COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2006

Cornelia G. Clark
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 No. 2005AP291

Cir. Ct. No. 2000CF2114

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY M. MCADOO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Johnny McAdoo appeals an order amending his judgment of conviction and denying his motion for postconviction relief brought pursuant to WIS. STAT. § 974.06 (2003-04).[1] The issues are: (1) whether McAdoo received ineffective assistance of postconviction counsel; (2) whether McAdoo's sentence was based on inaccurate information; and (3) whether the penalty enhancers were properly applied in this case. We affirm in part and reverse in part.

¶2 McAdoo first argues that he received ineffective assistance of postconviction counsel because his counsel did not move for a new trial on the grounds that a witness had recanted. To substantiate a claim of ineffective assistance of counsel, a defendant must prove that counsel performed deficiently and that the defendant was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶3 In deciding his prior direct appeal, we stated in our opinion that McAdoo should have filed a motion for a new trial based on the witness recantation, but did not.[2] However, we also stated that, even if we were to

---

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] ***State v. Johnny M. McAdoo***, No. 01-2332-CR, unpublished slip op., ¶¶15-18 (Wis. Ct. App. March 26, 2002).

consider the merits, we would reject McAdoo's argument because there was no corroboration for the recantation. Because we have already decided this issue, we will not again consider it here. ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338 ("A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts.").

¶4 McAdoo next argues that his sentence was based on inaccurate information. A defendant seeking resentencing on the ground that the circuit court relied on inaccurate information at sentencing "must show both that the information was inaccurate and that the court relied on it." ***State v. Groth***, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 655 N.W.2d 163.

¶5 McAdoo first contends he was sentenced on the basis of inaccurate information because the circuit court thought he had nine prior convictions for operating after revocation, while he actually had only six prior convictions for operating after revocation and three civil forfeitures for operating after suspension. We reject McAdoo's argument because the circuit court's comments at sentencing show that it was not "nine prior convictions" for operating after revocation that influenced its sentence but McAdoo's behavior and attitude reflected by his record of multiple traffic offenses. The court found the salient point to be McAdoo's continued disregard of the law. Characterizing the convictions as "just … driving offense[s]," the court said that "the fact that you just continued to drive shows me you don't care. You don't think it's important [that] you obey th[e] law." It was this implication, which applies equally to operating after revocation and operating after suspension, that influenced the court's sentencing decision.

¶6 Second, McAdoo argues that the circuit court based the sentence in part on its belief, which McAdoo claims is incorrect, that victims had recanted on six prior occasions in cases involving him. The circuit court observed that this was a very unusual pattern, which it decided to give "some weight" in sentencing. The implication is that McAdoo routinely intimidated witnesses and victims into not testifying against him. McAdoo contends that some of the instances involved victims or witnesses changing their stories before they testified before a court and thus were not "recantations" in one sense of the word. However, because the circuit court's observation regarding the unusual pattern of similar circumstances is accurate regardless of the precise details of each, we also reject McAdoo's claim that he was sentenced on the basis of inaccurate information regarding past victim and witness recantations.

¶7 Finally, McAdoo argues that he was improperly sentenced on the conviction for fleeing an officer, as a habitual criminal, an offense committed on April 25, 2000, to which the TIS-I sentencing statutes applied.[3] The conviction for fleeing an officer carried a maximum term of imprisonment of three years, with a maximum of twenty-seven months' initial confinement. The habitual criminality enhancer allowed the maximum imprisonment and confinement to be increased by up to six years. McAdoo was initially sentenced to three years of initial confinement and three years of extended supervision, a total of six years' imprisonment, which was a penalty-enhanced sentence that exceeded the maximum terms of confinement and imprisonment specified for the base offense.

[3] Truth-in-Sentencing I (TIS-I).

In its decision on McAdoo's postconviction motion, the circuit court reduced the term of extended supervision to twenty-seven months.

¶8 We follow the analysis set forth in ***State v. Kleven***, 2005 WI App 66, ¶23, 280 Wis. 2d 468, 696 N.W.2d 226.[4] The maximum enhanced TIS-I sentence McAdoo could have received for the fleeing conviction was nine years (108 months) of imprisonment, consisting of confinement and extended supervision. The maximum term of confinement that could be ordered was 75% of 108 months, or 81 months. *See* ***id***. Thus, the three-year term of initial confinement imposed by the circuit court on the fleeing charge did not exceed the maximum term of confinement for the enhanced offense under TIS-I.

¶9 As for extended supervision, McAdoo could "be ordered to serve, at most, the maximum term of extended supervision available for his base offense" because "penalty enhancers are not to be bifurcated." ***Id.***, ¶¶26-27. Instead, penalty enhancers "serve only to extend the confinement portion of a bifurcated sentence under TIS-I." ***Id.***, ¶27. The maximum term of extended supervision available under TIS-I when an enhanced term of confinement is ordered is the maximum term of extended supervision that may be ordered on a maximum sentence for the base offense (i.e., maximum confinement for base offense plus supervision to achieve maximum specified imprisonment for base offense). *See* ***id***., ¶¶26-27. In this case, the result is a maximum term of extended supervision of nine months (36 months maximum imprisonment for base offense, less 27 months'

---

[4] The State argues that we erred in ***Kleven*** in our analysis of the maximum term of extended supervision that may be ordered as part of a penalty-enhanced TIS-I sentence. We are bound by the analysis, however. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

maximum confinement for base offense).[5] We therefore remand with directions to the circuit court clerk to modify the judgment of conviction on the fleeing offense to reflect a total sentence of three years and nine months of imprisonment, consisting of three years of initial confinement and nine months of extended supervision.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

[5] Although the State disagrees with this result (see footnote 4), it concedes that, under the ***Kleven*** analysis, nine months is the maximum extended supervision that could have been ordered on the enhanced fleeing conviction, and, moreover, that the twenty-seven months of extended supervision the court imposed must be set aside in any event. In a lengthy and intricate argument that we do not recall being made in ***Kleven***, the State argues that the circuit court could have ordered McAdoo to serve up to twenty-four months of extended supervision following his thirty-six months of confinement. Although we decline the State's request to certify this issue to the supreme court, and although it did not petition for review of our decision in ***Kleven***, it may, of course, pursue the issue by seeking the supreme court's review of this decision.