COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2477-CR **Cir. Ct. No. 2007CF393**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLE STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nicole Stewart, *pro se*, appeals from an amended judgment of conviction for four counts of Medicaid fraud, contrary to WIS. STAT.

§ 49.49(1)(a)3. (2005-06),[1] and from an order denying several postconviction motions. Stewart, who pled guilty, presents eight primary reasons why several counts should be dismissed or amended, her sentence should be reduced and the restitution order should be amended. We reject her arguments and affirm the judgment and order.[2]

BACKGROUND

¶2 Stewart was the founder and president of Compassionate Mothers, Inc., an entity that provided services to clients that were paid for by Medicaid. Following a fraud investigation that was instigated after an audit, Stewart was charged with numerous counts of Medicaid fraud related to seeking payment for services that were not provided. The second amended information alleged sixteen counts of knowing and willful Medicaid fraud and sixteen counts of failing to disclose Medicaid fraud, with intent. *See* WIS. STAT. § 49.49(1)(a)1. & 3. (2005-06).[3] Several of Stewart's employees were also charged with Medicaid fraud.

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] We do not attempt to address every sub-argument that Stewart presents in this *pro se* direct appeal. In many instances, Stewart's briefing is inadequate and difficult to understand. Those arguments that we do not address explicitly are denied because they are inadequately briefed and lack any discernable merit. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments). Also, to the extent that Stewart raises new arguments in her reply brief, we will not consider them. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995) (it is a well-established rule of appellate practice that the court will not consider arguments raised for the first time in a reply brief).

[3] WISCONSIN STAT. § 49.49 (2005-06) provided in relevant part:

> **(1)** FRAUD. (a) *Prohibited conduct.* No person, in connection with a medical assistance program, may:

(continued)

¶3 Stewart reached a plea agreement with the State and entered guilty pleas to four counts of failing to disclose Medicaid fraud, with intent. The remaining twenty-eight counts, as well as an additional three counts of Medicaid fraud and one count of felony bail jumping that were charged in a separate case, were dismissed and read in for sentencing purposes.[4]

¶4 At the plea hearing, trial counsel told the trial court that the facts alleged in the complaint provided a factual basis for Stewart's guilty pleas. Trial counsel then added:

> The only caveat to that, and I have discussed this in detail with my client, is … [that] my client doesn't specifically remember some instances…. She knew that there was a problem. She knew that services were being billed which had not been performed during the relevant time periods…. [So she] sent a memo to [some employees indicating] … that they needed to make sure that the database and the folders were updated … and she offered those employees $1,500 each to do that….
>
> … [S]he attempted to solve [the problem] by in a sense creating the false documents.

> 1. Knowingly and willfully make or cause to be made any false statement or representation of a material fact in any application for any benefit or payment.
>
> ….
>
> 3. Having knowledge of the occurrence of any event affecting the initial or continued right to any such benefit or payment or the initial or continued right to any such benefit or payment of any other individual in whose behalf he or she has applied for or is receiving such benefit or payment, conceal or fail to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized.

[4] *See* ***State v. Stewart***, No. 2007CF3690 (Wis. Cir. Ct. Milwaukee County, Oct. 22, 2007).

> … [S]he is certainly prepared to admit in the terms of the read-ins that she knew what was going on, she knew services were being billed which had not occurred, and she knew that and in fact tried to solve that problem by covering it up.

Stewart told the trial court that she agreed with trial counsel's summary of the facts supporting her guilty pleas.

¶5 The trial court found that the facts in the criminal complaint, trial counsel's statements and Stewart's statements provided a factual basis for the pleas. The trial court found Stewart guilty and ordered a presentence investigation.

¶6 At sentencing, the State recommended a sentence of three years' initial confinement and three years' extended supervision on one count. With respect to the three remaining counts, the State recommended that the trial court withhold sentence and place Stewart on six years' probation, consecutive to the first count. The State also sought restitution of $320,603.28, which included fraud relating to both the convictions and read-in counts. The State said that the four-to-eight years of initial confinement recommended by the presentence investigation writer was more incarceration than was needed.

¶7 Trial counsel asked the trial court to place Stewart on probation, with either "very significant imposed and stayed time" or a withheld sentence. He argued that doing so would give Stewart the opportunity to earn money to pay the restitution. With respect to the restitution, the trial court asked numerous questions about the basis for the requested amount and about Stewart's ability to pay. It specifically asked Stewart if she understood the restitution requested and whether she disputed the amount. Stewart indicated that she understood the amount and did not dispute it.

¶8 The trial court ultimately sentenced Stewart on three counts and withheld sentence on the fourth count. The trial court imposed an aggregate total of five years' initial confinement and nine years' extended supervision. With respect to the fourth count, the trial court withheld sentence and imposed a three-year period of probation, consecutive to the other sentences. The trial court also ordered Stewart to pay $320,603.28 in restitution.

¶9 Stewart filed a notice of intent to pursue postconviction relief and appellate counsel was appointed for her. After appellate counsel indicated that she intended to file a no-merit report, Stewart sought to represent herself. After corresponding with Stewart to ensure that she was knowingly, intelligently and voluntarily giving up her right to appellate counsel, we granted her request and permitted counsel to withdraw.

¶10 Stewart filed several postconviction sentence modification motions in the trial court that sought to modify her sentence in a variety of ways, including amending or dismissing several counts, ordering concurrent sentences and ordering Huber release.[5] The trial court denied the motions in a written decision, without a hearing. This appeal follows.

DISCUSSION

¶11 Stewart's appellate brief identifies eight main issues, each of which we address in turn. We have combined her final two arguments, which both relate to her sentence.

[5] Stewart did not file motions to withdraw her pleas.

I. Challenge to the sufficiency of the evidence.

¶12 Stewart asserts that she is challenging "the sufficiency of the evidence" that was used to support her guilty pleas. (Capitalization and bolding omitted.) However, Stewart's argument is more accurately characterized as a challenge to the accuracy of the information that was in the complaint and presented at the plea hearing through her trial counsel. In other words, Stewart does not argue that the factual allegations in the complaint fail to support a Medicaid fraud charge. Rather, she contests the veracity of those allegations. For instance, she argues that her employees offered "hearsay confessions" that were not reliable and she asserts that her employees were the ones who submitted the fraudulent claims.

¶13 We analyze this issue using the standard of review articulated in ***State v. Sutton***, 2006 WI App 118, 294 Wis. 2d 330, 718 N.W.2d 146:

> When we review a [trial] court's determination that a sufficient factual basis exists to support a plea, we look at the totality of the circumstances surrounding the plea to determine whether the court's findings were clearly erroneous. We approach this issue recognizing that where, as here, the plea is pursuant to a negotiated agreement between the State and the defendant, the court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea.

Id., ¶16 (citations and internal quotation marks omitted). In this case, the facts offered in support of the guilty plea—both those alleged in the complaint and stated by trial counsel at the plea hearing—clearly support the charges. Trial counsel stated, and Stewart agreed, that when she learned that her employees were billing for services that had not been performed, she attempted "to solve the

problem by covering it up," by offering her employees financial incentive to falsify records.

¶14 At issue, then, is whether Stewart can challenge the facts that she agreed to at the plea hearing. She cannot. A valid guilty plea forfeits all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. When Stewart chose to plead guilty, she forfeited her right to challenge discrepancies in the evidence against her. Moreover, at sentencing, Stewart personally told the trial court that when she became aware of improperly billed services, she "went to the various case managers to ask them to fix their documents in which case I should not have." We reject Stewart's argument because she forfeited her right to challenge the evidence against her when she pled guilty. *See* ***id.***

II. Allegations of judicial bias.

¶15 Stewart's second argument is entitled "judicial bias prior to sentencing." (Capitalization and bolding omitted.) She appears to argue that the trial court displayed bias when it denied her motion to be released on bail while she awaited sentence. We discern no basis for reversal.

¶16 "A person's right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the [F]ifth [A]mendment of the United States Constitution." ***State v. Hollingsworth***, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). "A litigant is denied due process only if the judge, in fact, treats him or her unfairly." ***Id.*** at 894.

¶17 Stewart suggests that the trial court displayed bias with respect to her request to be released on bail prior to sentencing. The record indicates that while

the case remained in trial status, Stewart missed a court date and the trial court issued a warrant for her arrest. One week after she was arrested pursuant to the warrant, Stewart appeared before the trial court and entered her guilty pleas. At the conclusion of the guilty plea hearing, trial counsel asked the trial court to release Stewart on bail while she awaited sentencing. He argued that Stewart had missed only a single court date, and that had been due to confusion over the date. He said Stewart should be released on bail so that she could make arrangements for people to care for her children after she was sentenced.

¶18 The trial court denied Stewart's request for bail, noting that Stewart had been convicted of four felonies and faced up to six years of imprisonment on each count. It noted that Stewart had missed one court appearance and that another criminal charge against her was pending in Waukesha County.[6] The trial court concluded that it was not appropriate to release Stewart on bail.

¶19 On appeal, Stewart does not directly challenge the trial court's exercise of discretion in denying her motion for release on bail while awaiting sentencing. *See* WIS. STAT. § 969.01(2)(a) (after conviction, release may be allowed in trial court's discretion). Rather, she argues the trial court displayed bias. We are not convinced that the record supports her assertion. The trial court considered appropriate factors and determined that release was not warranted. There is no indication that Stewart was treated unfairly. *See* ***Hollingsworth***, 160 Wis. 2d at 894.

[6] The Waukesha County charge was later dismissed.

