COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP2123-CR **Cir. Ct. No. 2005CM1055**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT LEE BRANDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH and FREDERICK C. ROSA, Judges. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Scott Lee Brandt appeals from a judgment entered after he pled guilty to one count of disorderly conduct, one count of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

criminal damage to property, and fourteen counts of bail jumping in violation of WIS. STAT. §§ 947.01, 943.01(1) and 946.49(1)(a) (2003-04).[2] He also appeals from an order denying his postconviction motion. Brandt claims that the trial court erroneously exercised its sentencing discretion by relying on inaccurate information. He further contends that twelve of his fourteen bail-jumping convictions are invalid because the no contact order in his bail agreement was unenforceable under WIS. STAT. ch. 969. Because Brandt does not meet his burden to show that the trial court relied upon inaccurate information, and because the bail jumping counts do not violate WIS. STAT. ch. 969, this court affirms.

BACKGROUND

¶2 On January 15, 2005, Brandt went to the residence of Steven Narloch, and found his girlfriend Laura Oleszak there. Brandt broke several windows in Narloch's home, while threatening to kill him. When police officers arrived Brandt told them, "He's got my woman. I came to beat his ass." Brandt was charged the next day as a habitual criminal with one count of disorderly conduct and one count of criminal damage of property. He was released on $500 bail and ordered to have absolutely no contact with Oleszak.

¶3 On February 13, 2005, Brandt was charged with battery, as a habitual criminal. Three days prior, Oleszak told police that Brandt had slammed her head on the concrete floor and repeatedly punched and kicked her. For this second charge, Brandt's bail was set at $7500. From February 15th to February 17th, Brandt made twelve phone calls to Oleszak threatening to kill her and harm

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

her children unless she paid his bail. Brandt was released when his bail was posted on February 17th. Oleszak's body was found on February 27th at her home. Brandt admitted to police that he had been in violation of his "no contact order." He was subsequently charged on March 4, 2005, with fourteen counts of bail jumping as a habitual criminal.

¶4 As part of a plea agreement, Brandt pled guilty to the count of disorderly conduct, the count of criminal damage to property, and all fourteen counts of bail jumping. In exchange, the State dismissed the battery count. The terms of the plea agreement allowed both the State and defense to argue for any sentence.

¶5 At the sentencing hearing, the State argued for imposing the maximum sentence of thirty-two years, consisting of sixteen years of initial confinement and sixteen years of extended supervision. Brandt requested a sentence of twenty-four years, consisting of eight years of initial confinement and sixteen years of extended supervision. The court sentenced Brandt to a twenty-four year sentence, consisting of twelve years and six months of initial incarceration, followed by eleven years and six months of extended supervision. Judgment was entered.

¶6 Brandt filed a postconviction motion claiming the trial court improperly relied on inaccurate information and also claiming that twelve of the fourteen bail-jumping counts were invalid because Brandt was in custody on other charges at the time he had contact with Oleszak via the telephone. On August 7, 2006, Brandt's motion was denied. The court adopted the State's brief as its own decision and held both that resentencing was not warranted and that the defendant's bail-jumping convictions were legally valid. Brandt now appeals.

DISCUSSION

¶7 Brandt challenges the trial court's sentence and the conviction related to twelve counts of bail jumping. He contends that the trial court relied on inaccurate information when sentencing him, and claims the twelve bail-jumping convictions are invalid because a "no contact order" is only enforceable when a defendant is not in custody. This court rejects Brandt's claims.

A. Inaccurate Information in Sentencing

¶8 Generally, sentencing is a decision within the discretion of the trial court and appellate review should set aside a sentence only if there was an erroneous exercise of discretion. ***State v. Patino***, 177 Wis. 2d 348, 384, 502 N.W.2d 601 (Ct. App. 1993). Brandt contends that the trial court considered the uncharged offense of the murder of Oleszak in sentencing and that by doing so, the trial court based its sentence on inaccurate information and erroneously exercised its discretion. A trial court should consider three main factors when sentencing: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. ***State v. Bobbitt***, 178 Wis. 2d 11, 14, 503 N.W.2d 11 (Ct. App. 1993), *citing* ***Harris v. State***, 75 Wis. 2d 513, 518, 250 N.W.2d 7 (1977). A trial court has broad discretion to consider what information is relevant to determining these factors. When sentencing, a trial court may "consider other unproven offenses, since those other offenses are evidence of a pattern of behavior which is an index of the defendant's character …." ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980).

¶9 Because the trial court may consider an unproven offense, its discretion was erroneously exercised only if Brandt can show the trial court's actual reliance on the unproven offense and its factual inaccuracy. The supreme

court recently restated that to make a claim of this nature, a defendant "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (citation omitted). The State points out many sources of information the trial court considered when it sentenced Brandt that could support a harsh sentence, including evidence about Brandt's history of domestic abuse, without relying on the unproven murder. Brandt offers two pieces of evidence to show that the trial court relied upon inaccurate information.

¶10 First, Brandt quoted two paragraphs of the trial court's comments from sentencing where the court stated its awareness that Oleszak was dead and mentioned how "the ramifications and repercussions are extensive and wide-ranging." At most, the remarks indicated a desire to consider Oleszak's death as one factor among many, since the two paragraphs cited are a miniscule portion of the total sentencing documentation. The paragraphs are put into further context when read together with the paragraph in between and the subsequent paragraph quoted in the State's brief. When read together with these other paragraphs, there is little to suggest the trial court relied on the facts it was discussing.

