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DISTRICT IV

October 25, 2016

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

2015AP2540 State of Wisconsin v. Jimmy L. Powell (L.C. # 2009CF792)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Jimmy Powell, pro se, appeals a circuit court order that denied Powell's motion for postconviction relief under WIS. STAT. § 974.06 (2013-14).[1] Powell contends that he is entitled to resentencing because his trial counsel was ineffective by failing to object to the sentencing court's reliance on inaccurate information. He also contends that his postconviction counsel was ineffective by failing to argue that claim of ineffective assistance of trial counsel in

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

postconviction proceedings. 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. We summarily affirm.

In April 2010, following a jury trial, Powell was convicted of one count of first-degree reckless injury and acquitted of attempted homicide and armed robbery. We affirmed the conviction and an order denying postconviction relief. Powell then sought resentencing under WIS. STAT. § 974.06. He argued that he was denied the effective assistance of trial counsel when his counsel allowed the sentencing court to rely on inaccurate information. He argued that his postconviction counsel was ineffective by failing to pursue that claim in direct postconviction proceedings. The circuit court denied the motion without a hearing.

Powell's claims of ineffective assistance of counsel are premised on his assertion that his trial counsel allowed the sentencing court to rely on inaccurate information. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984) (claim of ineffective assistance of counsel must show that counsel was deficient and the deficiency prejudiced the defense); ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information."). Thus, as a threshold matter, Powell's postconviction motion was required to "establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." ***Tiepelman***, 291 Wis. 2d 179, ¶31. We conclude that Powell failed to show that there was inaccurate information before the circuit court. Accordingly, Powell has not established that trial or postconviction counsel were ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (a claim of ineffective assistance of postconviction counsel for failing to argue ineffective assistance of trial counsel must establish

that trial counsel was, in fact, deficient); ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless argument).

Powell contends that the circuit court relied on inaccurate information as to the sentencing recommendation in the presentence investigation report (PSI). He argues that a letter from the Department of Corrections (DOC) to the circuit court, which stated that the PSI author based her recommendation on the reckless injury count only, presented inaccurate information to the court. Powell argues that the letter implied that the PSI sentencing recommendation would have been higher if the author had considered the acquitted charges. Powell argues that the letter presented inaccurate information because the PSI author could not consider acquitted charges under then-existing WIS. ADMIN. CODE § DOC 328.29(3) (Apr. 1997). We do not agree that Powell has identified any inaccurate information before the sentencing court.

The PSI recommended a sentence including ten to twelve years of initial confinement. At the State's request, the DOC filed a letter with the circuit court stating that the PSI author did not consider the acquitted charges in making her recommendation. The State then filed a sentencing memorandum in which it pointed out that the court could consider the facts underlying the acquitted charges; highlighted those facts; and recommended fifteen years of initial confinement.

At the sentencing hearing, the State noted that it had requested that the DOC clarify whether the PSI sentencing recommendation was based on the reckless injury count only, without consideration of the acquitted charges. The State reiterated that the circuit court, in imposing a sentence, could consider the facts underlying the acquitted charges, and recommended fifteen years of initial confinement. The court noted that the PSI recommended

ten to twelve years of initial confinement, and that the DOC letter indicated that the PSI author did not consider the acquitted charges. The court stated that it did not know what the PSI's sentencing recommendation would have been had the PSI author considered that information. The court imposed thirteen years of initial confinement.

We conclude that the DOC letter did not present inaccurate information to the circuit court. Rather, it set forth an accurate statement: that the PSI author did not consider the acquitted charges in recommending a sentence, as required by DOC rules. Moreover, nothing prohibited the State from arguing that the court, as opposed to the PSI author, could consider the facts underlying the acquitted charges. *See* ***State v. Bobbitt***, 178 Wis. 2d 11, 16-19, 503 N.W.2d 11 (Ct. App. 1993) (evidence underlying acquitted charge may be considered by the circuit court when imposing sentence for crime of conviction). This remains the case even if, as Powell contends, the State used the DOC letter to imply that the PSI recommendation may have been higher had the author considered those facts as well. Because Powell has failed to establish that any information before the circuit court was inaccurate, counsel was not deficient for failing to raise an objection. Accordingly, the court properly exercised its discretion to deny Powell's motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996) (if a postconviction motion raises insufficient facts, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has discretion to deny the motion without a hearing).

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals