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DISTRICT II

November 22, 2023

To:

Hon. Michael Kenitz
Circuit Court Judge
Electronic Notice

Jacob J. Wittwer
Electronic Notice

Sarah Adjemian
Clerk of Circuit Court
Washington County Courthouse
Electronic Notice

Brian Demarco Mitchell, #569040
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

You are hereby notified that the Court has entered the following opinion and order:

2022AP1829

State of Wisconsin v. Brian Demarco Mitchell (L.C. #2019CF260)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Demarco Mitchell appeals from an order denying his WIS. STAT. § 974.06 (2021-22)¹ motion, in which he asserted that he was sentenced on inaccurate information.² On

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² In his motion, Mitchell also alleged: (1) the Washington County Circuit Court lacks jurisdiction over him due to what he claims was a defective Complaint; (2) his trial lawyer provided ineffective assistance for failing to object to the purportedly defective Complaint and for allowing the circuit court to rely on the Complaint as a factual basis for his plea; (3) the plea colloquy was deficient due to the court's reliance on the Complaint for the factual basis to support his plea because the Complaint was purportedly defective; (4) the court's acceptance of the oral amendment of the charges in the Complaint was vague and ambiguous; and (5) his double jeopardy rights were violated. The postconviction court rejected all of these assertions, and Mitchell does not raise any of them on appeal; thus, we deem them abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (Issues not briefed or argued are deemed abandoned.).

appeal, he claims: (1) the sentencing court relied “on inaccurate information and improper stereotypes” when it imposed sentence; (2) the sentencing court exhibited bias against him; and (3) his trial counsel provided ineffective assistance for not objecting to the circuit court’s alleged bias. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

In June 2019, the State charged Mitchell with three counts of identity theft—financial gain and three counts of bail jumping. The Complaint alleged that on March 28, 2019, just before 11:00 a.m., the victim, V.N., parked and locked her car at the grocery store in West Bend where she worked but left her purse visible in the front seat. When V.N. came out to her car during her work break, at about 2:00 p.m., she noticed the driver’s side window had been broken, and her purse, which contained two debit cards, was gone. Investigation revealed that one of the cards had been used on March 28th at 1:49 p.m. to buy \$557.42 of merchandise at a Target in Wauwatosa. Her second debit card was then used at 1:53 p.m. at the Target ATM to withdraw \$403.00. The second debit card was also used on March 28th at 2:13 p.m. at Saks OFF 5TH in Wauwatosa to buy \$232.28 worth of merchandise. Police obtained surveillance video and identified Mitchell as the person who used the victim’s debit cards. The victim’s bank confirmed that a call made from Mitchell’s cell phone changed the pin for that debit card.

Counts 1, 2, and 3 of the Complaint were based on the three fraudulent uses of the victim’s debit cards. Counts 4, 5, and 6 were felony bail-jumping charges for each violation of his bond condition because at the time he used the victim’s cards, Mitchell had been released on bond for a pending felony charge from another county. There was no surveillance video of the

actual breaking of the victim's car window or stealing of the purse, and, as a result, the State did not charge Mitchell with that crime.

In October 2019, Mitchell entered into a plea bargain with the State. He pled guilty to Counts 1 and 2 after the State reduced both charges from felony identity theft to misdemeanor fraudulent use of a credit card (less than \$2500), and he pled guilty to Count 4, felony bail jumping. The three remaining counts were dismissed and read in at sentencing. As a part of the plea bargain, the parties agreed to a joint sentencing recommendation consisting of nine months of jail time on each of the misdemeanor counts and three years' initial confinement followed by three years' extended supervision on the felony count with these sentences imposed but stayed in favor of three years of probation. The sentencing court imposed a slightly different sentence.³ First, it imposed but stayed nine months of jail time on each of the misdemeanor counts and ordered Mitchell to serve two years' probation, but it imposed sixty days of conditional jail time on Count 1. Second, it imposed but stayed three years' initial confinement and three years of extended supervision on the bail-jumping count—putting Mitchell on probation for three years, consecutive to the other counts. The circuit court set a date for Mitchell to report to jail for his sixty days of conditional jail time. When Mitchell failed to report to jail on the scheduled date, a warrant was issued for his arrest, his probation was revoked, and he began serving his sentences.