¶11 Second, Brandt contends that his sentence is exceptionally strenuous when compared to the state averages. This harshness can only be explained, he claims, by understanding that the trial court was taking into consideration Oleszak's murder. It is true that Brandt is being sentenced to a total of twenty-four years, mostly on account of misdemeanors. However, this sentence was the same overall length which was requested by defense counsel at sentencing. Further, the prosecutor, who argued for the maximum sentence based on aggravating factors, did not cite Oleszak's murder as one of them. The trial court imposed a sentence with an overall scheme of twenty-four years, with only twelve

and a half years of initial confinement. Given the numerous counts, this was not outside the reasonable discretion of the trial court. Brandt cannot show that the court relied on the unproven offense, so a determination of accuracy about the unproven offense need not be reached. Brandt has not met the burden of the ***Tiepelman*** test and thus cannot demonstrate that the trial court relied on inaccurate information.

B. Validity of Bail Jumping Convictions

¶12 Brandt claims that he did not violate WIS. STAT. § 946.49 on twelve counts because WIS. STAT. ch. 969 only allows the no contact provision of his bail agreement to be in effect while Brandt is not in custody. We reject his contention.

¶13 This issue presents a question of statutory construction, which is a question of law that this court reviews independently. *See* ***State v. Leitner***, 2002 WI 77, ¶16, 253 Wis. 2d 449, 646 N.W.2d 341.

¶14 Brandt contends that the plain language of WIS. STAT. ch. 969 and the holdings of ***State v. Orlik***, 226 Wis. 2d 527, 595 N.W.2d 468 (Ct. App. 1999), and ***State v. Dawson***, 195 Wis. 2d 161, 536 N.W.2d 119 (Ct. App. 1995), render the conditions of release unenforceable if the defendant is in custody on other charges at the time of the violation. Finally, Brandt contends that the failure of his trial counsel to object to twelve of the bail-jumping counts amounts to ineffective assistance of counsel.

¶15 Brandt does not challenge the ability of the court to issue a no contact order as a condition of bail. His assertion is that once taken back into custody, the conditions of his release are unenforceable. The statute Brandt relies upon states in relevant part: "Conditions of release, other than monetary

conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses." WIS. STAT. § 969.01. Brandt emphasizes the word "release" in that sentence. The plain reading of the statute explains the procedures for releasing an individual from custody. Brandt was released and then brought back into custody on other charges. The plain language of the text does not speak conclusively to these facts, but is silent as to an exception for someone who returns to custody.

¶16 Brandt submits that ***Dawson*** supports his claim that a person who is in custody is no longer considered "released" for purposes of WIS. STAT. ch. 969. The State points out that in ***Dawson***, the court explained the elements of bail jumping as being: (1) the defendant was charged with a felony or misdemeanor; (2) the defendant was released from custody under conditions established by the trial court; and (3) the defendant intentionally failed to comply with the terms of release. ***Dawson***, 195 Wis. 2d at 170-71. Those three conditions have been met in this case. Even though Brandt was taken back into custody on a different charge, he was at one point in time released from custody.

¶17 Brandt contends that ***Orlik*** has established precedent that a no contact order is unenforceable while a defendant is in custody. In ***Orlik***, the trial court set a high bail amount and a no contact order as the conditions of release for a defendant. ***Orlik***, 226 Wis. 2d at 530. Orlik was unable to post bail and subsequently violated the no contact order in custody, having never left. ***Id.*** The ***Orlik*** court found this no contact provision unenforceable because the no contact order was one of the conditions the statute authorizes "that governs the release of the defendant from custody." ***Id.*** at 538.

¶18 The question is whether a defendant who is released but returns to custody on another matter is still considered released for purposes of the bail-jumping statute. Brandt argues against such a conclusion because to do so would require the existence of the apparently paradoxical condition of simultaneously being released from custody for one proceeding and being in custody for another when a person physically cannot be both released and in custody at the same time. The discrepancy Brandt asserts relies on a second assumption that whether "the defendant was released from custody on a bond, under conditions established by the trial court," ***Dawson***, 195 Wis. 2d at 170, is an element of the crime that must constantly be satisfied depending on the current location of the defendant.

¶19 Brandt states that the purpose of the bail-jumping statute cannot be met if the defendant is in custody. That is not necessarily the case. One of the purposes for the no contact order in this case was the protection of Oleszak. Being in custody did not stop Brandt from making a dozen threatening phone calls to her that were more than idle words, considering Brandt was in custody on account of his alleged battery of Oleszak. Brandt was released from custody under conditions that he later intentionally violated. The bail-jumping statute requires that he be released with conditions at some point, not that he is out of custody at the time of the violation. Here, the elements of the bail-jumping statute were satisfied. Accordingly, the twelve convictions based on that statute do not violate WIS. STAT. ch. 969.

¶20 Finally, Brandt contends that his trial counsel was ineffective for not raising an objection to twelve of the bail-jumping counts. We reject this contention. 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).

¶21 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, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶22 We have already concluded that the bail-jumping convictions did not violate the statutory scheme. It logically follows then, that any objection would have been meritless and would not have altered the result in the case. Accordingly, Brandt was not prejudiced in any way by the lack of such a motion. Thus, his ineffective assistance claim fails. Based on the foregoing, this court

concludes that the trial court properly exercised its sentencing discretion and that the challenged bail-jumping convictions are valid and enforceable.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)5.