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DISTRICT II

July 6, 2016

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

2015AP1819-CR

State of Wisconsin v. Errol L. Noel (L.C. #1997CF705)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Errol Noel appeals pro se from an order denying his motion for sentence modification.¹

He argues that the sentencing court relied on inaccurate information and that defense counsel ineffectively failed to request a continuance so as to resolve the allegedly inaccurate information.

¹ We construe Noel's motion as being made pursuant to WIS. STAT. § 974.06. A motion for sentence modification was untimely under both WIS. STAT. § 973.19(1) and WIS. STAT. RULE 809.30(2). As the claimed inaccurate information in the PSI was known at the time of sentencing, it also cannot constitute a new factor. See *State v. Harbor*, 2011 WI 28, ¶¶35, 40, 333 Wis. 2d 53, 797 N.W.2d 828.

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

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(1).

In 1996, twenty-seven-year-old Noel had repeated, nonforcible sexual intercourse with a girl he claimed to believe was older than her actual age of fourteen, resulting in the birth of a child. In 1997, he pled guilty to two counts of second-degree sexual assault. He was sentenced to eight years' prison on count one, consecutive to a sentence he then was serving, and, on count two, to a consecutive fifteen-year stayed sentence plus ten years' probation. He did not appeal. Noel's probation was revoked in 2008, and he began serving his fifteen-year stayed sentence.

In 2015, Noel filed a "motion for sentence modification." He asserted that the circuit court had sentenced him on inaccurate information in the PSI and that his attorney ineffectively failed to request a hearing to resolve the "disputed information." Noel claimed the circuit court relied on an allegedly false statement in the PSI that "four or five women said [he] was the father of their children," and that the court gave undue weight to that "false speculation, and in the process was unduly harsh toward [him]." He further contended his attorney deficiently declined the court's offer of more time to review the report. The court denied his motion as well as his motion for reconsideration. This appeal followed.

Noel claims the circuit court sentenced him on inaccurate information in the PSI that "there were about five girls that 'say they have my kids—but their [sic] not.'" A criminal defendant has a due process right to be sentenced upon only materially accurate information. *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). Whether a defendant has been denied this due process right is a constitutional issue an appellate court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant seeking resentencing

based on the claimed use of inaccurate information “must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.” *Lechner*, 217 Wis. 2d at 419 (citation omitted).

Noel has not made that showing. The court merely referred to Noel’s own statement to the PSI writer that five girls claimed he fathered their children. It also reacted to Noel’s comment that his current predicament—being sentenced to prison after the birth of his son—was “the worst thing I could ever have gotten myself into,” by responding that “the worst is all these children that might be yours that you make no claim or assertion to and don’t know if they’re yours.” Noel himself was the source of the information he now challenges as being inaccurate. Finally, as the circuit court followed the parties’ sentencing recommendation and limited its support conditions to children for which his paternity was adjudicated, it cannot be said that the court actually relied on the information Noel claims is inaccurate.

Noel next asserts that his counsel rendered ineffective assistance by failing to either request a continuance or to accept the court’s offer to review the PSI with him to resolve the information he now contests. To establish ineffective assistance, a defendant must show that counsel’s representation was deficient and that he or she was prejudiced by the deficient performance. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

A defendant has the right to be sentenced on reliable information, *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999), but it need not be established beyond a reasonable doubt, *State v. Marhal*, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992). Noel’s counsel rebutted the suggestion that Noel had fathered multiple children by telling the court that Noel had no paternity adjudications and that one paternity test established that he was not the father.

Counsel's performance was within the range of professionally competent assistance, and we are satisfied that there is no reasonable probability that, had counsel taken more time with the PSI, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals