OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

December 15, 2020

To:

Hon. Leon D. Stenz
Circuit Court Judge
200 E. Madison St.
Crandon, WI 54520

Courtney Kay Lanz
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Brenda Behrle
Clerk of Circuit Court
Oneida County Courthouse
1 Courthouse Square
P.O. Box 400
Rhinelander, WI 54501

Michael W. Schiek
District Attorney
P.O. Box 400
Rhinelander, WI 54501

Frances Philomene Colbert
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

2019AP329-CR State of Wisconsin v. Robert H. Weiss
(L. C. No. 2016CF265)

Before Stark, P.J., Hruz and Seidl, 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).

Robert Weiss appeals a judgment of conviction entered upon his resentencing. Weiss argues the circuit court erroneously exercised its discretion and violated Weiss's constitutional right to adequate representation by denying his request to adjourn the resentencing hearing. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. We reject Weiss's arguments, and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

In February 2017, Weiss entered a no-contest plea to one count of using a computer to facilitate a child sex crime, contrary to WIS. STAT. § 948.075(1r). The circuit court imposed a fifteen-year sentence, consisting of eight years' initial confinement and seven years' extended supervision. Weiss later moved for resentencing before a different judge on the grounds that the sentencing judge had previously prosecuted a sexual assault case involving the same victim as in Weiss's case. The court granted the motion.

At the outset of the resentencing hearing before a new judge, the circuit court asked defense counsel if there were any corrections to the presentence investigation report (PSI). Defense counsel replied, "I guess that I am a little unprepared on that because … the Defense rather is in a state of disarray." Counsel noted that he had received and reviewed "all of these documents" and "saw the need to do further investigation." His plan to do so, however, was "kind of short-circuited" when the court set a resentencing date after Weiss wrote to his counsel, copying the court on the correspondence, stating he "felt that this was going too slowly." Counsel acknowledged that the court's decision to schedule the hearing was "[e]ntirely what [Weiss] ask[ed] for," but it left counsel "not as completely prepared … as [he] would hope to be." Ultimately, defense counsel recalled that "there wasn't a whole lot that made a big difference in the PSI report," and therefore he had no "specific corrections" to the PSI.

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

The circuit court then asked for the parties' positions on whether the court could impose a sentence exceeding the original sentence that had been imposed. The district attorney expressed his opinion that the court could exceed the original sentence, but he offered to research the topic and agreed to reschedule the hearing if necessary. Defense counsel expressed his belief that the court could exceed the original sentence, but he agreed that rescheduling "would be the best because … all of us … would like [to] do this hearing properly so that … it gets done right and fairly to … Weiss." Defense counsel added that although they were all in court that day "primarily because [Weiss] was getting understandably impatient," Weiss had since recognized "the benefit to going slow and preparing thoroughly." Defense counsel opined, however, that the legal issue regarding the court's authority presented "a very simple question to answer."

The circuit court decided to proceed with the resentencing hearing, explaining it was "not going to adjourn" given that both parties agreed it could exceed the original sentence and the court understood the relevant case law as allowing it to impose a sentence greater than the original sentence if there were objective new factors that were not known at the time of the original sentencing. After considering the proper sentencing factors and the mitigating circumstances raised by Weiss, the court imposed a fifteen-year sentence identical to the original sentence. Weiss appeals.

Weiss argues the circuit court erroneously exercised its discretion by denying his request to adjourn the resentencing hearing. "The decision whether to grant or deny an adjournment request is left to the [circuit] court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion." ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. Where, as here, a defendant asserts he or she was denied the right to effective counsel because the court denied an adjournment request, this court balances "the defendant's

constitutional right to adequate representation by counsel against the public interest and the prompt and efficient administration of justice." *See* ***State Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). This inquiry is guided by a six-factor test: (1) the length of the delay requested; (2) whether another attorney is prepared to proceed; (3) whether other continuances have been requested and obtained by the defendant; (4) convenience or inconvenience to the parties, witnesses, and the court; (5) whether the delay is for legitimate reasons or only for a dilatory purpose; and (6) any other relevant factors. ***Id.*** at 470.

