COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2071-CR **Cir. Ct. No. 94-CF-64**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. RUPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. John A. Rupp appeals pro se from a judgment sentencing him after revocation of probation and from an order denying his motion for sentence modification based on a new factor. Rupp attacks the validity of his no contest plea, the revocation of his probation, and the sentence imposed after revocation by a variety of claims, including claims that the prosecution breached

the plea agreement and that he was denied the effective assistance of counsel by each of the five different attorneys appointed to represent him in the history of this prosecution. Despite Rupp's utilization of the wrong procedure and that he raises many of his claims for the first time on appeal, we consider many of the issues. We affirm the judgment and order.

¶2 In 1994, Rupp was charged as a party to the crime of two counts of burglary and one count of theft. When Rupp failed to post $2,000 cash bond by September 13, 1994, a bench warrant was issued. Rupp did not appear for the trial scheduled to commence on November 8, 1994, and was not placed into custody again until August 4, 1996. Under a plea agreement, Rupp entered a no contest plea to one count of burglary and the other two counts were dismissed and read-in at sentencing. On September 12, 1996, Rupp was sentenced to four years' probation with sixty days' jail time as a condition of probation. Rupp was permitted work and child care release privileges. The prosecution moved to revoke those release privileges after it discovered that while on release, Rupp drove a car without a valid driver's license. In April 1999, Rupp's probation was revoked. Rupp was then sentenced to six years' imprisonment. On July 13, 2000, Rupp filed a pro se motion for sentence modification.

¶3 We first observe that Rupp's appeal is limited to issues "*initially raised* by the events of the resentencing hearing and the judgment entered after that hearing." ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. An appeal taken from sentencing after revocation does not bring the original judgment of conviction before this court. ***Id.*** A defendant is barred from challenging the underlying judgment of conviction unless relief was timely sought from that conviction. ***Id.*** at ¶11. Rupp did not timely appeal the original judgment of conviction and therefore is barred from challenging the validity of his plea and

the original sentence. Additionally, Rupp raises claims that were never raised in the trial court. Issues not presented to the trial court will not be considered for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997). Rupp failed to file a motion in the trial court to withdraw his plea or claiming ineffective assistance of counsel. A claim of ineffective assistance of counsel not preserved by raising it at a postconviction hearing before the trial court is deemed waived. ***State v. Waites***, 158 Wis. 2d 376, 392-93, 462 N.W.2d 206 (1990). Rupp's appellant's brief may not masquerade as a petition for a writ of habeas corpus.

¶4 Despite these constraints on our appellate review, we address the claims Rupp makes for the single reason that they serve as the rungs on a ladder ending at the pinnacle issue, the only issue properly raised on appeal—whether the sentence imposed violated Rupp's right to due process because it was based on inaccurate information or an erroneous exercise of discretion. Simply, Rupp claims that because his plea is invalid, the trial court was without sentencing authority. In order to withdraw a guilty plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). Rupp has not met the standard.

¶5 Rupp first contends that he should be allowed to withdraw his plea because the prosecution breached the plea agreement. Rupp identifies several alleged breaches: the prosecution's motion to revoke Rupp's work and child care release privileges, coercion in the execution of new probation rules which prevented Rupp from being self-employed or entering into any contracts for home improvement work, the recommendation and ultimate revocation of his probation, and the six-year sentence. The record does not establish a breach of the plea

agreement. Although the prosecution agreed to a joint sentencing recommendation, it adhered to the recommendation at sentencing. There was no promise to refrain from seeking modification of the conditions of probation. Thus, the subsequent actions Rupp complains about were not subject to constraints of the plea agreement. Also, once revocation occurred, the prosecution was free to argue for any sentence after revocation. *See* ***State v. Windom***, 169 Wis. 2d 341, 350, 485 N.W.2d 832 (Ct. App. 1992) (plea agreement is limited to the original sentence for probation). The terms of probation and the recommendation for revocation were not within the prosecution's authority and do not support a request to withdraw the plea. Rupp has served his condition time and any claims regarding release privileges for that time are moot.

¶6 Next, Rupp claims that his plea was not voluntary. He contends that his plea was coerced by the threat that he would not be permitted release on bail without the plea. A plea is manifestly unjust if it is involuntary. ***Hatcher v. State***, 83 Wis. 2d 559, 564, 266 N.W.2d 320 (1978). The procedure used at the plea hearing fully conformed to the strictures of ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The alleged threat was known to Rupp at the time he entered his plea, yet he executed a "guilty plea acceptance form" which acknowledged that no threats or promises were made to induce the plea other than the plea agreement. In response to the trial court's inquiry during the plea hearing, Rupp denied that anyone made threats to induce the plea. There is simply no evidence of coercion.

¶7 In his reply brief, Rupp argues for the first time that he did not understand the elements of the charged offenses. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Caban***, 210 Wis. 2d at 605. The plea questionnaire stated the elements of the offense and they were

repeated at the plea hearing when the trial court read the count to which Rupp entered his no contest plea. At no time did Rupp express a lack of understanding. *See* ***State v. Schill***, 93 Wis. 2d 361, 379-80, 286 N.W.2d 836 (1980). Even if we were to conclude that the plea procedure was inadequate with respect to the elements of the offense, Rupp's assertion in his reply brief that he did not understand the elements of the offense has not been presented to the trial court. If his assertion is truthful, the State has not had the opportunity to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). We cannot address the issue.

¶8 Rupp suggests that we have jurisdiction over this issue because we denied his motion for a remand. He refers to the motion for remand to which the State filed an objection. That motion sought to stay the appeal and remand the record so Rupp could pursue a motion for reconsideration of the sentence based on newly discovered evidence. Before this court could rule on whether a remand was appropriate, Rupp's motion for reconsideration was filed and decided by the trial court without a remand. Our November 1, 2000 order accepted jurisdiction of the trial court's order denying the motion for reconsideration as if this court had remanded the issue. WIS. STAT. § 808.075(5), (6) (1999-2000).[1] However, this did not vest jurisdiction over Rupp's claim that he did not understand the nature of the offense. His request for a remand did not suggest that he had filed a motion for withdrawal of the plea and the motion filed in the trial court only sought reconsideration of the sentence.

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

¶9 Rupp also argues that the trial court was without jurisdiction to accept the plea because there was no factual basis for it. A manifest injustice has occurred if the plea is accepted without an adequate factual basis. ***State v. Black***, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363. Rupp claims that there was no evidence that he actually entered the dwelling and stole the antique items that he sold to antique dealers. The trial court is not required to conduct a mini-trial at every plea hearing to establish that the defendant committed the crime charged beyond a reasonable doubt. ***Id.*** at ¶14. The trial court "is not required to satisfy the defendant that he or she committed the crime charged. Indeed, the defendant evidenced his or her own satisfaction by entering a plea and thereby waiving his or her right to a jury trial." ***Id.*** at ¶12 "If the facts as set forth in the complaint meet the elements of the crime charged, they may form the factual basis for a plea." ***Id.*** at ¶14.

¶10 The criminal complaint identified Rupp as one of three persons who sold stolen antiques to several antique dealers. Rupp was identified by antique dealers at the preliminary hearing. The items were taken from a farmhouse on property that was being maintained as part of an estate proceeding. The house was not lived in. One of the owners of the stolen antiques testified that someone broke into the farmhouse and removed items without permission. A basement window was broken. Earlier that same year, Rupp had made inquiries to the owner about renting the barn and other buildings on the farm. Just as circumstantial evidence is sufficient to sustain a finding of guilt at trial, it may establish a factual basis for a plea. *See* ***id.*** at ¶16 ("a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and

the defendant later maintains that the exculpatory inference is the correct one"). The plea was not invalid for the lack of a factual basis.

¶11 We summarily reject Rupp's contention that the prosecution knowingly falsified the complaint.[2] The evidence at the preliminary hearing verified much of the information in the complaint. Further, Rupp's no contest plea stands as an admission to the material facts stated in the complaint. *See* ***State v. Liebnitz***, 231 Wis. 2d 272, 287-88, 603 N.W.2d 208 (1999). While the principles of ***Franks v. Delaware***, 438 U.S. 154 (1978), mandating a hearing when a defendant makes a substantial preliminary showing that the prosecution has made a false statement or critical omission, apply to the validity of the complaint, ***State v. Mann***, 123 Wis. 2d 375, 384-85, 367 N.W.2d 209 (1985), Rupp's conclusory assertion of falsified information is not sufficient to require a ***Franks*** hearing. "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." ***Mann***, 123 Wis. 2d at 388 (quoting ***Franks***, 438 U.S. at 171).

¶12 A claim of ineffective assistance of trial counsel is raised. As we have previously noted, Rupp did not raise this claim in the trial court. While this appeal was pending, Rupp filed a habeas action in the circuit court. Again, Rupp claims that because our order of February 20, 2001, denied his request to stay this appeal pending a decision on his habeas petition, these issues are properly raised in this appeal. The issues in this appeal are confined to the issues raised in the trial court prior to the filing of the notice of appeal. *See* ***Chicago & N. W. R.R. v.***

[2] Rupp vigorously repeats claims that a criminal prosecution against him filed in Juneau county in March 2000 was based on falsified information. Those claims cannot be raised in this appeal.

LIRC, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980) (an appeal from a judgment does not embrace an order entered after judgment). This is an appeal from Rupp's criminal conviction. Indeed, a petition for a writ of habeas stands as an independent civil action and not as a motion in another proceeding. *See* ***Maier v. Byrnes***, 121 Wis. 2d 258, 260, 358 N.W.2d 833 (Ct. App. 1984). The pending habeas petition does not confer appellate jurisdiction over the issues raised by that petition.

