defects. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). When the court imposed the sentences, it never mentioned any of the disputed portions of the presentence report as a basis for its decision. Rather, it placed great weight on Gering's apparent unwillingness to accept responsibility for the crimes to which he pled no contest. Gering's attorney carefully detailed his disagreements with the presentence report. Gering himself addressed the court and noted his concerns. In the order denying the motion to modify sentence, the trial court noted that the motion raised no new issue that the court had not already heard. When the court does not consider a disputed fact at sentencing, the court is not required to resolve the dispute. Gering's reliance on FED. R. CRIM. P. 32(c)3(d) and cases implementing that rule is misplaced. The FEDERAL RULES OF CRIMINAL PROCEDURE do not apply to state criminal proceedings.

For policy reasons, courts should not act to correct alleged errors in the presentence report in order to affect matters within the purview of the Department of Corrections. See *State v. Bush*, 185 Wis.2d 716, 724, 519 N.W.2d 645, 648 (Ct. App. 1994). Gering has not demonstrated that he has exhausted the administrative avenues available to address his concerns about the presentence report. His only specific complaints to the inmate complaint review investigator related to his exclusion from certain treatment programs, not the inaccuracies of the presentence report. A review of any final agency determination is initiated by writ of certiorari, not a motion to modify the sentence. *Id.*

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.