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March 13, 2019

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

2018AP1344-CR State of Wisconsin v. Antwaan T. Henderson (L.C. # 2016CF1687)

Before Kessler, P.J., Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Antwaan T. Henderson appeals a judgment of conviction and an order denying postconviction relief. He claims that a new factor warrants sentence modification and that his trial counsel was ineffective for failing to request a presentence investigation (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 (2017-18).[1] We affirm.

Henderson pled guilty to: (1) carrying a concealed weapon; (2) armed robbery by threat of force as a party to a crime; and (3) possessing, with intent to deliver and while armed with a dangerous weapon, not more than 200 grams of marijuana.[2] The circuit court imposed an aggregate, evenly bifurcated fourteen-year term of imprisonment. Approximately one month after sentencing, Henderson wrote a letter to the circuit court asking it to order a PSI and to reconsider his sentence in light of information that he had not previously disclosed. Specifically, he asserted that his codefendant, Christian Reynoso, coerced Henderson to commit armed robbery and then, when police stopped the pair shortly after they committed that crime, "ordered [Henderson] to take the blame for a quarter amount of drugs and one of the three pistols [Reynoso] had." The circuit court did not act on this letter.

Henderson subsequently obtained postconviction counsel, who filed a postconviction motion on Henderson's behalf. In the motion, Henderson renewed the allegation of coercion previously disclosed in his letter to the circuit court, claiming that the information constituted a new factor warranting sentencing modification. As a second ground for relief, Henderson alleged that his trial counsel was ineffective for failing to request preparation of a PSI because "a reasonable attorney would request a PSI in a felony case where the defendant is nineteen." According to Henderson, he "could have received a more favorable sentence" if trial counsel had

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Henderson also pled guilty to two charges filed against him in a second case. That case is not before us and we discuss it no further.

requested a PSI because "[t]here is a reasonable probability that the PSI report would have highlighted Reynoso's threats to Henderson and Henderson's success in school." The circuit court denied the motion without a hearing, and Henderson appeals.

We begin by considering Henderson's claim for sentence modification based on an alleged new factor. A new factor for purposes of sentence modification 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." *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant's sentence upon a showing of a new factor. *See* ***id.***, ¶35. To prevail, the defendant must satisfy a two-prong test. *See* ***id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.*** This presents a question of law, which we review *de novo*. *See* ***id.***, ¶¶33, 36. Second, the defendant must demonstrate that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. *See* ***id.*** If a defendant fails to satisfy one prong of the test, a court need not address the other. *See* ***id.***, ¶38.

Henderson's claim does not satisfy the first prong of the new-factor analysis. Although the circuit court was unaware at sentencing of the coercion that Henderson subsequently alleged in his letter and his postconviction motion, Henderson himself knew about the circumstances of his crimes from the moment he committed them. Because he did not "unknowingly overlook[]" that information, *see* ***id.***, ¶40, his belated revelations do not amount to a new factor. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (information known to the defendant at the time of sentencing is not a new factor). His claim therefore fails.

Henderson also claims that his trial counsel was ineffective. Such claims involve a familiar test requiring proof both that counsel performed deficiently and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove deficient performance, a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, ¶13 (internal citation omitted). A court may begin its analysis under ***Strickland*** by considering either the deficiency or the prejudice component of the test. *See* ***id.***, 466 U.S. at 697. If the defendant fails to satisfy one component, the court need not address the other. *See* ***id.***

To obtain a hearing on a claim of ineffective assistance of counsel, a defendant's motion must include allegations of fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion alleges facts requiring a hearing is a question of law. *See* ***id.***, ¶9. The circuit court has discretion, however, to deny the motion without a hearing if the motion does not raise sufficient material facts, the allegations are merely conclusory, or if the record conclusively shows the defendant is not entitled to relief. *See* ***id.*** With these principles in mind, we turn to the specifics of Henderson's claim.

Henderson contends that his trial counsel performed deficiently by failing to request a PSI. According to Henderson, "a reasonable attorney would request a PSI in a felony case where the defendant is nineteen." Henderson's assertion is unaccompanied by any factual allegations

or legal authority supporting the proposition that failing to request a PSI for a young defendant falls outside the wide range of professionally competent representation. In the absence of facts or law supporting Henderson's claim of deficient performance, we reject it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Accordingly, Henderson fails to satisfy the first component of the ***Strickland*** test.

For the sake of completeness, however, we address the second ***Strickland*** component, namely, the allegations that Henderson suffered prejudice as a consequence of the failure to request a PSI.[3] According to Henderson, a PSI would have led to a more favorable sentence for two reasons.

First, Henderson maintains that a PSI would have brought to the circuit court's attention that Reynoso threatened Henderson and coerced him into taking the blame for some of Reynoso's criminal activity. This assertion presupposes that Henderson would have revealed the alleged threats and coercion during the presentence investigation, but the record does not support that supposition.

Indeed, the record shows that Henderson had ample opportunity to disclose exculpatory information to the circuit court but did not do so. During the plea proceeding, the circuit court asked Henderson to describe his role in the robbery. Henderson replied: "I went in somebody's home and robbed them with the firearm and took their drugs." When the circuit court specifically probed Henderson's motivation, asking whether he "wanted to take drugs from the

[3] Henderson includes some of his allegations of prejudice as components of his assertion that trial counsel's performance was deficient. We are not bound by the manner in which a party frames an issue. *See* ***State v. Joyner***, 2002 WI App 250, ¶13, 258 Wis. 2d 249, 653 N.W.2d 290.

victim," Henderson replied: "Yes." At sentencing, Henderson elected to speak, and he began his allocution by stating: "I would like to say I know I'm not innocent. I know my actions are unjust." Henderson went on to say: "it's all my fault.... The actions are mine [and] I know what I d[id] is wrong." The circuit court asked Henderson to explain how and why he involved himself in a home invasion, and Henderson responded: "I actually don't have a valid reason because I do understand that it is extremely wrong so I – there's no answer that I can give you."

Accordingly, the record shows that Henderson had numerous chances both before and during sentencing to reveal to the circuit court the reasons and motivations for his crimes. Henderson used those opportunities to admit that he committed the crimes because he wanted to do so and that his actions were entirely volitional. Only after sentencing did Henderson suggest that his criminal conduct was coerced. The record thus refutes his contention that he would have made a claim of coercion during a presentence investigation. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

Second, Henderson maintains that a PSI would have "described his academic success in high school while dealing with extreme family hardship" and "would have given additional insight into the defendant's academic success where he graduated second overall in his high school class." Although a PSI may well have included the information that Henderson summarizes, he fails to show a reasonable probability that the outcome of the sentencing proceeding would therefore have been different. Trial counsel supplied the circuit court with information about Henderson's academic achievements, and the circuit court additionally received numerous testimonials from Henderson's family members, friends, and classmates. At the sentencing hearing, the circuit court read aloud from Henderson's high school transcripts that detailed his classes, grades, grade point average, and class rank. The circuit court also acknowledged that Henderson had been "living on the streets" but was nonetheless able to

graduate from high school and had received "all these beautiful letters of support." Thus, the circuit court was aware of Henderson's achievements and the hardships that he endured. Reiteration of that information in a PSI would have been merely cumulative. Accordingly, Henderson was not prejudiced by its absence. *Cf.* ***State v. Rockette***, 2006 WI App 103, ¶33, 294 Wis. 2d 611, 718 N.W.2d 269 ("merely cumulative" evidence is of little importance); ***State v. Cathey***, 32 Wis. 2d 79, 88, 93, 145 N.W.2d 100 (1966) (trial counsel not ineffective for failing to present merely cumulative evidence).

Finally, we observe that Henderson appears to assume the circuit court would have relied on a PSI at his sentencing if such a document had been prepared. Such an assumption is unwarranted. "The use of a PSI is a matter within the [circuit] court's discretion. The court has discretion to order a PSI and to determine the extent to which it will rely upon the information in the PSI." ***State v. Suchocki***, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. Henderson's implied contention that the circuit court would have given determinative weight to the content of a PSI thus rests entirely on speculation and is therefore inadequate to earn him relief. *See* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

In sum, Henderson failed to demonstrate either that his trial counsel performed deficiently by forgoing a request for a PSI or that he was prejudiced by the alleged failure. Accordingly, the circuit court properly denied his claim without a hearing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals