

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2002

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. 01-1945-CR

Cir. Ct. No. 95-CF-666

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE C. HARRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

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

¶1 PER CURIAM. On November 20, 1996, George C. Harrell was sentenced to fourteen years in prison for burglary, as a party to the crime. He was also placed on probation, consecutive to the fourteen-year prison sentence, based on a judgment convicting him as a party to the crime of false imprisonment and substantial battery by use of a dangerous weapon. All of the convictions arose

from an incident which occurred on September 18, 1995, in which Harrell's two accomplices forced their way into an apartment in Kenosha, severely battering the woman who lived in the apartment, demanding money, and restraining the woman's young son by tying him with duct tape. When the boy's father arrived home, the assailants struck him and fled. Harrell assisted the two assailants by helping them identify and locate the woman whose apartment they wanted to invade. He waited for them in the car while they committed the offenses, and fled with them.

¶2 Harrell has now appealed from an order denying his motion for sentence modification. We affirm the trial court's order.

¶3 Harrell contends that his due process rights were violated at sentencing because the trial court sentenced him on the basis of false information in the presentence report (PSI). He also contends that the trial court ignored corrections to the PSI made by his defense counsel, and erroneously exercised its discretion by considering that one of the victims had pending drug charges. Finally, Harrell contends that his trial counsel rendered ineffective assistance by failing to correct all of the inaccurate information in the PSI.

¶4 A defendant who alleges that a sentencing decision was based on inaccurate information must show that: (1) the information was inaccurate; and (2) that the trial court actually relied on the inaccurate information at sentencing. *State v. Harris*, 174 Wis. 2d 367, 378, 497 N.W.2d 742 (Ct. App. 1993). 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).

¶5 Harrell contends that the PSI inaccurately stated that he was a drug dealer at the time of his arrest, and that he used drug dealing as a means of supporting himself. He contends that the trial court relied on this inaccurate information, mischaracterizing him as a drug dealer and the offenses as drug related.

¶6 At the outset of the trial court's sentencing remarks, the court noted that it initially read about these offenses in the newspaper. Although acknowledging that the newspaper article did not say anything about drugs, based upon the nature of the events the trial court stated that it suspected that drugs were involved. The trial court stated, "I immediately had that suspicion, which of course was borne out by all of the information that I have obtained about this offense since." The trial court then concluded that the crime involved two of society's most serious problems, violence against other people and drugs. The trial court then discussed Harrell's personal history, including his history of drug dealing with his uncle, and his rehabilitative needs. It concluded by addressing society's needs, stating that when people read about these kinds of incidents, they think "the drug dealers are—now they're committing crimes [against] each other." The trial court noted that society was thus expending resources "to deal with people who are all involved in drugs and who are all committing crimes. So society has to be satisfied that there is both punishment and rehabilitation for incidents like this as well."

¶7 The trial court then proceeded to sentence Harrell to fourteen years in prison, followed by a consecutive term of probation. Harrell contends that the trial court's sentencing discussion establishes that it relied on inaccurate statements in the PSI, indicating that he was a drug dealer at the time of his arrest, and that he used drug dealing as a means of supporting himself.

¶8 Initially, we note that Harrell’s trial counsel corrected this alleged inaccuracy prior to sentencing in a document entitled “Defendant’s Corrections to the PSI Report.” In the corrections, counsel stated that Harrell denied being involved in drug dealing during the time period surrounding his arrest, and merely indicated to the PSI writer that he gambles, “and when he gambles he gambles with drug dealers.”

¶9 Harrell asserts that at sentencing, the trial court failed to consider these corrections. However, at the November 20, 1996 sentencing and in the June 25, 2001 order denying Harrell’s motion for sentence modification, the trial court stated that it reviewed and considered the corrections to the PSI presented by Harrell’s counsel at the time Harrell was sentenced. The record thus establishes that the trial court considered Harrell’s corrections to the PSI, which indicated that he was not a drug dealer at the time of these offenses, but that he gambled with drug dealers.¹

¶10 It is also noteworthy that in its sentencing comments, the trial court did not state that Harrell was supporting himself by drug dealing in September 1995, or was an active drug dealer at the time these offenses were committed. However, it did infer and conclude that the offenses involved drug dealers and were drug related.

