COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP2679-CR
2010AP2680-CR

Cir. Ct. Nos. 2007CF4570
2009CF460

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVALLE RIMMER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

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

¶1 CURLEY, P.J. Lavalle Rimmer appeals two judgments convicting her of three counts of using personal identification to obtain a thing of value and one count of possession of personal identifying information with intent to use,

contrary to WIS. STAT. §§ 943.201(2)(a) & 939.05 (2009-10).[1] Rimmer also appeals the order denying her motion for postconviction relief. Rimmer presents three arguments on appeal. She argues that: (1) the trial court relied on inaccurate information in sentencing her, and that the reliance on inaccurate information was not harmless error; (2) the trial court erred in denying her motion for an evidentiary hearing on the aforementioned sentencing issue; and (3) trial counsel was ineffective. We affirm.

I. BACKGROUND.

¶2 Rimmer participated in an identity theft ring in which she and her cohorts used drivers' licenses and personal information—obtained from her employment at Northwestern Mutual Life Insurance Company, a financial services company—from various people to obtain credit cards and purchase merchandise. She consequently pled guilty to three counts of using personal identification to obtain a thing of value and one count of possession of personal identifying information with intent to use. As part of the plea agreement, eight additional charges—including four counts of forgery, two counts of possession of personal identifying information with intent to use, and two counts of use of personal identifying information to obtain a thing of value—were dismissed but read in at sentencing.

[1] This appeal concerns the judgments convicting Lavalle Rimmer in Milwaukee County Case Nos. 2007CF4570 and 2009CF460, which were consolidated and are considered together on appeal, as well as the subsequent order denying Rimmer's postconviction motion.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 After Rimmer left Northwestern Mutual, but before she was charged in the instant case, Rimmer started working at MGIC, another financial institution. At Rimmer's sentencing hearing, the State twice referred to the fact that Rimmer had obtained another job where she had access to the same type of information that she had misused at Northwestern Mutual. However, the prosecutor mistakenly stated that Rimmer had begun working at MGIC *after* her arrest, not before:

> One of the more troubling aspects of this case is, at least in my view, [] that after [Rimmer] was charged with this case, [she] sought employment giving her access to the same type of information.... And I just think that's a really bad idea for Ms. Rimmer….
>
> I've already noted that, after her arrest, she obtained employment in the same industry. I've analogized that choice as something akin to an alcoholic taking a job as a wine tester. I think that says there is a higher risk for her re-offense in this case.

¶4 The trial court made a single reference to this information at sentencing, concluding:

> I find the offense aggravated. And then when I look at the risk factors for possibly repeating this offense, well, again, I've already stated I see the pattern with the prior offense. And then I note you've applied for jobs since that seem to indicate that you don't realize you've got to stay away from any work in financial institutions.

¶5 At the sentencing hearing, the trial court also referred to numerous other factors that it considered in formulating Rimmer's sentence. For example, the trial court noted that the amount of the loss was over $70,000 and that her crimes caused "extreme" emotional and economic harm to the victims. The trial court also referred to the fact that the offenses derived from Rimmer's greed, that she abused her position of trust at a financial institution and persuaded another

person to abuse a position of trust, that she was a repeat offender, and that she was in absconder status when she committed these crimes. The court further found that Rimmer was not remorseful and that she had not accepted responsibility for her actions. Additionally, the trial court noted several mitigating factors, including that Rimmer's prior felony occurred eight years before the present offenses, that she was usually employed, and that she did not threaten violence or cause bodily harm.

¶6 Rimmer subsequently moved for postconviction relief, seeking resentencing. She asserted that the sentencing court relied on three pieces of inaccurate information regarding: (a) whether she solicited others to join the scheme; (b) whether she was in absconder status when she committed her crimes; and (c) whether she began working for another financial services company after she was charged with the crimes to which she pled guilty.[2] Rimmer also asserted that her trial counsel was ineffective for failing to investigate the correct information and to provide it for the trial court at sentencing.

¶7 In its response to Rimmer's postconviction motion, the State conceded that its sentencing memorandum contained inaccurate information regarding when Rimmer began her job with another financial services company. The State conceded that Rimmer began her job there *before* she was charged in the instant cases and not afterward, as it had argued in its memorandum and at sentencing.

[2] On appeal, Rimmer has abandoned her arguments that the trial court relied on inaccurate information regarding whether she solicited others to join the scheme and whether she was in absconder status when she committed her crimes.

¶8 The State argued that the sentencing court did not rely on the information regarding when Rimmer sought or started working with the second company. The State argued that the material part of the information was that Rimmer sought employment at a financial services company after she committed the crimes to which she pled guilty. Alternatively, the State argued that any error was harmless. The State also argued that Rimmer did not show that her trial counsel was deficient or that trial counsel's performance prejudiced her in any way, and that her ineffective assistance of counsel claim must therefore be rejected.