¶20 Finally, within this section of Stewart's brief, she also references terms such as "duress," "illegally arrested," "deprived of her constitutional rights" and "coerced confession." To the extent Stewart is attempting to challenge her arrest, confinement, confession and other aspects of the proceedings, her arguments fail because they are inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments). We decline to develop her arguments for her. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

III. Suppression of evidence.

¶21 Stewart's third argument is entitled "unconstitutional suppression of evidence by the State." (Capitalization and bolding omitted.) She provides a long list of alleged evidence and facts that she claims should "be reconciled so that fairness can be achieved." Stewart's attempt to challenge the accuracy of the evidence fails because when she pled guilty, she forfeited her right to challenge discrepancies in the evidence against her. *See* ***Kelty***, 294 Wis. 2d 62, ¶18.

IV. Allegation that charges were multiplicitous.

¶22 Stewart argues that the four counts to which she pled guilty are multiplicitous in violation of the prohibition on double jeopardy contained in the United States and Wisconsin Constitutions. She contends that the four charges "constituted one offense" and therefore three of the convictions should be vacated. We are not convinced.

¶23 Whether charges are multiplicitous is a question of law subject to *de novo* review. ***State v. Schaefer***, 2003 WI App 164, ¶43, 266 Wis. 2d 719, 668 N.W.2d 760. If a multiplicity claim can be resolved based on the record, it can be

raised despite the entry of a guilty plea. *See* ***Kelty***, 294 Wis. 2d 62, ¶39. Because the record is sufficient to allow review of this issue, we will consider the merits of Stewart's claim. The following legal standards apply:

> [M]ultiplicity claims are examined under a two-part test. The first part asks whether the offenses are identical in law and in fact. The second part examines whether the legislature intended to authorize multiple punishments. If it is determined under the first part of the test that the charged offenses are identical in both law and fact, a presumption arises under the second part of the test that the legislature did not intend to authorize cumulative punishments. Conversely, if the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments.

State v. Eaglefeathers, 2009 WI App 2, ¶7, 316 Wis. 2d 152, 762 N.W.2d 690 (Ct. App. 2008) (citations omitted).

¶24 The four offenses to which Stewart pled guilty are identical in law: they allege violations of the same statute. However, they are not identical in fact. "Offenses are different in fact if the offenses 'are either separated in time or are significantly different in nature.'" ***Id.***, ¶8 (citation omitted). "The test for whether offenses are significantly different in nature 'is whether each count requires proof of an additional fact that the other count does not.'" ***Id.*** (citation omitted). Here, the four counts at issue involved four different clients. In each instance, Stewart failed to disclose that Medicaid was billed for services that were not provided to that client. Because the charges are not identical in fact, they are not multiplicitous.

V. Allegation that the audit violated government procedure.

¶25 Stewart argues that the audit of her company by the Department of Health and Family Services was improper because the "auditors made allegations

that were not substantiated." She asserts that the audit "resulted in prejudice to [her] constitutional rights." We reject this argument because Stewart forfeited the right to challenge the evidence against her—including the way the information was gathered and whether the evidence is reliable—when she pled guilty. *See* ***Kelty***, 294 Wis. 2d 62, ¶18.

VI. Challenge to the restitution order.

¶26 Despite the fact that Stewart stipulated to the amount of restitution at the sentencing hearing, she now asserts that the trial court "relied upon incorrect information which has resulted in a restitution discrepancy." (Capitalization and bolding omitted.) The record is clear that both Stewart and her attorney stipulated to the amount of restitution at the sentencing hearing. *See* WIS. STAT. § 973.20(13)(c) ("The court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim and to present evidence and arguments on the factors specified in par. (a)."). Stewart does not explain why she should not be bound by her stipulation, other than to assert that there were discrepancies in the evidence concerning the amounts owed and that Compassionate Mothers, Inc., or an insurance company should pay the restitution. Her argument fails.

VII. Sentencing.

¶27 The final two headings of Stewart's brief are entitled "sentencing disparity" and "consecutive sentences." (Capitalization and bolding omitted.) With respect to disparity, Stewart notes that in three other Wisconsin cases, people charged with Medicaid fraud received lower sentences than Stewart. She cites a single case for the proposition that similar offenders should be treated similarly, but she does not present any legal arguments concerning how the fact that different defendants received lower sentences should affect her sentence. Her

argument is inadequate and we decline to develop it for her. *See* ***Pettit***, 171 Wis. 2d at 646; ***Gulrud***, 140 Wis. 2d at 730.

¶28 Similarly, we reject Stewart's final issue because she has not presented any argument concerning the fact that she received consecutive sentences. *See* ***Pettit***, 171 Wis. 2d at 646**.** Rather, she simply quotes a case concerning consecutive sentences and notes that she received consecutive sentences. Consecutive sentences are permitted and Stewart offers no reason why her consecutive sentences are improper.

By the Court.—Judgment and order affirmed.

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