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April 29, 2015

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

2014AP1607-CR State of Wisconsin v. William Bransford (L.C. #2001CF6890)

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

William Bransford, *pro se*, appeals an order denying his postconviction motion for permission to review his presentence investigation report (PSI). 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 (2013-14).[1] We affirm.

A jury convicted Bransford in 2002 of six counts of second-degree sexual assault with use of force, one count of robbery with use of force, and one count of kidnapping. The trial court

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

ordered preparation of a PSI in advance of sentencing.[2] When the matter reconvened for the sentencing hearing, however, Bransford objected to the PSI because its author, without consulting or advising trial counsel, had required Bransford to take a psychological examination. Bransford sought to strike the PSI and to require a new PSI prepared by an author who was uninfluenced by the results of the psychological examination.

The trial court proposed going forward with the sentencing, explaining that the court had not read the PSI and would not do so. To further ensure that the psychological examination would not affect Bransford's sentencing, the trial court ordered the State to limit any discussion of the contents of the PSI to objective information and biographical data. The trial court additionally assured Bransford that it would seal all of the copies of the PSI so that its contents could not be obtained from the court file.

Bransford, through trial counsel, said he was "completely prepared to proceed" as the trial court proposed. The State also agreed with the trial court's solution. The State further advised that it had already identified for defense counsel the portions of the PSI the State would discuss, and defense counsel had no objection.

The trial court then conducted the sentencing hearing without reviewing the PSI. At the conclusion of the proceeding, the trial court imposed eight consecutive sentences. The

[2] The Honorable Jacqueline D. Schellinger presided over the trial and imposed sentence in this matter. We refer to Judge Schellinger both as the trial court and as the sentencing court. The Honorable David L. Borowski presided over the postconviction motion that underlies this appeal. We refer to Judge Borowski as the circuit court.

aggregate term of imprisonment was 168 years, bifurcated as 112 years of initial confinement and 56 years of extended supervision.

Bransford sought resentencing with the assistance of appointed counsel, who argued the sentences were unduly harsh. Bransford did not prevail. His appellate counsel pursued a direct appeal on his behalf, and this court summarily affirmed. *See* ***State v. Bransford***, No. 2003AP3068-CR, unpublished op. and order (WI App. Dec. 17, 2004).

Bransford next filed the postconviction motion underlying this appeal, seeking an order permitting him to review the sealed PSI. He claimed his postconviction counsel "should have requested to open the sealed PSI report because information within the report was relevant to the resentencing motion and would qualify as a new factor." Bransford asserted that, because he is now a *pro se* litigant, he is entitled to review the PSI himself. As authority for his asserted entitlement, he cited WIS. STAT. § 972.15(4m) and ***State v. Parent***, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915. The circuit court denied the motion in a written order, and he appeals.

The parties agree that the decision to grant or deny access to a PSI after sentencing rests in the circuit court's discretion. We agree as well. *See* ***State v. Zanelli***, 212 Wis. 2d 358, 378, 569 N.W.2d 301 (Ct. App. 1997). Accordingly, our standard of review is highly deferential. *See* ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶16, 296 Wis. 2d 337, 723 N.W.2d 131. We will sustain a discretionary decision if the circuit court undertook a reasonable examination of the facts and the law, and the record shows a reasonable basis for the circuit court's determination. ***Id.***, ¶¶16-17.

Bransford first claims the circuit court erred because WIS. STAT. § 972.15(4m) affords a defendant the opportunity to review a PSI upon a showing that the defendant is unrepresented.

The statute provides, in pertinent part: "[t]he district attorney [and] the defendant's attorney ... are entitled to have and keep a copy of the presentence investigation report. If the defendant is not represented by counsel, the defendant is entitled to view the presentence investigation report but may not keep a copy of the report." ***Id.*** Interpretation and application of statutory language presents a question of law for our *de novo* review. *See* ***State v. Soto***, 2012 WI 93, ¶14, 343 Wis. 2d 43, 817 N.W.2d 848.

In this case, Bransford has already viewed the PSI. At sentencing, trial counsel advised the court, while Bransford was in the courtroom: "Mr. Bransford read this report in its entirety." Bransford did not contradict his counsel's remark. The statutory provision in WIS. STAT. § 972.15(4m) barring the defendant from keeping a copy of the PSI demonstrates that an offender has only a limited opportunity to review the document. Bransford fails to show that § 972.15(4m) affords a prisoner who is unrepresented in collateral proceedings the right to examine a PSI that he or she has previously reviewed.[3] We do "not read into the statute language that the legislature did not put in." ***Brauneis v. LIRC***, 2000 WI 69, ¶27, 236 Wis. 2d 27, 612 N.W.2d 635.