Weiss contends the circuit court erroneously exercised its discretion by failing to address the ***Wollman*** factors or to otherwise give any reason for denying Weiss's adjournment request. Weiss's entire argument, however, is based on a false premise. Namely, defense counsel never explicitly requested an adjournment of the resentencing hearing. Although counsel initially stated that he was "not as completely prepared" as he had hoped to be for the resentencing hearing, counsel did not inform the court that he was so ill-prepared that he could not proceed, nor did he specifically request more time to prepare. Weiss nevertheless suggests that defense counsel's statement on his level of preparedness at the beginning of the hearing, in combination with counsel's statements made when discussing whether the court could exceed the original sentence, formed a clear request for a continuance by "unambiguously referring to his unprepared state." We are not persuaded.

As noted above, the State expressed its willingness to reschedule the hearing in order to research the legal question posited by the circuit court. Defense counsel agreed that rescheduling would be best to ensure the hearing "gets done right and fairly to … Weiss." In the context in which these statements were made, the court could reasonably understand the parties to be suggesting an adjournment if the court thought more research was necessary to determine

whether it could exceed the original sentence. The court then concluded there was no need to adjourn based on its own research and the parties' agreement that the court could exceed the original sentence if new factors justified it doing so. In the absence of a clear adjournment request based on a need to be adequately prepared for the hearing, the court was not required to consider or address the ***Wollman*** factors.

Weiss nevertheless contends that the circuit court's failure to adjourn the hearing violated his constitutional right to adequate representation under the Sixth Amendment. Specifically, Weiss argues that by declining his "request to proceed with prepared counsel," the court deprived him of his right to effective representation, resulting in a structural error for which prejudice should be presumed.[2] Again, we are not persuaded. Weiss asserts that his defense counsel effectively informed the court that he was not competent to proceed. This assertion overstates the discussion that took place at the hearing. Defense counsel's comment that he was "a little unprepared" and "saw the need to do further investigation" is not the same as declaring himself unable to proceed as counsel, much less constituting a motion to adjourn. Certainly, the court did not err in not construing counsel's statements as such. Further, as noted above, defense counsel did not explicitly request an adjournment of the resentencing hearing. Thus, contrary to Weiss's assertions, the court never forced defense counsel to proceed after an express statement that he was not able to competently handle the hearing. Counsel's statement that he could be

[2] As the State properly notes, Weiss cannot allege ineffective assistance of sentencing counsel in this appeal because he did not first present such a claim to the circuit court. Appellants seeking to raise an ineffective assistance of counsel claim must preserve the testimony of trial counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). An appellant forfeits an ineffective assistance claim regarding trial counsel by failing to raise it in the circuit court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996).

better prepared does not establish that he was incapable of providing constitutionally adequate representation.

Given the foregoing conclusion, it follows that we reject Weiss's contention that prejudice from the circuit court's denial of defense counsel's "motion" for a continuance must be presumed. Moreover, Weiss has not established how granting a continuance, had it been requested, would have changed the outcome of the sentencing hearing. *See* ***L.M.S. v. Atkinson***, 2006 WI App 116,¶19, 294 Wis. 2d 553, 718 N.W.2d 118 ("A party who appeals the denial of a motion for a continuance must demonstrate that he or she suffered prejudice from the adverse ruling."). Weiss claims that his counsel did not subject the State's case regarding sentencing "to meaningful adversarial testing," as evidenced by his counsel's failure to independently correct the PSI and his legally impossible sentencing recommendation.[3] Before imposing the sentence, however, the parties agreed that the court could hear the corrections to the PSI recited by Weiss's prior defense counsel at the original sentencing, and the prosecutor read those corrections into the record. It is therefore unclear how this claimed deficiency resulted in prejudice to Weiss.

With respect to defense counsel's sentence recommendation, it did not mislead the court to Weiss's detriment. Therefore, we are not persuaded that this deficiency prejudiced Weiss at sentencing. Weiss faced a maximum possible forty-year sentence, with a mandatory minimum of five years' initial confinement, *see* WIS. STAT. §§ 939.50(3)(c), 939.617(1); Weiss received a sentence well within the appropriate range. Ultimately, the record shows that defense counsel reviewed the sentencing documents, met with Weiss, argued mitigating circumstances, and

[3] Although Weiss was subject to a mandatory minimum sentence of five years' initial confinement, defense counsel recommended an extended period of probation for Weiss's sentence.

advocated for Weiss's rehabilitative needs. Weiss's allegation of prejudice in the absence of a continuance therefore fails.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed pursuant to 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