COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-1830-CR, 02-1831-CR, & 02-1832-CR

Cir. Ct. Nos. 01 CF 2086, 01 CF 5716, & 01 CM 5923

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLEETRA S. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charleetra S. Johnson appeals from judgments entered after she pled guilty to: conspiracy to commit forgery-uttering; misappropriation of personal identifying information; retail theft, as a party to a crime; and attempted theft by false representation. *See* WIS. STAT. §§ 943.38(2),

939.31, 943.201(2), 943.50(1m)(b), 939.05, 943.20(1)(d), and 939.32 (2001–2002).[1] She also appeals from an order denying her postconviction motion for sentence modification. Johnson alleges that the trial court: (1) erred when it denied her postconviction motion without an evidentiary hearing; and (2) violated her right of allocution. We affirm.

I.

¶2 Johnson appeals from three cases that were consolidated for sentencing. In case 01-CF-2086, Johnson was charged with one count of conspiracy to commit forgery-uttering and two counts of forgery-uttering, as a party to a crime, for her involvement in a counterfeit-check-cashing ring. Johnson was released on a personal-recognizance bond.

¶3 While the charges in case 01-CF-2086 were pending, Johnson was arrested for shoplifting merchandise from the Burlington Coat Factory. As a result, she was charged with committing retail theft, as a party to a crime, in case 01-CM-5923. Johnson was again released on bail.

¶4 Pursuant to a plea bargain, Johnson pled guilty to conspiracy to commit forgery-uttering; misappropriation of personal identifying information; and retail theft, as a party to a crime. The day before sentencing, the State learned that Johnson may have filed a fraudulent application for credit while she was on bail. The trial court adjourned sentencing to allow the State to investigate.

[1] All references to the Wisconsin Statutes are to the 2001–2002 version unless otherwise noted.

¶5 The investigation revealed that Johnson faxed a false application for an automobile loan in the amount of $14,131 to the Lifetime Credit Union. The State also learned that nine other financial institutions had received similar credit-application forms from Johnson. Johnson was charged with attempted theft by fraud and bail jumping in case 01-CF-5716. This case was also plea bargained, and Johnson pled guilty to attempted theft by fraud. The bail-jumping charge was dismissed and read-in for sentencing purposes.

¶6 At sentencing, Johnson's attorney told the trial court that he and Johnson had read Johnson's presentence-investigation report. Johnson's counsel proposed one correction to the report—that Johnson was living in her own apartment instead of with her aunt. After the State and Johnson's attorney gave their statements to the trial court, the court asked Johnson if she wanted to make a statement. Johnson told the court:

> First of all, I want to say that I'm very sorry for wasting your time and mine. I'm supposed to be in school right now and I'm here. I have just learned a valuable lesson how you can be a person in one month that your whole life be [sic] turned around in a couple of months.
>
> I've had the hardest time finding a job. I've never been in a technical field before. I've always worked in an office. I've always went [sic] to school and because I got mixed up wit [sic] the wrong people it's hard for me to find a job.
>
> I have applied for jobs for the last two years and nobody will hire me. I was staying with my aunt because I couldn't find a place to stay. Every apartment that I went to they ran a criminal check and I was just so embarrassed. My children are suffering because of this and I'm just very apologetic. I'm sorry. I should not be here. This is not me.

The trial court commented:

> That's bologna. This is completely you. I really am offended that you would truly say, "This is not me. I just got mixed up with the wrong people."
>
> The person who floated all the applications for credit was you and you alone. You're not charged with being a party to a crime there with a conspiracy to attempt to rip off credit granting institutions. That is really offensive and you have just lost your chance for a pure probation sentence.
>
> I am shocked that much as I was willing to give you a chance completely on probation that you instead would again try to minimize your dishonest criminal activity.

¶7 The trial court then sentenced Johnson to two years in prison on the forgery charge, with one year of confinement and one year of extended supervision; two years in prison on the misappropriation charge, with one year of confinement and one year of extended supervision; six months in prison on the retail-theft charge; and five years in prison on the attempted-theft charge, with two years of confinement and three years of extended supervision. The trial court imposed the misappropriation sentence consecutive to the forgery sentence; the retail-theft sentence consecutive to the misappropriation and forgery sentences; and stayed the attempted-theft sentence and placed Johnson on five years of probation, consecutive to the other sentences.

¶8 Johnson filed a postconviction motion seeking sentence modification. She claimed that she was sentenced based on inaccurate information because she had "corrections to make to the presentence report which were not heard by the court due to her … panicky state of mind … and the way matters progressed in court." Johnson also alleged that she was entitled to resentencing because the trial court "interrupted" her allocution without giving her a chance to explain her statements. She thus claimed that, if a hearing was granted, she could have provided further evidence that would have "properly inform[ed] the court as

to [her] views as to her sentencing and her offenses and the roles that she played in each."