¶9 The trial court adopted the State's response as its decision in this case. It denied Rimmer's motion, and Rimmer now appeals.

II. ANALYSIS.

¶10 Rimmer presents three issues for appellate review. She argues that the trial court relied on inaccurate information in sentencing her, and that the reliance on inaccurate information was not harmless error. She further argues that the trial court erred in denying her motion for an evidentiary hearing on the aforementioned sentencing issue. Additionally, Rimmer argues that trial counsel was ineffective. We address each argument in turn.

A. Rimmer is not entitled to resentencing because the trial court did not rely on inaccurate information in sentencing her, and any error that may have resulted was harmless.

¶11 Rimmer first argues that she is entitled to resentencing because the trial court relied on inaccurate information in sentencing her and the resulting error was not harmless. "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. Whether this due process right has been denied is a constitutional issue that we review *de novo*. *See* ***id.***

¶12 "[I]n a motion for resentencing based on a [trial] court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the [trial] court actually relied on the inaccurate information." ***Id.***, 291 Wis. 2d 179, ¶¶2, 26, 31. Whether the trial court "'actually relied'" on the incorrect information at sentencing depends upon whether it gave "'explicit attention'" or "'specific consideration'" to it such that the misinformation "'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citation omitted). Stated another way, the defendant must show, by "clear and convincing evidence," that the trial court relied on the inaccurate information. *See* ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409; *see also* ***State v. Littrup***, 164 Wis. 2d 120, 131-32, 473 N.W.2d 164 (Ct. App. 1991) (applying the clear and convincing evidence burden to a due process claim of improper sentencing based on inaccurate information), *abrogated on other grounds by* ***Tiepelman***, 291 Wis. 2d 179, ¶31. This means that the defendant must show that reliance was "'highly probable or reasonably certain.'" *See* ***Harris***, 326 Wis. 2d 685, ¶35 (citation omitted). If the defendant shows that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. ***Tiepelman***, 291 Wis. 2d 179, ¶3.

¶13 Because the parties agree that there was inaccurate information before the sentencing court—namely, the timing of Rimmer's employment at MGIC relative to her arrest—the only issue before us is whether the trial court "actually relied" on the information. *See, e.g.*, ***id.***, ¶¶2, 14; ***Harris***, 326 Wis. 2d 685, ¶¶34-35. Rimmer argues that the trial court relied on the State's incorrect representation that she had begun working at MGIC after she was arrested for the

crimes committed while working for Northwestern Mutual. She claims that even though the trial court did not specifically reference the State's representation during sentencing, it is nonetheless highly probable that the trial court relied on it.

¶14 We conclude that the trial court did not rely on inaccurate information in sentencing Rimmer. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶¶2, 14; ***Harris***, 326 Wis. 2d 685, ¶¶34-35. As noted, the trial court articulated numerous factors it relied on in formulating Rimmer's sentence, including the egregiousness of the offenses, the "extreme" emotional and economic harm suffered by the victims, and the fact that Rimmer not only abused her position of trust at a financial institution, but also persuaded another person to abuse a position of trust. The trial court also relied on the fact that Rimmer's conduct was not isolated, but instead formed a troubling pattern. The court observed this pattern in Rimmer's prior offense, as well as in the fact that she began working at another financial institution at some point after committing the crimes at Northwestern Mutual. The trial court did not, however, rely on the State's inaccurate description of the timing of Rimmer's employment at MGIC relative to her arrest in fashioning her sentence. Although the court referred to the fact that Rimmer began working at a financial institution "since," it did not indicate whether it meant since her arrest, or since she committed the offenses leading to her arrest in this case:

> I find the offense aggravated. And then when I look at the risk factors for possibly repeating this offense, well, again, I've already stated I see the pattern with the prior offense. And then I note you've applied for jobs since that seem to indicate that you don't realize you've got to stay away from any work in financial institutions.

¶15 Moreover, given that the pattern of repeat behavior is the primary issue the trial court sought to address, whether Rimmer began working at MGIC

after committing the offenses at Northwestern, or after "getting caught"—i.e. arrested—for those offenses is immaterial.

¶16 Furthermore, we do not agree with Rimmer that her case is analogous to other cases in which the sentencing court was found to have relied on inaccurate information. *See* ***United States v. Tucker***, 404 U.S. 443, 448 (1972); ***State v. Groth***, 2002 WI App 299, 258 Wis. 2d 889, 655 N.W.2d 163, *abrogated on other grounds by* ***Tiepelman***, 291 Wis. 2d 179, ¶31; ***State v. Anderson***, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998). Unlike the case before us, where the trial court made no mention of the complained of inaccuracy, the trial courts in these cases more explicitly referenced the inaccurate information at sentencing. *See* ***Tucker***, 404 U.S. at 444 & n.1; ***Groth***, 258 Wis. 2d 889, ¶17 (specifically referencing inaccurate facts "'as pointed out by the prosecutor'") (brackets and emphasis omitted); ***Anderson***, 222 Wis. 2d at 410 ("Even though trial counsel had not reviewed the entire PSI, he did clearly alert the court that Anderson disputed many of the more serious allegations contained in the report. And the words of the trial court tell us that the court relied on those allegations in sentencing Anderson to eighty years in prison."). Additionally, unlike the case before us—where the inaccuracy that Rimmer calls to our attention had no effect on the trial court's reasoning—the inaccuracies on which the trial courts relied in the cases she cites directly impacted the defendants' sentences. *See* ***Tucker***, 404 U.S. at 448; ***Groth***, 258 Wis. 2d 889, ¶17 (specifically referencing inaccurate facts "'as pointed out by the prosecutor'") (brackets and emphasis omitted); ***Anderson***, 222 Wis. 2d at 410.

¶17 We further conclude that even if the trial court did rely on the State's inaccurate timing of Rimmer's employment at MGIC relative to her arrest, any error was harmless. *See* ***State v. Sveum***, 2009 WI App 81, ¶59, 319 Wis. 2d 498,

769 N.W.2d 53, *aff'd*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317. As noted above, the trial court based its sentence on a multitude of factors, including the fact that Rimmer exhibited a pattern of unsavory behavior—a pattern which began with her prior offenses and continued even after she left Northwestern Mutual. As evidenced by its comments at sentencing, the trial court focused its attention on the fact that Rimmer caused significant emotional and economic harm to her victims, yet showed no remorse, and in fact positioned herself such that she could repeat her past offenses. Therefore, even if there was error as to the timing of Rimmer's employment at MGIC relative to her arrest in the instant case, there was "'no reasonable possibility that the error contributed to the [sentence].'" *See* ***id.*** (citation omitted).

B. Rimmer is not entitled to an evidentiary hearing on her postconviction claim regarding resentencing because she has not alleged facts entitling her to relief.

¶18 Rimmer also argues that she is entitled to an evidentiary hearing on her claim that the court relied on inaccurate information in sentencing her. Whether Rimmer's postconviction motion alleges sufficient facts entitling her to a hearing is a question we analyze under a mixed standard of review. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine whether her "motion on its face alleges sufficient material facts that, if true, would entitle [her] to relief." *See* ***id.*** This is a question of law we review *de novo*. *See* ***id.***; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996), 548 N.W.2d 50. If Rimmer's motion does raise such facts, the court must hold an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Conversely, if the motion does not raise facts sufficient to entitle Rimmer to relief, or the motion "presents only conclusory allegations, or if the record conclusively demonstrates that [she] is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing." *See* ***id.***, ¶¶9, 12. We review the trial court's discretionary decisions under the

erroneous exercise of discretion standard. *See* ***id.***, ¶9; *see also* ***Bentley***, 201 Wis. 2d at 311.

¶19 For all of the reasons explained in part A above, Rimmer's motion does not allege sufficient facts entitling her to a hearing. Contrary to what Rimmer argues, the trial court did not rely on the State's inaccurate timing regarding Rimmer's employment at MGIC relative to her arrest in sentencing Rimmer; rather, it sentenced her based on the egregiousness of her crimes, the fact that her criminal behavior was developing into a "pattern," and the fact that she showed no remorse. Even if the trial court did rely on the State's inaccurate timing regarding Rimmer's employment at MGIC relative to her arrest, she still is not entitled to relief in these particular circumstances because any error would have been harmless. *See* ***Sveum***, 319 Wis. 2d 498, ¶59. We therefore conclude that Rimmer was not entitled to an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶¶9, 12.

C. Rimmer's trial counsel was not ineffective.

¶20 Additionally, Rimmer argues that her trial counsel was ineffective. To establish a claim for ineffective assistance of counsel, Rimmer must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. To establish deficient performance, Rimmer must show facts from which a court could conclude that trial counsel's representation was below the objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, she "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v.***

Washington, 466 U.S. 668, 694 (1984). If Rimmer fails to make a sufficient showing on one ***Strickland*** prong, we need not address the other. *See* ***id.*** at 697.

¶21 Rimmer's ineffective assistance of counsel claim fails because, as we explained above, the trial court did not rely on the State's inaccurate timing regarding Rimmer's employment at MGIC relative to her arrest in sentencing Rimmer; therefore, trial counsel's failure to correct the inaccuracy was not prejudicial. *See* ***id.*** at 694. Moreover, even if Rimmer were to establish that the trial court did in fact rely on the inaccurate information, for the reasons discussed above, we would conclude that Rimmer cannot show ineffectiveness because she was not prejudiced by what was a harmless error. *See* ***id.*** at 694; ***Sveum***, 319 Wis. 2d 498, ¶59. In either case, we would not need to address whether trial counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697; *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground).

By the Court.—Judgments and order affirmed.

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