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DISTRICT III

May 17, 2022

To:

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

2020AP2111-CR State of Wisconsin v. Sanjeev S. Sewpersaud
(L. C. No. 2018CF138)

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

Sanjeev Sewpersaud appeals a judgment, entered upon a jury's verdicts, convicting him of three child sex crimes. Sewpersaud also challenges an order denying his postconviction motion for resentencing. Sewpersaud argues he is entitled to resentencing because the circuit court relied on inaccurate information about the applicable penalties for one of his offenses. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. We reject Sewpersaud's arguments and summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2019-20).¹

The State charged Sewpersaud with using a computer to facilitate a child sex crime, child enticement, and attempted sexual assault of a child under the age of sixteen. The charges arose from an undercover investigation in which a law enforcement officer communicated with Sewpersaud, on a dating app, while law enforcement posed as a fifteen-year-old male named "Spencer." Based on messages exchanged on the app, the State alleged that Sewpersaud arranged to meet Spencer for the purpose of engaging in sexual acts. Sewpersaud was arrested at the pre-arranged meeting place. A jury ultimately found Sewpersaud guilty of the crimes charged.

At the sentencing hearing, the prosecutor, defense counsel, and the circuit court acknowledged that Sewpersaud faced a five-year mandatory minimum term of initial confinement based on his conviction for using a computer to facilitate a child sex crime, contrary to WIS. STAT. § 948.075(1r). After considering the proper sentencing factors, the court ultimately imposed concurrent ten-year sentences for each crime, consisting of five years' initial confinement and five years' extended supervision. Sewpersaud filed a postconviction motion alleging that he was entitled to a new trial based on the ineffective assistance of his trial counsel. Sewpersaud alternatively sought resentencing, claiming that he was sentenced based on inaccurate information. Specifically, Sewpersaud asserted that the State misled the court into believing that it did not have discretion to depart from the mandatory minimum initial

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

confinement term. After a hearing, the court denied Sewpersaud's motion. This appeal followed.

Sewpersaud argues he is entitled to resentencing because the sentencing court relied on inaccurate information.² A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. *Id.* A defendant who moves for resentencing on the ground that the circuit court relied on inaccurate information must establish that there was inaccurate information before the sentencing court and that the court actually relied on the inaccurate information. *Id.*, ¶31. “Whether the court ‘actually relied’ on the incorrect information at sentencing [is] based upon whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.*, ¶14 (citation omitted).

Here, Sewpersaud contends that the circuit court erroneously believed that WIS. STAT. § 939.617(1) required a mandatory minimum term of initial confinement. That statute provides:

(1) Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s. 948.05 or 948.075 and 3 years for violations of s. 948.12. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

² Sewpersaud does not pursue his challenge to the effectiveness of his trial counsel. We therefore conclude Sewpersaud has abandoned any challenge to the denial of his motion for a new trial. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (“[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.”).

Relevant to this appeal, § 939.617(2) provides:

If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:

(a) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of the violation.

(b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.

According to Sewpersaud, the exceptions under WIS. STAT. § 939.617(2) gave the circuit court discretion, in this case, to depart from the mandatory minimum because the State did not prove that the crime was committed against a child who was more than forty-eight months younger than Sewpersaud. Rather, the purported victim was a fictitious person conjured by law enforcement and personified by an officer who was an adult. Based on his assertion that he cannot be more than forty-eight months older than a fictitious victim, Sewpersaud claims that the mandatory minimum term of initial confinement contemplated by § 939.617(1) does not apply to his case. Sewpersaud is mistaken.

As the circuit court properly recognized when denying Sewpersaud's postconviction motion, the statutory exceptions to the mandatory minimum term of initial confinement apply only when a defendant is convicted of violating WIS. STAT. § 948.05 (sexual exploitation of a child) or WIS. STAT. § 948.12 (possession of child pornography). Because Sewpersaud was convicted of using a computer to facilitate a child sex crime under WIS. STAT. § 948.075(1r), the court lacked discretion to impose a sentence with less than five years of initial confinement, as required under WIS. STAT. § 939.617(1).

To the extent Sewpersaud alternatively claims that the mandatory minimum sentence does not apply because the child victim was not real, liability under WIS. STAT. § 948.075(1r) does not differentiate between real and fictitious child victims. The statute requires only that “the actor believes or has reason to believe [that the individual] has not attained the age of 16 years.” Sec. 948.075(1r). Indeed, the fact that a real child victim did not exist did nothing to prohibit Sewpersaud’s conviction for the underlying offense. Because Sewpersaud has failed to establish that he was sentenced on the basis of inaccurate information, the circuit court properly denied his motion for resentencing.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. 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