COURT OF APPEALS DECISION DATED AND FILED

December 19, 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. 2006AP54-CR

Cir. Ct. No. 2001CF3571

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT WARREN ZIESEMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER, Reserve Judge. *Affirmed*.

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

¶1 WEDEMEYER, P.J. Scott Warren Ziesemer appeals *pro se* from an order denying his postconviction motion. Ziesemer claims: (1) the WIS. STAT.

§ 961.48 (1999-2000)[1] penalty enhancer was improperly applied to his sentence; (2) erroneous and inaccurate information was used at sentencing; (3) the prosecutor breached the plea agreement and therefore he should be allowed to withdraw his pleas; (4) he received ineffective assistance of trial counsel; and (5) the sentence imposed was excessive. Because each claim is resolved in favor of upholding the order, we affirm.

BACKGROUND

¶2 In March 2003, Ziesemer pled guilty to three counts of manufacture/delivery of non-narcotics (ecstasy), second or subsequent offense. In July 2003, he was sentenced to three concurrent fourteen-year terms on each count, each consisting of seven years of initial confinement followed by seven years of extended supervision. After a series of postconviction motions were denied,[2] Ziesemer filed a *pro se* motion for postconviction relief pursuant to WIS. STAT. § 809.30 (2003-04) raising the same issues in the trial court that he raises in this appeal. The trial court denied the motion. Ziesemer appeals from that order.

DISCUSSION

A. Applicability of WIS. STAT. § 961.48.

¶3 Ziesemer contends that WIS. STAT. § 961.48 was unlawfully applied to his conviction. Section 961.48 provides:

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The extensive procedural history following his conviction will not be recounted here, as it is adequately set forth in the trial court's December 15, 2005 order denying Ziesemer's postconviction motion.

> **Second or subsequent offenses. (1)** Except as provided in subs. (2) and (4), any person who is charged under sub. (2m) with a 2nd or subsequent offense under this chapter and convicted of that 2nd or subsequent offense may be fined an amount up to twice that otherwise authorized or imprisoned for a term up to twice the term otherwise authorized or both.

Ziesemer was convicted under WIS. STAT. § 961.41(1)(b). He argues because § 961.41(1)(b) is not specifically referenced in § 961.48, that § 961.48's penalty enhancer cannot be applied to his case. We are not convinced.

¶4 This issue was specifically rejected by two separate trial courts in previous postconviction orders. In the June 29, 2004 order, the trial court denied this claim, stating:

> At the time the offenses were committed, section 961.48(4) provided, "This section does not apply to offenses under s. 961.41(3g)(a)1., (b) and (f)." The defendant was convicted of violating section 961.41(1)(b), which relates to the manufacture, distribution, or delivery of non-narcotic drugs generally. The defendant was not convicted under section 961.41(3g)(a)1., (b), or (f), which relates to the possession of controlled substances. In sum, the defendant's convictions as a repeat offender under section 961.48 are authorized under the statute.

Likewise, the June 14, 2005 order denied this claim, stating:

> The defendant's interpretation renders subsection (1) of section 961.48 meaningless; moreover, he has failed to provide the court with any authority to support his contention that the statute should be interpreted in such a limited fashion. Under the circumstances, the court finds that the offenses for which the defendant was convicted were subject to the second and subsequent penalty enhancer under section 961.48 and that the sentences are not excessive under the law.

¶5 We reject Ziesemer's repeated attempts to raise this issue for the same reasons expressed in the trial court's orders. The penalty enhancer in the statute was properly applied to Ziesemer.

B. Erroneous and Inaccurate Information at Sentencing.

¶6 Ziesemer next contends that the trial court erroneously exercised its sentencing discretion by relying on erroneous and inaccurate information at sentencing. We reject this contention.

¶7 "Defendants have a due process right to be sentenced on the basis of accurate information." ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). In order to prove a violation of due process, a defendant must prove by clear and convincing evidence both that the information was inaccurate, and that the court actually relied on the inaccurate information in sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Although sentencing is within the trial court's discretion, whether a defendant's due process right was violated is a question of law, which we review independently. ***State v. Littrup***, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991).

¶8 In reviewing the transcript here, Ziesemer has failed to prove that the trial court relied on inaccurate information. Ziesemer points to a portion of the transcript where the prosecutor made statements about Ziesemer's involvement in drug activity in 1997. Ziesemer asserts that such statements were inaccurate as he was, in fact, incarcerated at the time. Ziesemer, however, overlooks the fact that he refuted the prosecutor's inaccurate statements during the sentencing hearing and the trial court acknowledged as much, and did not rely on that information. The trial court specifically found:

> The defendant and his attorney both refuted portions of the prosecutor's statements, specifically by indicating that he couldn't have been involved in the type of drug activity the prosecutor had outlined because he was in prison during that time. The court was aware of his contention based on the particular information provided by the presentence report. The court did not consider this information when it sentenced him; it only considered his character in terms of his involvement with the people who were found shot at the Pieces of Eight restaurant. The defendant did not dispute that he had involvement with these people, nor does he do so now. In imposing sentence, a court may consider the type of people with whom a defendant involves himself or herself and may consider uncharged, unproven as well as pending charges in order to acquire full knowledge of his or her character and behavior.