¶9 The trial court denied the motion. It concluded that Johnson was not entitled to a hearing because her motion did not contain specific allegations of inaccuracies in the presentence report. It also concluded that any additional explanation Johnson would have provided would not have "altered the court's view of the defendant [or] the original sentencing disposition."

II.

¶10 First, Johnson alleges that the trial court erred when it denied her postconviction motion without an evidentiary hearing. We disagree. A defendant is not automatically entitled to an evidentiary hearing. The defendant must allege facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however, "'the defendant fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id.***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted).

¶11 Johnson claims on appeal that, at sentencing, she "wished to address the court further" because a "serious communication problem" arose during the plea colloquy. She thus alleges that a hearing is "most significant in this case"

because "without the factual determinations which would have been produced at such a hearing … [we] cannot fully, fairly, and meaningfully evaluate" her claim.

¶12 Johnson's allegations are conclusory and undeveloped. To establish a violation of the right to be sentenced on true and accurate information, a defendant must show by clear and convincing evidence that: (1) the information used in sentencing was inaccurate; and (2) he or she was prejudiced by the misinformation. *See* ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). In this case, Johnson does not allege what information in the presentence report was inaccurate or how she was prejudiced by the allegedly inaccurate information. Furthermore, she fails to allege what she would have told the court to clear up the "serious communication problem." Instead, Johnson simply claims that such information would have been "produced" at a hearing. Johnson misinterprets the showing required for an evidentiary hearing.

¶13 Before a trial court must grant an evidentiary hearing, the defendant must allege sufficient facts to raise a question of fact for the reviewing court. ***State v. Washington***, 176 Wis. 2d 205, 214–215, 500 N.W.2d 331, 335–336 (Ct. App. 1993). A defendant cannot make conclusory allegations hoping to supplement them at a later hearing. ***Levesque v. State***, 63 Wis. 2d 412, 421, 217 N.W.2d 317, 322 (1974). As we have seen, Johnson fails to allege facts sufficient to raise a question of fact regarding the accuracy of the information used in sentencing. Accordingly, the trial court properly denied Johnson's postconviction motion without a hearing.[2]

[2] In the section of her brief discussing the alleged inaccuracies, Johnson also cites the legal standard for sentence modification based on a new factor. *See* ***Rosado v. State***, 70 Wis. 2d (continued)

¶14 Second, Johnson claims that her right of allocution was violated. In Wisconsin, the right of allocution is codified at WIS. STAT. § 972.14(2), which provides, as relevant: "Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence."[3]

¶15 Johnson alleges that her right of allocution was violated because her initial comments "clearly set off the trial judge [and] resulted in her allocution being nothing more than a few words which, in the end result, left the court with the wrong impression of what [she] intended to state." Again, we disagree.

¶16 As we have seen, the trial court gave Johnson the opportunity to make a statement. There is no evidence that the trial court "interrupted" Johnson or prevented her from finishing her statement. What Johnson actually appears to claim is that her right of allocution was violated when the trial court formed a

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280, 288, 234 N.W.2d 69, 73 (1975) (A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."). She does not, however, develop this argument beyond the mere citation. ***Barakat v. Department of Health and Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed").

[3] Johnson alleges that her sentencing rights were violated under "Article I, Sections 1 and 8 of the Wisconsin Constitution, as well as the 5th and 14th Amendments to the United States Constitution." There is no federal constitutional right to allocution. *See* ***Hill v. United States***, 368 U.S. 424, 428 (1962); ***State v. Lindsey***, 203 Wis. 2d 423, 447, 554 N.W.2d 215, 224 (Ct. App. 1996). It is unclear whether there is a due-process right to allocution under the Wisconsin Constitution. ***Lindsey***, 203 Wis. 2d at 447 n.15, 554 N.W.2d at 224–225 n.15 (discussing conflict in Wisconsin case law). We do not resolve this issue, however, because, regardless of whether the right of allocution is characterized as a constitutional right or a statutory right, it is clear that Johnson had a full and fair opportunity at sentencing to address the court. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

negative impression of her character. Johnson does not point us to any case law, however, nor do we know of any, that makes a trial court's negative reaction to a defendant's statement a violation of the right of allocution. Indeed, a trial court, in the exercise of its sentencing discretion, may consider the defendant's failure to accept full responsibility for his or her behavior. *See* ***State v. Olson***, 127 Wis. 2d 412, 428, 380 N.W.2d 375, 383 (Ct. App. 1985) (sentencing court may consider defendant's remorse, repentance, and cooperativeness). There is no evidence that the trial court violated Johnson's right of allocution and, as noted, she does not even set out what she now claims she would have said at the time.

By the Court.—Judgments and order affirmed.

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