COURT OF APPEALS
DECISION
DATED AND RELEASED

October 8, 1996

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.

NOTICE

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

No. 95-3200

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Walter Szymanski,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed*.

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

PER CURIAM. Walter Szymanski appeals from the trial court order denying his postconviction motion. Szymanski requested resentencing or, in the alternative, sentence modification based on new factors. He also contended that counsel was ineffective. Szymanski argues that the trial court should have granted his request for resentencing or, at the very least, should have granted an evidentiary hearing. We affirm.

The background of this case is summarized in this court's July 15, 1988 opinion and order, appended to this decision, denying Szymanski's previous appeal challenging his sentence. Szymanski again challenges his sentence, now arguing: (1) the trial court relied on alleged inaccurate information contained in the presentence report; (2) trial counsel rendered ineffective assistance by failing to provide him with the presentence report, thus denying him the chance to rebut the alleged inaccurate information; and (3) a change in parole policies constituted a new factor requiring resentencing.[1]

Szymanski first argues that he was denied due process because the trial court relied on the presentence report that, he contends, contained inaccurate information. Quoting ***United States ex rel. Welch v. Lane***, 738 F.2d 863, 865 (7th Cir. 1984), he argues that "'a sentence must be set aside where the defendant can show that false information was *part* of the basis for the sentence.'" (Emphasis added in appellant's brief.)

Due process requires that a defendant be sentenced on the basis of true and correct information. ***State ex rel. LeFebre v. Israel***, 109 Wis.2d 337, 345, 325 N.W.2d 899, 903 (1982). A defendant bears the burden of proving by clear and convincing evidence that the challenged information was inaccurate and that it produced prejudice. ***State v. Littrup***, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991).

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[1] The State does not concede either that trial counsel failed to give Szymanski the opportunity to read the presentence before sentencing or that the presentence contained inaccurate information. The sentencing transcript resolves neither issue. Early in the proceeding, Szymanski commented that he had gone over the presentence with his lawyer who further commented that there were no additions or corrections. Much later in the hearing, however, Szymanski stated that there were "some things in that Presentence Report I'm not privy to."

Nevertheless, in this appeal, the State has not challenged Szymanski's assertion that he could not have litigated these issues in his original postconviction motion and appeal, consistent with the requirements of ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994), because he was not given the opportunity to read the presentence until after filing his first postconviction motion and appeal.

Szymanski's sentencing hearing included statements and recommendations from the victim, her father, a prosecutor from each of the two counties where the assaults occurred, defense counsel, and Szymanski. In the course of lengthy comments, each prosecutor and defense counsel made several brief references to the presentence. In addition to specific references we will discuss, the trial court prefaced its sentencing decision by commenting:

> All right, at this time the Court will incorporate the entire 19-page Presentence Report into my sentence, so that it does not have to be repeated, let me just say there were many times where various portions were alluded to, and I made note of that.

Therefore, Szymanski contends that the trial court "thus expressly considered and relied upon *all* of the presentence report's allegations in imposing sentence." (Emphasis added in appellant's brief.)

In his postconviction motion, Szymanski challenged the accuracy of three portions of the presentence regarding: (1) whether he exaggerated the extent of his assistance to the Wisconsin Department of Justice as an informant on drug use at a health club; (2) whether he made an obscene gesture toward a young child in the victim's family; and (3) whether the fact that young females continued to frequent his home reflected any "preference for young females."

1. Assistance to the Justice Department. According to the presentence, for a number of years Szymanski assisted the Wisconsin Department of Justice as an informant regarding drug use at a health club. Szymanski maintains that the presentence "inaccurately reflected the nature and extent of [his] assistance ..., asserting and permitting the conclusion that [he] was exaggerating his involvement in order to obtain a lesser sentence." As summarized by the trial court in its decision denying Szymanski's postconviction motion:

> The presentence writer interviewed both Szymanski and the DOJ agent who was his contact when he was acting as an

> "informant." Based on these interviews, the presentence writer essentially concluded that Szymanski was probably overstating his involvement in the health club drug investigation. This is because Szymanski told the presentence writer that his involvement with the DOJ agent continued for over two years (although he admitted that for a year and a half "nothing was happening" with the information he was providing to the agent.) The DOJ agent supposedly told the presentence writer that his contact with Szymanski was more sporadic than Szymanski implied, and consisted of two or three in-person contacts and five phone calls. The DOJ agent did acknowledge to the presentence writer the accuracy of Szymanski's information, but essentially said it was not significant to the investigation in that none of the arrests produced by the investigation resulted from Szymanski's involvement. Because of these discrepancies between Szymanski's version of his cooperation and the DOJ agent's recollection, the presentence writer concluded that Szymanski was exag[g]erating his involvement.
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> Szymanski now submits an affidavit of an investigator who recently interviewed the same DOJ agent. The investigator indicates that the DOJ agent told him that Szymanski's involvement with the DOJ did in fact continue over a period of two years, but reconfirmed that that involvement was only sporadic in nature after an initial six week period of "quite extensive" activity. The agent apparently did not modify his earlier opinion that Szymanski's information, while correct, did not contribute to the results of the investigation.

On appeal, Szymanski does not challenge this trial court summary. Thus, any inaccuracy would relate essentially to nothing more than the length of Szymanski's cooperation and the presentence writer's possible

implication that Szymanski exaggerated the extent of his cooperation with the Justice Department. At the sentencing, however, although one of the prosecutors briefly addressed this subject, the court never mentioned it. Denying Szymanski's postconviction motion, the trial court explained:

> The alleged inaccuracy is so slight and so collateral to the facts of the case as to be meaningless in the context of Szymanski's sentencing.... [W]hether or not Szymanski exa[g]gerated his level of cooperation with the DOJ on a wholly unrelated drug investigation is not terribly relevant to the sentencing equation.
>
> ...[T]he fact is that the defendant's cooperation with the DOJ on the health club drug investigation -- whether he overstated it or not -- is totally collateral to the proceedings in this case.... [I]f the sentencing judge had had the present information about Szymanski's cooperation with the DOJ before him at the time of sentencing, it would have had no impact on his decision. The transcript indicates that while the sentencing judge incorporated into the record the entire presentence and all other matters brought to his attention in the sentencing proceeding, he did not mention, in his sentencing remarks, the DOJ investigation and any role the defendant might have played in it. The record is very clear that the sentencing judge was primarily concerned about the seriousness of the defendant's conduct towards the fourteen-year old victim, its impact on her and her family and the defendant's abuse of both his position and the trust of this family.... I do not believe it is reasonable, based upon this record, to suggest that the sentence would have been any different had the present information about the defendant's role with the DOJ been available at the time of sentencing. Accordingly, the defendant has not shown that the alleged inaccuracies on this issue were either material or were relied upon by the sentencing judge,

> nor has he shown that but for the error of his counsel in not showing him the presentence, the result would have been different.

We agree. Although ***Welch*** provides support for Szymanski's assertion that resentencing is required where a defendant establishes that false information formed even "part of the basis for the sentence," ***Welch***, 738 F.2d at 865, ***Welch*** also calls on a reviewing court "to determine whether the court gave the misinformation 'specific consideration,' so that the information formed part of the basis for the sentence." ***Id.*** at 866. Szymanski has offered nothing to establish that the alleged inaccuracy was specifically considered at all or, if it was, that it could have had any possible impact on the sentence. Thus, even assuming the inaccuracy Szymanski asserts, we conclude that Szymanski has failed to establish prejudice.

2. Obscene Gesture. The sentencing court referred to the presentence and asked Szymanski:

> What about those two references to you grabbing your genital area as somebody went by sticking out your tongue and licking your lips, seductive obscene gestures referred to when Lisa went by one time or when you drove past her house?

Szymanski responded:

> A comment on what I think you're referring to, and that's when I was working out in the garage or by the garage or coming from the neighbor's house, ..., and I stuck my tongue out once when they were staring at me and we said words back and forth across the street. That was immature and that was wrong. That's all I can say. That happened a long time ago. I mean, it's been a year since these charges have come, and it's been a year of daily thinking about all this.

The sentencing court made no further comment on this subject and did not refer to it when articulating the reasons for the sentence.

In support of his postconviction motion, Szymanski submitted affidavits not disputing the tongue gesture but attributing the obscene genital gesture to a teenage neighbor. Szymanski offers no authority, however, to support his apparent implicit theory: even when a defendant responsively replies to a sentencing court's direct inquiry about information in a presentence, and even when the sentencing court says nothing to suggest that it has disbelieved or rejected the defendant's account, and even when the sentencing court makes no further reference to the incident, the defendant still has been denied due process by virtue of the court's reliance on the alleged inaccurate information, and still has been denied effective assistance of counsel by virtue of counsel's alleged failure to provide the presentence.

This theory makes no sense. Although Szymanski also replied to the sentencing court's inquiry that "I guess there is some things in that Presentence Report I'm not privy to," the fact remains that the sentencing court disclosed the information to Szymanski and Szymanski commented on it. Under these circumstances, Szymanski has offered nothing to establish any denial of due process.

3. Young Females. The presentence stated that the victim's father advised that a neighbor of Szymanski could provide information about young females continuing to frequent Szymanski's home and his "preference towards younger females." Szymanski submitted affidavits asserting that the females were daughters of a neighbor who were visiting for innocent reasons, and that two of them were adults. Once again, however, this area of alleged inaccuracy was confronted at sentencing. Defense counsel commented:

> The indication [in the presentence] that there are young girls coming in and out of his house. Even today, I discussed with him and he still has a very close relationship with a neighbor who has young children. I have spoken to that neighbor who verifies that for probably the last two months Mr. Szymanski

> had essentially lived with him, ate with him, did the dishes with him and his family, and that his young children have in fact, his teenage children have in fact been in and out of Dr. Szymanski's home many, many times. So there may well be very significant substance to that.