Based on the foregoing, Ziesemer's claim that the trial court relied on inaccurate information at sentencing must be rejected.

¶9 Ziesemer also contends that the trial court erroneously exercised its discretion by relying on uncharged and unproved offenses, based on "tales" that were "concocted" by the prosecutor. We are not convinced. "This court has stated that the trial court in imposing sentence for one crime can consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Thus, any consideration of uncharged offenses at sentencing was not an erroneous exercise of discretion.

C. Breach of Plea Agreement.

¶10 Ziesemer next contends that the prosecutor breached the plea agreement by stating that he "believes Ziesemer resisted arrest," even though the count for resisting arrest had been dismissed as a part of the plea agreement.

Ziesemer argues that, based on this breach, he should be allowed to withdraw his guilty plea. We reject his contentions.

¶11 Whether a prosecutor violated the terms of a plea agreement will depend on the circumstances of every case. If there is a disputed question of fact whether the prosecutor violated the terms of the agreement, we shall give deference to the factual findings of the trial court unless clearly erroneous. ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995). If there are no disputed facts, the question is one of law to be reviewed independently. ***Id.*** If, on the other hand, there is both a disputed question of fact and a question of whether the facts establish a breach, then we must first review the facts under the clearly erroneous standard of review and then determine as a matter of law independently whether the prosecutor violated the terms of the plea agreement. ***Id.*** at 277-78. In reviewing an alleged breach, we will consider the entire sentencing proceeding. ***State v. Hanson***, 2000 WI App 10, ¶26, 232 Wis. 2d 291, 606 N.W.2d 278.

¶12 Here, Ziesemer takes an isolated statement out of context in making his argument. In looking at the statement in context, there clearly was not a breach. After the prosecutor stated: "I believe he resisted arrest and he then was hit," he advised the court:

> Whether the extent of his resistance and the extent in which he was injured is really something that the defendant is pursuing in other courts in other forums, I think that's appropriate.
>
> I don't need to litigate the obstructing an officer count here. I'm not agreeing he didn't resist. I really think that is something that doesn't belong in this forum at all and defense has already previously discussed it briefly with the Court and said what measures are being taken.
>
> Justice for that offense by the police officer or by the defendant will be resolved elsewhere. It shouldn't be

> really used here to significantly change anything this Court does.

Based on this context, together with the remainder of the sentencing hearing, we conclude that the prosecutor did not breach the plea agreement. Although he referenced the resisting an arrest charge, he advised the trial court that that was not being litigated here. The prosecutor's comments did not suggest "that the State believed a more severe sentence than that recommended was appropriate. Rather, the prosecutor's comments supported the recommended sentence …." ***State v. Naydihor***, 2004 WI 43, ¶30, 270 Wis. 2d 585, 678 N.W.2d 220.

¶13 Accordingly, because there was no breach of the plea agreement, there is no basis to grant Ziesemer's request for plea withdrawal on that basis. Thus, we summarily reject his claim for plea withdrawal.

D. Ineffective Assistance.

¶14 Ziesemer next argues that he received ineffective assistance of counsel. Specifically, he contends that his trial counsel was deficient for failing to ascertain that the penalty enhancer in WIS. STAT. § 961.48 did not apply to him and for failing to object on the basis that the prosecutor breached the plea agreement.

¶15 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶16 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* **Sanchez**, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶17 We summarily reject Ziesemer's ineffective assistance claim because we have already determined that there is no merit to his claim that WIS. STAT. § 961.48 did not apply to him and that the prosecutor did not breach the plea agreement. Thus, there is no basis upon which he could assert an ineffective assistance claim.

E. Excessive Sentence.

¶18 Ziesemer claims that the trial court erroneously exercised its discretion by imposing an excessive sentence. We disagree.

¶19 There is "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***State v. Paske***, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991) (citing ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, "the trial court is presumed to have acted reasonably, and the burden is on the appellant to 'show some unreasonable or unjustifiable basis in the record for the sentence complained of.'" ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). A trial court's sentence is reviewed for an erroneous exercise of discretion. ***Paske***, 163 Wis. 2d at 70.

¶20 Trial courts must consider three primary factors in passing sentence. Those factors are "the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public." ***Paske***, 163 Wis. 2d at 62 (citing ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984)).

¶21 The length of the sentence imposed by a trial court will be disturbed on appeal "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶22 Here, Ziesemer's excessive sentence argument is based solely on his belief that the penalty enhancer in WIS. STAT. § 961.48 was unlawfully applied to his case. We rejected his statutory argument earlier in this opinion. Accordingly, his claim that he received an excessive sentence based on the statutory argument fails as well. Moreover, it is clear from our review of the sentencing transcript

that the trial court did not erroneously exercise its discretion when it imposed Ziesemer's sentence. Likewise, we are not convinced that the sentence imposed was disproportionate or shocking to public sentiment.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.