Next, Bransford claims the circuit court erroneously relied on ***Parent*** to deny his motion. In fact, Bransford relied on ***Parent***. The circuit court referred to ***Parent*** only to help Bransford understand why he misplaced his reliance on that case. In ***Parent***, the supreme court held that a

[3] Bransford states in his appellate brief that "he only gleaned [sic] over the PSI during the sentencing proceeding." This ambiguous remark, apparently offered to suggest Bransford has not fully reviewed the PSI, does not undermine the clear record showing Bransford read the PSI "in its entirety." "Assertions of fact that are not part of the record will not be considered." ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991).

convicted person may view a copy of the PSI in aid of his or her direct appeal under the no-merit procedures described in WIS. STAT. RULE 809.32. *See* ***Parent***, 298 Wis. 2d 63, ¶43. The supreme court subsequently held that "the rule of ***Parent*** is confined to no-merit appeals." *See* ***State ex rel Office of the SPD v. Court of Appeals***, 2013 WI 31, ¶29, 346 Wis. 2d 735, 828 N.W.2d 847. Bransford's case does not involve a no-merit appeal. Therefore, ***Parent*** is inapplicable, as the circuit court correctly explained.

Bransford next assigns error to the circuit court's conclusion that the PSI "could not be utilized for new factor purposes." In his view, because the sentencing judge never read the PSI, "any information within the psychological examination would qualify as information that [the sentencing judge] was unaware of at the time of sentencing.... The mere fact that information was not considered by [the] judge ... should qualify it as a new factor upon future motions." Bransford misunderstands the legal concept of "new factor." In the context of sentencing proceedings, a new factor is '"a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties."' ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). In this case, the psychological examination and the PSI were in existence at the time of sentencing, so they do not qualify as factors that were previously nonexistent. Further, neither the PSI nor the psychological examination was "unknowingly overlooked"; they were intentionally excluded from review in response to Bransford's objection.

Bransford next—and somewhat inconsistently—faults the circuit court for concluding that the PSI was irrelevant to the sentencing decision. He acknowledges that the sentencing judge sealed the PSI and never reviewed it. Nonetheless, he asserts the PSI is relevant to a

determination of whether his appellate counsel should have "raised the issue of the psychological exam being performed without the advice of defense counsel and the effect it had on the sentencing hearing." He suggests he might challenge the effectiveness of his appellate counsel for failing to contend that the events surrounding the preparation of the PSI deprived him of his Sixth Amendment right to counsel at sentencing. *See* U.S. CONST. amend. VI. Bransford fails to demonstrate, however, that information sealed by the sentencing judge without review affected the sentencing hearing.

Bransford responds that, unless he examines the PSI, he cannot tell whether the information discussed by the State at sentencing originated with the psychological examination. The contention is unpersuasive. Bransford plainly has access to the sentencing transcript, excerpts of which he included in the appendix to his appellate brief. Despite that access, his postconviction motion failed to identify any information in the State's sentencing remarks that, in his view, must have originated with the psychological examination because the information could have no other source.[4]

Bransford goes on to complain that the lack of a PSI leads to "a far less fair and just sentence." Bransford appears to argue here that the sentencing court erred by not considering the PSI. That claim, however, is unavailable to Bransford. At sentencing, his trial counsel told the court that Bransford was "completely prepared to proceed" as the court suggested, without

[4] In the reply brief, Bransford suggests that sentencing remarks by the State concerning his "promiscuous life style" could have been "gleaned" from the psychological report. "It is a well-established rule that we do not consider arguments raised for the first time in a reply brief." ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Nonetheless, we note Bransford's failure to say that the psychological report is the only possible source for the State's information.

judicial review of or access to the PSI. Accordingly, Bransford may not assert that the court should have reviewed and considered the PSI before imposing sentence. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (we will not review error invited by appellant); *see also* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971) (defendant who acquiesces to trial counsel's strategic choice is bound by that decision).

Next, and perhaps relatedly, Bransford complains that "it is not logical ... to impose an aggregate total sentence of 168 years without any assistance of a PSI," and he asserts a sentencing court needs a PSI to conduct "the 'beyond a reasonable doubt' analysis." He is wrong. First, "[i]nformation upon which a trial court bases a sentencing decision, as opposed to a finding of guilt, need not, of course, be established beyond a reasonable doubt." ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992). Second, "a PSI is not required prior to sentencing." ***State v. Greve***, 2004 WI 69, ¶10, 272 Wis. 2d 444, 681 N.W.2d 479.

Bransford next asserts the PSI is an important document that influences correctional decisions. Nothing in the postconviction motion, however, alleged that the sealed PSI is affecting his institutional placement, nor has he demonstrated that review of the document could facilitate any change in his institutional treatment. We do not address arguments that are inadequately briefed, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), or presented for the first time on appeal, *see* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889.

Bransford concludes his reply brief by complaining he is unfairly required to disclose the basis for a contemplated future postconviction motion in order to review the PSI. He faces no such requirement. To prevail, however, he must persuade the circuit court that it should, in the

exercise of its discretion, permit him to read a PSI he previously viewed. *See* ***Zanelli***, 212 Wis. 2d at 378. He attempted to carry his burden by asserting that the PSI is relevant to resentencing and would qualify as a new factor. The circuit court did not agree with him. We see no error. Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals