

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 31, 2011

A. John Voelker
Acting 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. 2010AP2024-CR

Cir. Ct. No. 2009CM1032

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VLADIMIR GOROKHOVSKY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Vladimir Gorokhovsky appeals his judgments of conviction for two counts of battery and one count of disorderly conduct, all as

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

acts of domestic abuse. Gorokhovsky contends that the trial court infringed on his substantive and procedural due process rights when it permitted jurors to deliberate after the official hours of operation for the Ozaukee county courthouse and when it proceeded to sentencing that same evening. Because neither the facts nor the law support Gorokhovsky's arguments on appeal, we affirm the judgments and the trial court's order denying his motion for postconviction relief.

BACKGROUND

¶2 Gorokhovsky was charged with three counts of domestic abuse battery and three counts of disorderly conduct, all as acts of domestic abuse. On August 11, 2010, Gorokhovsky stood trial for the charges before a jury. The jury heard all testimony from the State and the defense and began deliberation at 3:53 p.m. At 6:05 p.m., the jury returned its verdict, finding Gorokhovsky guilty on two counts of battery and one count of disorderly conduct.

¶3 After the jury was excused, the court attempted to set a date for sentencing. The court suggested several dates, all of which created a conflict for either Gorokhovsky or his counsel. Defense counsel then requested that the sentencing be done immediately. The court then specifically asked the defense if it was prepared for sentencing; defense counsel responded, "As much as I am going to be at this point, sure." The court reiterated that other dates were available and attempted to ensure that the defense had sufficient time to prepare for the sentencing hearing; however, the defense still asked to proceed with sentencing immediately. Gorokhovsky was subsequently sentenced to eighteen months of probation for the two battery charges and a sixty-day jail term for the disorderly conduct conviction. He filed a postconviction motion requesting resentencing or a new trial. Both requests were denied by the trial court. Gorokhovsky appeals.

DISCUSSION

¶4 Gorokhovsky claims that he was denied constitutional due process rights because (1) he was forced into sentencing immediately following the jury trial conviction and (2) the jury was allowed to deliberate beyond normal working hours of the court. Insofar as Gorokhovsky frames these issues in terms of his constitutional right to due process, the issues present questions of constitutional fact reviewed using a two-step process. See *State v. Jennings*, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142. We uphold the trial court’s findings of historical or evidentiary fact unless they are clearly erroneous. *Id.* We review independently the trial court’s application of constitutional principles to those evidentiary facts. *Id.*

¶5 Gorokhovsky first argues that he was forced by the court into an immediate sentencing hearing and was therefore deprived of his right to present evidence of his character for the trial court to consider. Gorokhovsky’s argument fails. At the postconviction motion hearing, the court found that: (1) Gorokhovsky was offered several possible dates for sentencing; (2) the court proceeded to sentencing that evening at the defense’s request; (3) prior to doing so, the court specifically inquired as to whether the defense was prepared for an immediate sentencing hearing, and reiterated that other dates were available.² Our

² At the postconviction hearing, the court observed:

(continued)

review of the record confirms the trial court's finding that the matter proceeded to sentencing at the request of the defense and Gorokhovsky was in no way "forced" into an immediate sentencing hearing.³ Because the trial court proceeded to

Your second issue is asking to vacate the sentence and to have a resentencing because in your words, you were forced into sentencing. And I have no problem when people make motions, but I do have a problem when people mislead ... in their motions. And sir, you were not forced into sentencing. The court was trying very hard to get a date between you and your attorney, and I watched you and your attorney during that time. You, sir, were the one that told your attorney, let's just have the sentencing now. When your attorney said that you were ready to go to sentencing now, I asked, are you certain or something to that effect, and as relayed to this Court that you were ready to go to sentencing.

I again reiterated that you could find another date for sentencing, and I was requested at your behest to go into sentencing. So please let the record be very clear there was no force exerted on you going to sentencing that particular evening, and it was at your request that the sentencing occur[red] that night.