¶13 Rupp first complains that the two attorneys who represented him prior to his plea were ineffective because they did not make a reasonable investigation of the crime and Rupp's lack of knowledge that items being sold to antique dealers were stolen. He asserts that the attorneys should have filed motions for dismissal. Rupp entered a valid no contest plea. A plea of guilty or no contest, when knowingly and voluntarily made, waives all nonjurisdictional defects and defenses. ***State v. Andrews***, 171 Wis. 2d 217, 223, 491 N.W.2d 504 (Ct. App. 1992). This waiver includes claims of violation of constitutional rights prior to the plea. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). Any claim of ineffective assistance of counsel prior to the plea is waived.

¶14 Rupp argues that the attorney representing him during the plea was ineffective for permitting him to enter a plea to a crime he did not commit and that the trial court had no jurisdiction to accept. We have determined that the plea was not coerced and that the factual basis for the plea was sufficient. There is no merit to Rupp's claim. Although Rupp alleges that this same attorney allowed him to be sentenced on the basis of inaccurate information, he does not explain what the inaccuracies were. We need not consider arguments not developed. ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999).

¶15 Rupp claims that he was denied the right to counsel when his release privileges were revoked. Release privileges may be withdrawn by the trial court "at any time by order entered with or without notice." WIS. STAT. § 303.08(2). Rupp was not entitled to counsel.

¶16 In claiming that counsel was ineffective at resentencing, Rupp argues that counsel should have raised the ineffectiveness of the previous attorneys and filed motions he alleges his other attorneys should have filed. Those claims lack merit and counsel is not ineffective for not pursuing them. "It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996). The same is true with respect to Rupp's claim that counsel allowed him to be resentenced based on accurate information. In considering this issue later in this opinion, we conclude it too lacks merit.

¶17 The record belies Rupp's claim that he was denied effective counsel on this appeal after resentencing because postconviction counsel abandoned him. Postconviction counsel moved to withdraw after being discharged by Rupp. Rupp was advised by this court that as an alternative to self-representation he could require appointed counsel to file a no merit report and thereby test whether counsel's representation was effective. Rupp elected to discharge counsel and proceed pro se. Postconviction counsel did not abandon Rupp and Rupp cannot now claim that counsel was ineffective. "A defendant who insists on making a decision which is his or hers alone to make in a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was ineffective for complying with the ethical obligation to follow his or her undelegated decision." ***State v. Divanovic***, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996).

¶18 We finally reach the pinnacle issue in this appeal: whether the sentence was based on inaccurate information or the result of an erroneous exercise of discretion. Aside from Rupp's claims that the entire proceeding was infested with false information, the inaccurate information Rupp points to is the prosecutor's description of charges Rupp faced in Juneau county for fraud by a home improvement contractor. The defendant has the burden of proving by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Rupp has failed to meet this burden.

¶19 Whether or not Rupp did the things the prosecutor described is a factual question. At sentencing, the trial court heard Rupp's version of the dispute with the home owner and Rupp's denial that he took money for home improvement work that he failed to perform. The trial court found it probable that the truth lay between the two differing versions. Inaccuracy was not established.

¶20 Even if the information about the conduct leading up to the revocation of probation was inaccurate, it was not prejudicial. Rupp was not sentenced on the allegations of contractor fraud. The trial court reviewed and relied on the circumstances of the burglary and the victim's personal anguish because of the loss of family heirlooms. "[U]ncharged offenses may be considered by a sentencing court because they indicate whether the crime was an isolated act or a pattern of conduct." ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). The trial court properly limited its consideration of the alleged contractor fraud as bearing on Rupp's character.

¶21 Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of

discretion. ***State v. Bizzle***, 222 Wis. 2d 100, 104, 585 N.W.2d 899 (Ct. App. 1998). An erroneous exercise of discretion might be found for: (1) failure to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor in the face of other contravening considerations. ***Id.*** at 105.

¶22 The trial court considered the severity of the offense, including the two offenses dismissed but read-in for sentencing. Rupp's prior record for burglaries dating back to his first offense at a young age was noted. The trial court found that Rupp's explanation of the offense and other conduct demonstrates his tendency to lay blame on someone else and his refusal to accept personal accountability. For that reason, the court found a need to protect the public by a prison sentence that did not unduly depreciate the seriousness of the offense. The six-year sentence was a proper exercise of discretion.

¶23 Rupp makes several challenges to the procedure utilized during his probation revocation. He also claims that information leading to revocation was falsified, his attorney was ineffective during that proceeding, and that he was denied due process of law because others similarly situation were not revoked. These claims are not properly before this court. To challenge his probation revocation, Rupp needed to timely seek judicial review in the circuit court by a petition for a writ of certiorari. ***State ex rel. Mentek v. Schwarz***, 2001 WI 32, ¶6, 242 Wis. 2d 94, 624 N.W.2d 150. A claim of ineffective counsel at a probation revocation proceeding may be raised by a petition for a writ of habeas corpus. ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522-23, 563 N.W.2d 883 (1997). Even if the petition for a writ of habeas corpus filed while this appeal was pending raised these claims, they are not, for reasons previously explained, subject

to review in this appeal. We do not address any claims regarding the revocation of Rupp's probation.

By the Court.—Judgment and order affirmed.

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