¹ Harrell refers to the transcript of a hearing held on March 29, 1999, on his first postconviction motion, in which the trial court stated that the corrections document submitted by Harrell’s counsel at sentencing did not include a correction to the PSI writer’s claim that Harrell supported himself by dealing drugs and gambling. The accuracy of the trial court’s statement is irrelevant to this appeal, which is taken from an order entered two years after Harrell’s first postconviction proceedings.

¶11 Harrell appears to believe that if he was not an active drug dealer at the time these offenses were committed, the trial court erroneously exercised its discretion when it considered his history of drug dealing and whether the offenses were drug related. We disagree.

¶12 It is undisputed that Harrell had previously assisted his uncle as a drug dealer. The record also establishes that he had a lengthy history of drug and alcohol use, and had previously earned income from gambling and drug dealing, as well as through legitimate employment. In addition, Harrell's version of the offenses was that his co-defendants forced their way into the apartment of Roscoe Patterson, beat up Patterson's girlfriend and tied up his son in an attempt to collect a debt owed by Patterson. Although Harrell contended that the debt was a gambling debt, police responding to the scene immediately after the commission of the offenses discovered cocaine and drug paraphernalia for the sale of cocaine in Patterson's apartment.² In addition, Harrell admitted in his corrections to the PSI that he kept company with drug dealers and gambled with them.

¶13 Consequently, even accepting Harrell's contention that he was not dealing drugs at the time of these offenses, there was ample evidence in the record to support the trial court's inference that the crimes were drug related. The fact that Harrell may not personally have been dealing drugs in September 1995 does not negate the evidence that Patterson was engaged in drug sales. In addition,

² Harrell contends that the trial court should not have considered that Patterson faced pending drug-related charges. However, a sentencing court may "conduct an inquiry broad in scope and largely unlimited either as to the kind of information considered or the source from which it comes." *Handel v. State*, 74 Wis. 2d 699, 703, 247 N.W.2d 711 (1976). Information upon which a sentencing court bases its sentence need not be proven beyond a reasonable doubt and may include uncharged offenses and offenses which have not been prosecuted. *State v. Marhal*, 172 Wis. 2d 491, 502-03, 493 N.W.2d 758 (Ct. App. 1992).

while Harrell alleges that the crimes were committed in an attempt to recover money owed as a result of gambling, by his own admission he gambled with drug dealers, which presumably involved money obtained from drug sales. Because these offenses were committed in an attempt to recover money from a drug dealer, the trial court could reasonably infer that these offenses were drug related, even if Harrell and his accomplices were not attempting to steal drugs or recover a drug debt.

¶14 Harrell's final argument is that his trial counsel rendered ineffective assistance when he corrected the summary section of the PSI, wherein the PSI writer stated that "Mr. Harrell noted at the time of his arrest to involvement in drug dealing and gambling," but failed to specifically correct the "Employment" section of the PSI. In that section, the PSI writer stated that "Mr. Harrell indicated that as a means to support himself, prior to incarceration that he was involved in side work, drug dealing and gambling." In the employment section, the PSI writer also stated that "Mr. Harrell indicated periods of involvement in drug dealing as a means of earning income."

¶15 To establish ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998). To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Anderson*, 222 Wis. 2d at 408. "Stated differently, ... we look to see whether trial counsel's errors were so serious as to deprive the defendant of a fair

sentencing, the result of which is reliable.” *Id.* at 408-09. The final determinations of whether counsel’s performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *Id.* at 409.

¶16 Although the correction made by counsel regarding Harrell’s involvement in drug dealing referred to the summary section of the PSI, it encompassed the allegations set forth in both the employment section and the summary. Counsel stated: “Mr. Harrell denies being involved in drug dealing at the time of his arrest. He indicated to the PSI reporter that he gambles and when he gambles he gambles with drug dealers.”

¶17 Counsel’s statement clearly corrected the allegations that Harrell was an active drug dealer at the time of these offenses.³ No basis exists to conclude that Harrell was prejudiced by counsel’s failure to specifically refer to the employment section of the PSI when making the correction.

By the Court.—Order affirmed.

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

³ Harrell, by his own admission, was involved in drug dealing with his uncle at earlier times in his life. Consequently, trial counsel was not required to correct every reference to Harrell’s involvement in drug dealing.