³ The record reflects that the trial court offered the defense no less than six sentencing dates, including first thing in the morning the following day, August 12, or late in the day on August 17, when counsel had no apparent conflict. None of the offered dates however were acceptable to either counsel or Gorokhovsky. While defense counsel initially indicated that she was unavailable during the month of September, she subsequently indicated some availability. However, without pursuing these dates further she advised the court that the defense wished to proceed. Defense counsel stated: "[J]ust do it now, since we can't find another date, if Court's available to do that now." The following exchange ensued:

THE COURT: And you're available to go to sentencing?

[Defense Counsel]: As much as I'm going to be able to at this point, sure.

THE COURT: Because we can do it tomorrow if that gives you time to prepare. I don't want the complaint being that he didn't have sufficient time to prepare for sentencing, so we're working with you on the date, so you can have tomorrow or the 20th or even the 23rd.

Defense counsel indicated that none of those dates worked, and the matter then proceeded to sentencing.

sentencing at Gorokhovsky's request, we need not address this issue further. We see no error. In any event, litigants who invite alleged trial court error have no basis to complain of the error on appeal. See *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). If any doubt existed as to whether Gorokhovsky invited the alleged error, it is nevertheless waived by his failure to object. See *State v. Gove*, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989) (even the claim of a constitutional right will be deemed waived unless timely raised in the trial court).

¶6 Gorokhovsky next claims that the trial court burdened his due process rights by allowing the jury to deliberate beyond the normal working hours of the court in violation of SCR 73.03 (1996). Gorokhovsky's argument is not supported by either facts or law, nor did he raise the issue before the trial court. The relevant portions of SCR 73.03 state:

(1) Jury deliberations shall take place under conditions and pursuant to procedures that are designed to maintain impartiality and to enhance rational decision making.

....

(4) The judge shall determine, after considering the needs of the jury, the parties and the court system, whether a jury will deliberate after normal working hours.

Gorokhovsky appears to contend that the court allowed the jury to deliberate under conditions that did not enhance rational decision making and that he was unfairly subjected to a criminal trial after closure of the official hours of courthouse operations. However, the trial court found that Gorokhovsky failed to present any evidence in support of his claim and we see nothing in the record to indicate otherwise. The only factual support of this contention Gorokhovsky offers is that the jury deliberated until 6:05 p.m. As the State points out, Gorokhovsky provided

no evidence as to when the courthouse in fact closed. In any event, SCR 73.03(4) clearly grants the judge discretion to permit the jury to deliberate beyond normal working hours as long as the needs of the jury, parties and court system are considered.

¶7 Gorokhovsky has not presented evidence or legal authority to support his contention that the trial court erred in allowing jury deliberations to continue until 6:05 p.m., and the record presents no facts that would support such an argument. Because there is no evidence or legal support that the jury deliberated under conditions that may have hampered rational decision making, Gorokhovsky's due process rights were not violated.⁴

CONCLUSION

¶8 The record in this case belies Gorokhovsky's contention that he was "forced" into sentencing immediately following his jury trial. The record demonstrates that the sentencing was conducted at the defense's request. Gorokhovsky also fails to present evidence that the jury's decision-making ability was hampered when the court permitted it to continue deliberating until 6:05 p.m., or case law supporting his contention that the trial court erroneously exercised its discretion in permitting it to do so. For the above reasons, we reject Gorokhovsky's contention that his due process rights were "burdened." We affirm

⁴ We reject Gorokhovsky's reliance on *State v. Laxton*, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. Gorokhovsky contends that the "unfair practice of subjecting defendant to criminal trial after closure of official hours of the courthouse operations constitutes deprivation of substantive due process right for fair trial." However, neither the cited portion nor any other portion of *Laxton* supports Gorokhovsky's argument. *Laxton* simply reiterates that a criminal defendant is afforded due process rights and adds nothing to Gorokhovsky's contention that *his* due process rights were violated in this case.

the judgments of conviction and the trial court order denying his motion for postconviction relief.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