Here, again, the sentencing court made no further comment indicating any disbelief or rejection of counsel's account, and made no reference to this subject when articulating the basis for the sentence. Accordingly, as we have just explained, because the record establishes that Szymanski, in fact, was confronted with and had the opportunity to respond to the very information he now disputes, and because the record offers nothing to suggest any reliance on inaccurate information, we reject Szymanski's claim.

Szymanski claims that counsel failed to provide him with the presentence and, as a result, that he was unable to respond to the alleged false statements or offer witnesses to rebut them. Thus, he maintains that counsel rendered ineffective assistance.

To prevail on a claim of ineffective assistance, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to establish either deficient performance or prejudice, his claim fails and, therefore, "[r]eview of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice....'" ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990) (quoting ***Strickland***, 466 U.S. at 697). To establish prejudice, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

Here, for the reasons we have explained, even assuming counsel failed to provide Szymanski with the presentence report, the sentencing was

unaffected and, therefore, Szymanski has not established that he was prejudiced by counsel's alleged deficient performance.[2]

Szymanski also argues that the trial court erred in denying sentence modification based on a new factor. He contends that "the sentencing court's view that [he] would move quickly through the system to early parole was rendered erroneous by subsequent changes in Department of Corrections regulations." He submitted affidavits to show that "[t]he effect of those changes was to extend dramatically and mechanistically the time [he] would have to spend in Maximum and Medium security before being eligible for reduction to Minimum and a realistic possibility of release on parole."

Szymanski points to the comments of the Milwaukee County assistant district attorney, computing parole eligibility dates and recommending a fifteen to thirty year sentence in part because, even with such a sentence, "I don't think this defendant ... is going to spend that much time in the prison systems. And definitely not that much time in a maximum security facility." Although the trial court acknowledged the accuracy of the prosecutor's computation during the prosecutor's presentation of his recommendation, the court did not refer in any way to Szymanski's probable parole eligibility when it articulated its reasoning and pronounced Szymanski's sentence.

In ***State v. Franklin***, 148 Wis.2d 1, 14, 434 N.W.2d 609, 613 (1989), the supreme court held "that a change in parole policy cannot be relevant to sentencing unless parole policy was actually considered by the circuit court." The supreme court rejected the proposition that a prosecutor's comments on parole eligibility, absent a sentencing court's explicit reference to those comments, established such actual consideration:

> [Franklin] asserts that, although the circuit court did not explicitly consider parole board policy, the prosecutor

[2] Moreover, the apparent insignificance of all three areas of alleged inaccuracy can be gleaned from this court's opinion in Szymanski's first appeal. None of these three alleged inaccuracies related in any way to either the factors Szymanski challenged or the factors this court concluded formed the basis for the sentencing.

> discussed parole policy and thus it was implicitly considered by the sentencing judge.
>
> ....
>
> In this case ... the sentencing court never expressly considered parole eligibility. It would be improper to impute the thoughts of the prosecutor to the sentencing judge....
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> We do not read ***Kutchera [v. State***, 69 Wis.2d 534, 230 N.W. 2d 750 (1975)], to imply that parole policy is automatically relevant to a sentencing decision when it is mentioned, not by the court, but by the prosecutor. In order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing. It is not a relevant factor unless the court expressly relies on parole eligibility. If the court does base its sentence on the likely action of the parole board, it has the power to protect its own decree by modifying the sentence if a change in parole policy occurs. Because it was not expressly considered by the court in sentencing, parole policy was not relevant to the imposition of this sentence.

Franklin, 148 Wis.2d at 14-15, 434 N.W.2d at 614 (footnote omitted).

Franklin controls. Despite the prosecutor's comments, the sentencing court did not "explicitly" or "expressly" consider parole policy. Thus, we reject Szymanski's claim that changes in parole policy constituted a new factor.[3]

[3] In his brief to this court, Szymanski also mentions that two other "new factors" justify resentencing: the information regarding his cooperation with the Department of Justice, and the information regarding the obscene gesture. He does not, however, offer any argument on these

Finally, Szymanski argues that the trial court erred in resolving these issues without an evidentiary hearing. An evidentiary hearing often is required to resolve issues that turn on material disputed facts. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). However, where "the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Nelson v. State***, 54 Wis.2d 489, 497-498, 195 N.W.2d 629, 633 (1972); *see* ***State v. Bentley***, 201 Wis.2d 303, 309-311, 548 N.W.2d 50, 53 (1996). In this case, although factual uncertainty remains regarding counsel's alleged deficient performance and whether any information in the presentence was inaccurate, no uncertainty attends the issue of whether Szymanski's sentence was affected by any alleged error. The record is clear and, accordingly, the trial court properly denied Szymanski's motion without an evidentiary hearing.

By the Court. – Order affirmed.

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

AN APPENDIX CONSISTING OF THIS COURT'S EARLIER SUMMARY ORDER DATED JULY 15, 1988, HAS BEEN ATTACHED TO THIS OPINION. THE APPENDIX CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

(..continued)
points other than those we have already rejected, or any separate theory under "new factor" analysis. Thus, we need not discuss them further. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments).

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