COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2984-CR **Cir. Ct. No. 1999CF1713**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY MINNIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Larry Minnis appeals from a judgment, entered upon a jury's verdicts, convicting him of eight felonies. He also appeals from an order denying postconviction relief. He claims that he should be resentenced for

his convictions in this matter in light of his successful motions to withdraw his guilty pleas in two other cases. We disagree and affirm.

BACKGROUND

¶2 Minnis seeks relief from the eight consecutive sentences imposed in this case, but the dispositions of numerous additional charges and accusations are pertinent to his challenge. We briefly set out the relevant allegations, and resolutions.

¶3 In the proceedings underlying the judgment of conviction in this case, a jury convicted Minnis in 1999 of five crimes against Cara S.: one count of kidnapping while armed, one count of first-degree sexual assault by threat of use of a dangerous weapon, two counts of first-degree sexual assault while aided or abetted by one or more other persons, and one count of armed robbery. Additionally, the jury convicted Minnis of two crimes against Dan L. Arent: armed robbery and kidnapping while armed. Finally, the jury convicted Minnis of operating William Elliot's motor vehicle without the owner's consent.

¶4 On the day of sentencing in this matter, Minnis entered a plea bargain that resolved four other pending cases. In Milwaukee County circuit court case No. 1999CF5798, Minnis pled guilty to second-degree sexual assault of Tamika F. by use of force. In Milwaukee County circuit court case No. 1999CF1718, he pled guilty to one count of armed robbery of Chenille E. In exchange for his guilty pleas, the State agreed to recommend sentences concurrent to each other and concurrent to any other sentence, and to dismiss and read in additional charges involving Chenille E.: kidnapping while armed and first-degree sexual assault by threat of use of a dangerous weapon, both as a party to a crime. The State also moved to dismiss and read in the charges in Milwaukee County

circuit court case No. 1998CF6035, alleging three offenses against Evelyn T., namely, kidnapping, armed robbery and first-degree sexual assault. Finally, the State moved to dismiss outright one count of escape charged in Milwaukee County circuit court case No. 1999CF2288.

¶5 The remaining matters proceeded to sentencing. The State described Minnis's participation in a crime spree lasting more than a year and advised the circuit court that DNA evidence implicated Minnis in uncharged sexual assaults against Tamika C., Michele L., Halaneia J., and Kelly S. The State argued that Minnis "is an extremely dangerous person and will be an extremely dangerous person for the rest of his life." Therefore, the State urged the circuit court to impose maximum consecutive sentences totaling 295 years in prison for the offenses against Cara S., Arent, and Elliot. As promised, the State sought concurrent sentences for the offenses against Tamika F. and Chenille E. charged in case Nos. 1999CF5798 and 1999CF1718.

¶6 The circuit court imposed consecutive maximum sentences for all of the convictions. It imposed 295 years in prison for the offenses in the instant matter and additional maximum consecutive sentences of twenty years and forty years respectively for the sexual assault of Tamika F. and the armed robbery of Chenille E. Thus, Minnis's aggregate penalty totaled 355 years in prison.

¶7 Minnis did not timely pursue a direct appeal. In 2008, however, this court reinstated Minnis's postconviction and appellate rights in the instant matter as well as in case Nos. 1999CF5798 and 1999CF1718. Minnis then sought postconviction relief in the circuit court. In case Nos. 1999CF5798 and 1999CF1718, he successfully moved to withdraw his guilty pleas on the ground that the circuit court failed to advise him that it was not bound by the terms of the

plea bargain. The circuit court subsequently granted the State's motions to dismiss those cases.[1] However, the circuit court denied Minnis's motion for resentencing in the instant matter, and Minnis appeals.

DISCUSSION

¶8 We begin by determining our standard of review. Minnis challenges an order denying resentencing for convictions that remain intact after two other cases were dismissed. Both parties state that we should consider the matter *de novo* because the judge who presided over the postconviction motion did not preside over the earlier sentencing proceeding. We are not bound, however, by the parties' concessions of law. *See* ***State v. Carter***, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516.

¶9 Here, neither party directs our attention to a controlling case. Minnis relies on ***State v. Herfel***, 49 Wis. 2d 513, 182 N.W.2d 232 (1971). That opinion addresses the standard of review when a successor judge considers a claim that newly discovered evidence warrants a new trial. ***Id.*** at 521. The State relies on ***State v. Coogan***, 154 Wis. 2d 387, 453 N.W.2d 186 (Ct. App. 1990). There, we held that "[w]hether due process warrants retrial is a constitutional question subject to *de novo* review." ***Id.*** at 395 (italics added).

[1] The full records of the proceedings in case Nos. 1999CF5798 and 1999CF1718 are not before us. Minnis's motions to withdraw his guilty pleas in those cases, however, are part of the record in this case because Minnis filed a consolidated pleading seeking postconviction relief in all three cases. The State's consolidated response is also in the record on appeal. The parties agree that the circuit court granted Minnis's motions for plea withdrawal in case Nos. 1999CF5798 and 1999CF1718 and the State's later motions to dismiss those cases. We may accept parties' stipulated facts. *See* ***Richards v. Badger Mut. Ins. Co.***, 2008 WI 52, ¶4, 309 Wis. 2d 541, 749 N.W.2d 581. We do so here.

¶10 More apt is our determination that when one conviction and accompanying sentence are vacated, resentencing on remaining convictions "is within the trial court's discretion." *See* ***State v. Sinks***, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (Ct. App. 1992). In ***Sinks***, we applied that rule when the defendant was sentenced by one judge and sought postconviction relief from a successor judge. *See* ***id.*** at 250-51, 255-56. Neither the State nor Minnis offers an argument distinguishing ***Sinks***, and we conclude that we must apply it here. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶11 This court will uphold a discretionary decision if the record reflects a reasoned application of the appropriate legal standard to the relevant facts. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). We are also obliged to uphold a discretionary determination if we can independently conclude that the facts of record applied to the proper legal standards support the circuit court's decision. ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993). We look for reasons to sustain a circuit court's discretionary determination. ***State v. Zanelli***, 223 Wis. 2d 545, 563, 589 N.W.2d 687 (Ct. App. 1998). With these principles in mind, we turn to the substantive issues.

¶12 Our analysis is guided by ***State v. Church***, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141. There, the supreme court addressed a claim for resentencing on four counts remaining after one conviction was vacated on double jeopardy grounds. ***Id.***, *passim*. The court held: "resentencing on convictions that remain intact after one or more counts in a multi-count case is vacated is not always required. Where, as here, the vacated count did not affect the overall dispositional structure of the original sentence, resentencing on the remaining counts is unnecessary." ***Id.***, ¶60. The supreme court further determined that "resentencing is procedurally and constitutionally permissible if the invalidation of

one sentence on double jeopardy grounds disturbs the overall sentence structure or frustrates the intent of the original dispositional scheme." ***Id.***, ¶26.

¶13 Minnis does not show that vacating the consecutive sentences in case Nos. 1999CF5798 and 1999CF1718 changed the overall structure of the eight consecutive sentences imposed in the instant case. At the original sentencing hearing, the circuit court ordered Minnis to serve the two sentences imposed in case Nos. 1999CF5798 and 1999CF1718 consecutively to each other and consecutively to any other sentences. "All consecutive sentences imposed for crimes committed before December 31, 1999, shall be computed as one continuous sentence." WIS. STAT. § 302.11(3) (2007-08).[2] Because the sentences in case Nos. 1999CF5798 and 1999CF1718 have now been vacated, Minnis's term of incarceration will end earlier than originally contemplated. His service of the first eight sentences, however, is unaffected.

¶14 Minnis also fails to demonstrate that vacating the sentences for crimes against Tamika F. and Chenille E. "frustrate[d] the intent of the original dispositional scheme." *See* ***Church***, 262 Wis. 2d 678, ¶26. When pronouncing the eight sentences imposed in the instant matter, the circuit court took into account all of the crimes described by the State, observing that Minnis "terrified the community during this one-year crime spree, literally taking people off the streets." The circuit court stated that Minnis "deserve[d] the worst because [he is] the worst," and that "maximum sentences are appropriate" because his victims

[2] At the time of sentencing in this case, the applicable statute provided that "[a]ll consecutive sentences shall be computed as one continuous sentence." *See* WIS. STAT. § 302.11(3) (1999-2000). All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

deserved protection from him "for the rest of their lives and the rest of their children's lives." In sum, the circuit court unambiguously articulated its intention to imprison Minnis for consecutive statutory maximum terms because, in the court's view, he is "a dangerous person" who posed a threat "to anyone who would want to walk the streets of the City of Milwaukee." Vacating the last sixty years of Minnis's 355-year aggregate period of incarceration does not frustrate the circuit court's intent to ensure that Minnis will do no further harm to any member of the community.[3]

¶15 Minnis nonetheless contends that the circuit court erred by denying resentencing on the eight intact convictions "because his original sentence was based on consideration of charges which have been dismissed." This argument simply does not support resentencing.

¶16 "[S]entencing courts are obliged to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 (citation and footnote omitted). Accordingly, "[a] sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted." ***Id.*** (footnotes omitted). Thus, a sentence is not

[3] We note that a probation and parole agent prepared a presentence investigation report in this case before the State charged Minnis with a crime against Tamika F. in case No. 1999CF5798 and while charges involving Chenille E. and Evelyn T. were pending and unresolved in case Nos. 1999CF1718 and 1998CF6035. The agent recommended the "maximum term allowable" based upon, among other factors, Minnis's dangerousness. Although a circuit court is not bound to accept the recommendations in a presentence investigation report, they are relevant factors in assisting the circuit court's determination of the type and length of sentence. ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41. Significantly here, the circuit court considered recommendations for maximum sentences that the presentence investigator made independent of and uninfluenced by Minnis's later guilty pleas and the State's accompanying concessions.

undermined merely because the circuit court took into account charges that later were dismissed.

¶17 Minnis also reminds this court that he has a due process right to be sentenced upon accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To earn resentencing based on a violation of this right, a defendant has the burden to show both that inaccurate information was before the circuit court and that the court actually relied on the inaccurate information in making the sentencing decision. ***Id.***, ¶26.

¶18 Minnis fails to demonstrate that the sentencing court relied on any inaccurate information. His successful motions for relief from the convictions in case Nos. 1999CF5798 and 1999CF1718 were not premised on evidence that he did not commit the crimes charged in those cases. Rather, he argued that the circuit court conducted a defective guilty plea colloquy by failing to establish his understanding that the circuit court could depart from the terms of the plea bargain. Also significantly, Minnis offered no argument that he did not commit offenses against the other sexual assault victims whose forensic examinations disclosed semen deposits from a donor with his DNA profile. Thus, Minnis fails to show that the circuit court relied on inaccurate information when imposing sentences in the instant matter.

¶19 Finally, Minnis argues that he should be resentenced "because the information submitted [about the subsequently dismissed charges] informed the court's sentencing decision in this case and was given greater weight than it otherwise might [have received]." This contention is no more than optimistic speculation that the circuit court might now impose lighter sentences and thus does not constitute a cognizable basis for resentencing.

¶20 We have rejected the notion that a defendant who has obtained relief from one conviction offers a legitimate reason for resentencing on remaining convictions by suggesting that he or she "would fare no worse" at a new proceeding. *See* ***State v. Krawczyk***, 2003 WI App 6, ¶37, 259 Wis. 2d 843, 657 N.W.2d 77. In ***Krawczyk***, the defendant pled guilty to several crimes and later successfully moved to set aside one conviction as multiplicitous. ***Id.***, ¶33. We upheld the circuit court's order denying relief from the remaining convictions and sentence. ***Id.***, ¶2. We explained:

> "[j]ust as a defendant should not be vindictively penalized for successfully challenging one of several convictions on appeal, neither should a defendant obtain a windfall from what is, in essence, a breach of his plea agreement with the State. That is, [the defendant] is entitled to be relieved of the consequences flowing from the wrongful conviction, but nothing more."

Id., ¶37 (citation omitted).

¶21 Here, Minnis entered into a plea bargain that resolved multiple allegations after a jury convicted him of eight other crimes. Like the defendant in ***Krawczyk***, he successfully obtained relief from his plea bargain. ***Krawczyk*** teaches that he is not entitled to a windfall in the form of resentencing on his remaining convictions based on a hope that he might fare better at a new sentencing proceeding. For all of the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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