COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1995

NOTICE

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, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-3222-CR
94-3223-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNIE HUNTER,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Johnnie S. Hunter appeals from the judgments of conviction for retail theft, two counts of bail jumping, fleeing an officer, and operating vehicle without owner's consent, and from the order denying his motion for sentence modification. He argues that the trial court sentenced him based on inaccurate information, failed to consider factors that could have

resulted in a lesser sentence, and failed to award him credit for time served. We affirm.

Pursuant to plea negotiations that resolved numerous charges from Fond du Lac County and Milwaukee County, Hunter pled guilty to retail theft, two counts of bail jumping, fleeing an officer, and operating a vehicle without the owner's consent. The trial court sentenced Hunter to one year in the House of Correction for fleeing an officer, and nine months for retail theft and each count of bail jumping, with each nine month sentence concurrent with the other nine month sentences but consecutive to the one year sentence. The court ordered credit of 126 days served on the fleeing charge but did not order any credit on the other counts. The court also placed Hunter on probation for three years for the operating charge, consecutive to the other sentences.

In his postconviction motion, Hunter asked the trial court to grant credit for 126 days on the retail theft and bail jumping sentences. The trial court denied the motion. Subsequently, Hunter's appellate counsel moved the trial court to modify the sentence based on alleged new factors including: (1) the existence of time already served while in custody in Fond du Lac County, and (2) the fact that Hunter had been sentenced in Washington County and had received 126 days credit while in custody. The trial court granted an additional five days of credit for time served in Fond du Lac County, but denied any other additional presentence credit.

A defendant has a due process right to be sentenced based on accurate information. ***State v. Coolidge***, 173 Wis.2d 783, 788, 496 N.W.2d 701, 705 (Ct. App. 1993). To establish a due process violation, a defendant must show, by clear and convincing evidence, that information on which a sentencing court relied was both inaccurate and prejudicial. ***Id.*** at 789, 496 N.W.2d at 705. Whether a defendant has established that a trial court violated due process by basing a sentence on inaccurate information presents a legal issue subject to our *de novo* review. *See* ***State v. Littrup***, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991). We conclude that Hunter has failed to establish that the trial court relied on inaccurate information at sentencing.

Hunter first argues that the trial court erroneously exercised discretion by sentencing him "without having all sufficient facts prior to sentencing." Specifically, Hunter contends that the trial court's error derives first from "the conflict of the prosecutor's recitation of the appellant's criminal history, in part, claiming that the appellant had been to prison twice." As Hunter acknowledges, however, the prosecutor conceded that the computer print-out of his record might have been inaccurate in that respect. Hunter told the trial court that he had been sentenced to prison only once, the prosecutor did not dispute that, and the trial court did not comment on whether Hunter had been imprisoned once or twice. Hunter has offered nothing to establish his exact criminal record, nothing to dispute the prosecutor's statement that he had at least thirteen prior convictions, and nothing to suggest that the trial court relied on inaccurate information.

Hunter next contends that the trial court failed to sentence him based on accurate information by not determining whether defense counsel was correct when, in his sentencing recommendation, he expressed doubt about whether the Fond du Lac County District Attorney was aware of Hunter's cooperation with Milwaukee County law enforcement authorities when he recommended a nine month consecutive sentence. He argues that the trial court "had a responsibility to determine if counsel's assertion was correct since the appellant's cooperation with law enforcement in solving crimes placed [sic] a factor in the imposition of the Court's sentence." Once again, however, Hunter has failed to offer anything to establish that the trial court relied on inaccurate information. In fact, regardless of what the Fond du Lac District Attorney may not have known, the trial court stated, "I'm not going to send you to prison, and I think you're getting a break for the things you did in helping the police ...."

Hunter also maintains that the trial court "completely ignore[d] [his] mental health history ... as well as his long term addiction to narcotics which could have been a factor, that may have resulted in a lessor sentence being imposed." He argues that because "his significant mental and behavioral problems had affected his actions relevant to the charges of fleeing," the trial court should have ordered a presentence report. The record belies his claim. Defense counsel referred to a recent report "from Mendota, which sort of goes through Mr. Hunter's history and also his need for drug treatment." Because the trial court had information about Hunter in this report, and also because Hunter wanted to be sentenced immediately, defense counsel expressly

declined to request a presentence even though the trial court desired to have one. We reject this argument. *See* ***State v. Mendez***, 157 Wis.2d 289, 294, 459 N.W.2d 578, 580 (Ct. App. 1990) (party judicially estopped from taking position on appeal inconsistent with position taken at trial court level).

Hunter also argues that the trial court erred in failing to "articulate why a three (3) year term of probation would be more appropriate than a two (2) year term" as he had requested. Hunter, however, fails to develop his argument or offer any authority to suggest that a trial court is required to articulate exactly why it considers a three year period of probation to be more appropriate than the shorter term a defendant requests. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-647, 492 N.W.2d 633, 642 (Ct. App. 1992) (inadequately briefed arguments not considered).

Hunter also argues that the trial court erred in denying his motion for 126 days credit against his nine month sentences. Hunter first cites case law that would seem to imply that he believes he is entitled to such credit as a matter of law. Hunter is incorrect; he was not entitled to additional credit on *consecutive* sentences. ***State v. Boettcher***, 144 Wis.2d 86, 87, 423 N.W.2d 533, 534 (1988).

Hunter also asserts that his subsequent sentencing in a Washington County case, in which he received "126 days credit concurrent with the sentence imposed in Milwaukee County" somehow constitutes a new factor. He further maintains that he should receive 126 days credit towards his withheld sentence. Hunter has failed to develop either argument. *See* ***Pettit***, 171 Wis.2d at 646-647, 442 N.W.2d at 642.[1]

[1] Hunter also contends that the trial court erred by denying his motions without an evidentiary hearing. However, no hearing is required when the record conclusively establishes that a defendant is not entitled to relief. ***State v. Carter***, 131 Wis.2d 69, 78, 389 N.W.2d 1, 4, *cert. denied*, 479 U.S. 989 (1986). In this case, on each issue, the record provided a clear basis for the trial court's denial of relief. No factual issues remained for determination at an evidentiary hearing. *See* ***Smith v. State***, 60 Wis.2d 373, 377-378, 210 N.W.2d 678, 681 (1973) (where defendant raises no question of fact, no evidentiary hearing is necessary). Thus we conclude that the trial court correctly addressed Hunter's motions without holding a hearing.

By the Court. – Judgments and order affirmed.

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