

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 93-3350-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANKLIN A. BARTON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Franklin A. Barton appeals from a judgment of conviction for multiple counts of second-degree sexual assaults and related crimes, and from a postconviction order. The issues are whether Barton received ineffective assistance of trial counsel and whether the trial court erroneously exercised its sentencing discretion. We conclude that Barton has not shown any prejudice from counsel's performance. Furthermore, because

the trial court applied the proper sentencing factors, we conclude that its refusal to consider the defendant's history as a child abuse victim was harmless error. Therefore, we affirm.

Barton pleaded guilty to multiple counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS., and to other related crimes. The trial court imposed the maximum aggregate sentence. Barton moved for postconviction relief alleging ineffective assistance of trial counsel. The court denied the motion, ruling that because Barton suffered no unfair prejudice, it was unnecessary to determine whether counsel's performance was deficient. Barton appeals.

At the postconviction hearing, trial counsel and Barton testified differently on two claimed instances of ineffective assistance, namely counsel's failure: (1) to show Barton the presentence investigation report (PSI); and (2) to present an argument at sentencing. The trial court concluded that these errors and omissions were not prejudicial because Barton failed to show a likelihood that the court would have imposed a different sentence. The court found that counsel's version of events was more credible than Barton's version. Because this finding is not clearly erroneous, we review the court's order in the context of counsel's testimony.

The PSI contained numerous unfavorable characterizations of Barton, including comments from Barton's brother, a pastor. Pastor Barton referred to his brother as a thief and a con artist. However, trial counsel testified that he reviewed the substance of the PSI with Barton and that Barton did not tell him to correct any information in the PSI, but merely conceded that he and his brother never saw "eye to eye." Barton testified that the PSI mischaracterized his juvenile record and minimized the fact that he was abused as a child. He also claims that he would have advised the court that he had completed a drug and alcohol treatment program, to demonstrate his ability to adjust to supervision.

Trial counsel presented a very brief sentencing argument.¹ However, counsel testified that Barton directed him not to present an argument

¹ Trial counsel's entire sentencing argument was that "[t]he foremost motivating factor

because he deserved the maximum sentence.² Counsel further testified that Barton confessed his guilt to a police detective and wrote to the trial court admitting that he deserved the maximum sentence, against counsel's advice.³

To establish ineffective assistance of counsel, the defendant must prove that counsel's deficient performance was prejudicial, in that counsel's errors were so serious that the defendant was deprived of a fair trial. *State v. Marty*, 137 Wis.2d 352, 356-57, 404 N.W.2d 120, 122 (Ct. App. 1987). Whether a defendant was prejudiced by counsel's deficient performance is a question of law, which we review *de novo*. *Id.* Because we agree with the trial court that Barton suffered no prejudice, we need not decide whether trial counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

Barton claims that he received ineffective assistance of trial counsel because he did not personally review the PSI. A defendant is entitled to personally review his PSI. *State v. Skaff*, 152 Wis.2d 48, 56-57, 447 N.W.2d 84, 88 (Ct. App. 1989). The trial court denied the motion, concluding that the misinformation in the PSI was not prejudicial because the court was not influenced by this "ancient history."

We agree with the trial court's conclusion that there was no prejudice. First, Barton was aware of the substance of the PSI and did not attempt to "set the record straight" until after the court imposed his sentence. Second, the allegedly erroneous information principally related to his character. However, the court's assessment of Barton's character was so overwhelmingly unfavorable that it is not reasonably probable that correction of this "ancient history" would have affected the sentence it imposed. After considering the

(..continued)

for Mr. Barton in pleading guilty to the crime was to spare the victim of any further suffering. The impact of his pleas of guilty and the negotiated plea only reduced his total exposure by 10 years. That's all I have to say, Your Honor."

² Barton conceded that he had believed that he deserved the maximum sentence, but then changed his mind. Barton formulated a probation proposal that he discussed with trial counsel. However, counsel testified that ultimately Barton decided not to have him pursue the proposal with the prosecutor.

³ Barton's confession and correspondence to the trial court are undisputed.

gravity of the offenses, Barton's confession and his correspondence to the court admitting that he deserved the maximum sentence, we conclude that it is not reasonably probable that correction of the errors and omissions in the PSI would have resulted in a different sentence.

Barton also claims ineffective assistance of counsel because his trial counsel failed to present a substantive argument at sentencing. Thereafter, the trial court imposed the maximum sentence. Barton contends that counsel should have used his independent professional judgment and presented a substantive sentencing argument to override Barton's directive. The court's credibility finding, that counsel's version of events was more credible than that of Barton's, is not clearly erroneous. Furthermore, we agree with the court's conclusion that Barton suffered no prejudice from counsel's failure because no sentencing argument would have affected the sentence it imposed.

Barton also contends that the trial court erroneously exercised its sentencing discretion because it refused to consider the defendant's history of physical abuse as a child. Although the court's categorical refusal is error, because it must impose a sentence specifically designed for the particular defendant's commission of a specific crime, this error is harmless. The trial court properly applied the sentencing factors.

We review a sentence to determine whether the trial court erroneously exercised its discretion. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. *Id.* at 427, 415 N.W.2d at 541. The weight given to each factor is also within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The trial court extensively considered and applied the sentencing factors. It summarized the gravity of the offenses and stated that it had "rarely seen an offense, a series of offenses, which have disgusted [it] more." The court extensively considered Barton's character and noted his previous convictions and his failure to adjust to supervision. The court addressed Barton's character deficiencies and concluded that he is "an individual without any redeeming values at all." It then considered public protection and reasoned that Barton's

alcoholism and penchant for taking advantage of individuals who are particularly vulnerable compelled a lengthy sentence because "[t]he public has a right to be protected from [Barton], and I have a duty as the judge to ensure that they are protected from you." After applying the sentencing factors, the court explained to Barton why the sentencing guidelines for these crimes were too lenient and why it was imposing the maximum aggregate sentence. Barton's sentence was based on a proper application of the sentencing factors, rendering harmless the court's error to refuse to consider Barton's history of physical abuse as a child.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.