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 29, 2020

To:

Hon. James M. Isaacson
Circuit Court Judge
Chippewa County Courthouse
711 N. Bridge St.
Chippewa Falls, WI 54729

Katie Schalley
Clerk of Circuit Court
Dunn County Judicial Center
615 Stokke Parkway, Suite 1500
Menomonie, WI 54751

Kara Lynn Janson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Andrea Amidon Nodolf
District Attorney
615 Stokke Parkway, #1700
Menomonie, WI 54751-2700

Steven J. Osterman 457108
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2018AP1871 State of Wisconsin v. Steven J. Osterman (L. C. No. 2005CF35)

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).

Steven Osterman, pro se, appeals from an order denying his motion for reconsideration of the circuit court's denial, without a hearing, of his postconviction motion seeking plea withdrawal. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. However, we remand to the

circuit court to amend the judgment of conviction to reflect Osterman's conviction of a Class C felony. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

A criminal complaint charged Osterman with repeated sexual assault of a child under sixteen years old, pursuant to WIS. STAT. § 948.025(1). The juvenile victim, with a date of birth of July 8, 1988, had reported to an investigator with the Dunn County Sheriff's Department that Osterman sexually assaulted him over 100 times when the victim was between the ages of twelve and sixteen. The victim stated the assaults involved performing oral sex on each other. The complaint identified the charging period as "from 2000 to 2003."

Ultimately, Osterman entered into a plea agreement that resolved five separate cases. Four of the five cases involved Osterman's sexual assault of different juveniles.[2] Osterman allegedly engaged in oral, anal, and mutual masturbatory sex with the victims, as well as three-way sexual relations with another adult male. Osterman also allegedly introduced the victims to other adult males to engage in sexual relations.

In the present case, Osterman pleaded guilty to one count of second-degree sexual assault of a child under the age of sixteen, pursuant to WIS. STAT. § 948.02(2), a Class C felony. The amended Information, which the circuit court used in conducting its plea colloquy, listed the charging period as "September of 2004." The court imposed a sentence consisting of fifteen years' initial confinement and ten years' extended supervision.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The fifth case involved three counts of felony bail jumping.

Osterman did not pursue a direct appeal of his conviction. Instead, over twelve years later, he filed a WIS. STAT. § 974.06 postconviction motion seeking plea withdrawal. Osterman contended he could not have been found guilty of second-degree sexual assault of a child under age sixteen based on an assault that occurred in September 2004—the charging period listed on the amended Information—because by that date the victim was two months over the age of sixteen. According to Osterman, the proper criminal classification under the September 2004 time frame was a Class A misdemeanor rather than a Class C felony. Osterman asserted that he had proved either a new factor justifying reversal of his conviction or ineffective assistance of counsel because "counsel did not check to make sure all the information and charges and evidence were correct." Pursuant to Osterman's request, the circuit court scheduled an evidentiary hearing on his motion.

Thereafter, the State filed a written response opposing Osterman's postconviction motion. The State argued, "The testimony at the preliminary hearing, the complaint, and the original [I]nformation, and the description [of] the offense in the presentence [investigation report] including the Offender's version, which all gave the correct offense date range, demonstrate that the date listed on the amended [I]nformation was a scrivener's error." Three days later, the State filed a second written response, requesting that the circuit court deny Osterman's motion without an evidentiary hearing on the ineffective assistance claim. The State submitted an "offer of proof" that Osterman's trial attorney had "no recollection of the circumstances of the plea." The State indicated that it did not dispute that "counsel was ineffective for not noticing the scrivener's error in the amended [I]nformation." The State argued, however, that Osterman could not show prejudice from any deficient performance.

The circuit court cancelled the evidentiary hearing and issued a written decision denying Osterman's postconviction motion, finding that the charging period listed on the amended Information was a scrivener's error. The court reasoned that the charging period was inconsequential because the victim had alleged over 100 sexual assaults commencing from the time he was twelve years old. More specifically, the court stated:

> The court finds that referring to an offense occurring in September 2004 was a scrivener's error. From the transcript provided by the defendant, it is clear the offense was sexual assault of someone under 16 years old. The colloquy, the complaint, and plea questionnaire all point to everyone knowing the offense and penalty. The fact that the [I]nformation has the wrong date of the offense is nothing more than a typographical error and is certainly nothing the court should use to allow withdrawal of a plea. This is not a new factor, but rather identifying a typographical error.

Osterman then contacted the circuit court, contending that "[e]vidently there was a hearing between the State and [the circuit court] to determine the denial of my motions. I did not know it was customary to have a hearing without the defendant." Osterman requested a transcript of the hearing that he believed had occurred.

Osterman subsequently filed a motion for reconsideration, again claiming there had been a hearing without his presence. Osterman also reasserted his argument that he was entitled to plea withdrawal. The circuit court issued a written decision denying Osterman's motion and also stating that "[t]here was no hearing and therefore no transcript." On the merits, the court found Osterman had not disclosed any new evidence but had just "rehashed the same old issues earlier decided." The court reiterated, "The issue raised by the defendant was only a scrivener's error (any number of offenses could have been added on the [I]nformation)."

Osterman filed a "letter of complaint," claiming he had not received copies of the State's responses in opposition to his postconviction motion until he read the circuit court's decision denying his motion for reconsideration. He asserted the State had violated his constitutional rights by not serving him with copies of its responses, and he asked the court to vacate its previous decisions and allow him an opportunity to reply to the State's position. The court did not address Osterman's request. Osterman now appeals.

At the outset, we note that Osterman appealed from the denial of the original WIS. STAT. § 974.06 postconviction motion, as well as the order denying his motion for reconsideration. However, by order dated November 12, 2018, we held that because his notice of appeal was filed more than ninety days after entry of the order denying the postconviction motion, we lacked jurisdiction to review that order. *See* WIS. STAT. RULE 809.10(1)(e) (2017-18). Although Osterman timely appealed the denial of his reconsideration motion, he may not use a motion for reconsideration to extend the time for appeal from a judgment or order when that time has expired. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). We therefore ordered that Osterman "must limit the issues in his brief to new issues raised in his motion for reconsideration …."

The only new argument Osterman raised in his motion for reconsideration was that a hearing on his postconviction motion had been improperly held in his absence. His argument appears to be based upon his belief that the circuit court engaged in ex parte communications with the State, but there is no evidence supporting that position, and the court specifically stated that it based its decision on the parties' written submissions.

As the State aptly notes, Osterman arguably raised a due process claim in his motion to reconsider. However, no due process violation occurs when the defendant has an opportunity to fully develop his or her claim. ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, ¶18, 263 Wis. 2d 83, 664 N.W.2d 596. Furthermore, as the party moving for postconviction relief, it was Osterman's burden to raise sufficient facts that, if true, that would entitle him to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion does not raise such facts, or presents only conclusory allegations, or if the record conclusively demonstrates the defendant is not entitled to relief, the court has discretion to deny the motion without a hearing. ***Id.***

In his brief-in-chief to this court, Osterman makes no effort to show that the circuit court erred by denying his reconsideration motion without a hearing. Following the denial of his reconsideration motion, Osterman argued that he had not received the State's responses to his original postconviction motion, and that had he been served copies he would have "responded immediately," and this "very well could have influenced [the court's] decision" denying his motion without a hearing. This argument, however, is undeveloped, as Osterman fails to explain what he would have argued differently in his motion for reconsideration, which addressed the State's general position that the underlying basis for Osterman's plea withdrawal request was a scrivener's error.

The record conclusively establishes that the circuit court properly denied Osterman's motion for postconviction relief without a hearing as Osterman alleged no factual basis for the court to find the "September of 2004" charging date alleged in the Information was anything other than a scrivener's error. Osterman provided no factual basis in support of his argument that the victim was actually over the age of sixteen at the time of the offense. As the court noted,

the complaint stated that the victim reported to the sheriff department's investigator that the sexual assaults occurred when he was between twelve and sixteen years old. The district attorney advised the court at the plea hearing of the parties' agreement, and that he was filing an amended Information "charg[ing] sexual assault of a child under 16 …." During the plea colloquy, the court advised Osterman of the elements of the offense, including that "they'd have to prove beyond a reasonable doubt that that child was under the age of 16." Osterman then represented in open court that he had no questions "about what the State would have to prove." Osterman also stipulated there was a sufficient factual basis to support his plea based on the preliminary hearing transcript.

Moreover, Osterman fully developed his plea withdrawal claim in his eight-page postconviction motion and corresponding attachments. He identified the underlying basis for his plea withdrawal request and developed several different legal theories for why he believed that he was entitled to relief. The circuit court set the matter for an evidentiary hearing. There is no indication in the record that it ordered the State to respond to Osterman's motion—but the State nevertheless filed two unsolicited written responses. After considering Osterman's motion and the State's responses, the court determined the record conclusively showed that Osterman was not entitled to relief and it denied his motion without a hearing, as it was legally authorized to do. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

The record is unclear as to whether Osterman was served with the State's responses to his original postconviction motion. Osterman claims he was not served, but even assuming for the sake of argument that is true, he had another opportunity to make his case for plea withdrawal in his reconsideration motion, and Osterman again attached documentation to support his position. Osterman knew the State's position was that the charging period on the amended Information

was an inconsequential scrivener's error, rather than a manifest injustice warranting plea withdrawal. The circuit court again denied relief after considering Osterman's arguments.

Accordingly, the record reveals that Osterman twice fully developed his claim for plea withdrawal, and the circuit court twice denied him relief after consideration of the merits of his position. Osterman's arguments for plea withdrawal were fully aired before the court. He was thus afforded due process. *See* ***State v. Amos***, 153 Wis. 2d 257, 281, 450 N.W.2d 503 (Ct. App. 1989). Any claim that he was entitled to a hearing on his postconviction motion was properly denied.

The remainder of Osterman's challenges on appeal focus primarily on the merits of his plea withdrawal claim. These arguments are precluded by our November 12, 2018 order limiting the issues in his brief to new issues raised in his motion for reconsideration. We therefore shall not further address the remainder of Osterman's arguments.

Finally, we note the judgment of conviction and the corrected judgments of conviction state that the severity of the offense was "Felony BC." At the plea hearing, however, the circuit court accepted Osterman's plea and adjudged him guilty of "the single count of sexual assault of a child under the age of 16 years, a C felony." This adjudication is consistent with the severity of the offense provided by WIS. STAT. § 948.02(2). Accordingly, the matter is remanded with

instructions to amend the judgment of conviction to reflect Osterman was convicted of a Class C felony.[3]

Therefore,

IT IS ORDERED that the order is summarily affirmed. The matter is remanded with instructions to amend the judgment of conviction to reflect Osterman's conviction of a Class C felony. *See* WIS. STAT. RULE 809.21 (2017-18).

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

Sheila T. Reiff
Clerk of Court of Appeals

[3] The original judgment of conviction and amended judgments of conviction list the offense date as "01-01-2000." This date would make the victim less than twelve years old at the time, although the criminal complaint alleged the crimes against the victim occurred between the ages of twelve and sixteen. Nonetheless, the offense date listed in the judgment of conviction is consistent with the charge for which Osterman was convicted, sexual assault of a child under sixteen years of age, without repeaters. *See* WIS. STAT. § 948.02(2).