In March 2022, Mitchell filed a pro se motion to modify his sentence under WIS. STAT. § 973.19, which the circuit court denied because it was not filed within ninety days of the

³ The Hon. Todd K. Martens presided over the plea and sentencing hearing.

sentence.⁴ In July 2022, Mitchell filed the WIS. STAT. § 974.06 motion that is the subject of this appeal. He also filed an amendment to that motion in September 2022. The circuit court held a hearing after which it denied Mitchell’s motion.⁵ Mitchell thereafter filed a motion seeking a rehearing, arguing that he should have had counsel appointed to handle his § 974.06 motion and the district attorney should have had a time limit to respond to his motion. The circuit court denied Mitchell’s motion. Mitchell now appeals.

Discussion

Mitchell makes three arguments on appeal. First, he claims the sentencing court relied on inaccurate information. Second, he argues the sentencing court exhibited bias against him. Third, he asserts his trial counsel provided ineffective assistance when he failed to raise a judicial bias claim. Mitchell raises the second and third claims for the first time on appeal. He did not raise either claim in the circuit court.⁶ Accordingly, he has forfeited those issues, and we will not address them. See *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (“Arguments raised for the first time on appeal are generally deemed forfeited[.]” (quoted source omitted)). We therefore address only Mitchell’s claim that he was sentenced on inaccurate information, which he did raise in his postconviction motion.

⁴ The Hon. Andrew T. Gonring entered this order.

⁵ The Hon. Michael S. Kenitz heard the WIS. STAT. § 974.06 postconviction motion underlying this appeal.

⁶ Although Mitchell’s postconviction motion alleged ineffective assistance, that claim was based solely on counsel’s failure to object to what Mitchell claimed was a defective Complaint. His motion did not assert a claim of judicial bias or ineffective assistance based on a failure to make a judicial bias claim.

“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. When a defendant alleges he was sentenced on inaccurate information, he has the burden to prove by clear and convincing evidence that the information was inaccurate and that the circuit court relied on the inaccurate information when it imposed sentence. *Id.*, ¶¶2, 25-26; *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. If a defendant satisfies his burden, he is not automatically entitled to resentencing; rather, the State has the opportunity to show that the court’s reliance on inaccurate information was harmless error. *Tiepelman*, 291 Wis. 2d 179, ¶26; *Payette*, 313 Wis. 2d 39, ¶46. “An error is harmless if there is no reasonable probability that it contributed to the outcome.” *Payette*, 313 Wis. 2d 39, ¶46 (citation omitted).

Thus, the first step in our review is to determine whether Mitchell proved by clear and convincing evidence that information at his sentencing was in fact inaccurate. Mitchell argues the inaccurate information was comments by the sentencing court suggesting that it believed Mitchell was the one who broke the victim’s window and stole her purse. Mitchell steadfastly denied that he committed the break-in or robbery. He told the sentencing court that someone else had given him the debit cards. Mitchell argues that there is “not a shred of evidence” that he committed the robbery.

We conclude that Mitchell failed to prove by clear and convincing evidence that this information was inaccurate. Although the State did not charge Mitchell with the break-in and robbery, there was strong circumstantial evidence from which the sentencing court could reasonably infer that it was Mitchell who broke into the victim’s car and stole her purse. The victim’s debit cards were used the same day of the robbery, in a nearby city, within a short time of the robbery. Mitchell had no explanation as to how he got the debit cards so soon after the

break-in or why the unidentified person he claims broke into the car—purportedly to steal the purse—suddenly decided he did not want to use the stolen items.

Sentencing courts are allowed to make reasonable inferences from the Record even if a defendant has been acquitted of an offense or if the State is unable to prove it beyond a reasonable doubt. See *State v. Marhal*, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992); *State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197. Under the facts and circumstances presented to the sentencing court, it was reasonable for the sentencing court to infer that Mitchell was the one who broke into the victim’s car and stole her purse. There was sufficient circumstantial evidence to draw that inference. Thus, Mitchell failed to meet his burden that the sentencing court’s beliefs constituted inaccurate information.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals