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DISTRICT IV

March 28, 2024

To:

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Electronic Notice

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

2022AP39 State of Wisconsin v. Shawn A. Beasley (L.C. # 2000CF154)

Before Kloppenburg, P.J., Graham, and Nashold, 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).

Shawn Beasley appeals a circuit court order that denied his postconviction motion without an evidentiary hearing. 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 (2021-22).[1] We summarily affirm.

In January 2000, when Beasley was nineteen years old, Beasley was involved in a home invasion and shooting that left one of the victims dead. The State charged Beasley with multiple

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

criminal offenses, including first-degree intentional homicide, attempted first-degree intentional homicide, and two counts of burglary, all as a party to the crime. Beasley was convicted on all counts following a jury trial. The circuit court sentenced Beasley to life in prison without the possibility of release to extended supervision.[2]

Beasley, by counsel, pursued a postconviction motion arguing that his burglary convictions were multiplicitous and that his trial counsel was ineffective for failing to move to dismiss one of the charges on that basis. The sentencing court denied the motion, and Beasley appealed. We affirmed. Beasley then filed a pro se petition for a writ of habeas corpus in this court under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), which we denied. Beasley subsequently pursued a pro se postconviction motion under WIS. STAT. § 974.06, raising ineffective assistance of counsel, newly discovered evidence, and other issues. The circuit court denied the motion and we affirmed on appeal.[3]

In 2021, Beasley, by new counsel, filed the postconviction motion underlying this appeal. The motion was titled "Defendant's Post-Conviction Motion for Modification of Sentence Based on Inaccurate Information." The motion stated that Beasley sought "modification of his sentence" but also asserted that it was "brought due to a claim of Inaccurate Information at Sentencing, in violation of the Due Process clause of the Fourteenth Amendment to the U.S. Constitution, pursuant to WIS. STAT. § 974.06; ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d

[2] The Honorable Angela B. Bartell presided over the trial and sentencing, and also decided Beasley's first postconviction motion. We will refer to Judge Bartell as the "sentencing court." We will refer to the judges who decided Beasley's subsequent postconviction motions, including the motion underlying this appeal, as the "circuit court."

[3] The Honorable David T. Flanagan decided Beasley's second postconviction motion.

179, 717 N.W.2d 1." Specifically, Beasley argued that his due process rights were violated at sentencing because the circuit court relied on inaccurate information in Beasley's presentence investigation report ("PSI") that his August 1993 juvenile adjudication was for *armed* robbery, when that adjudication was actually for robbery. *See* ***State v. Travis***, 2013 WI 38, ¶21, 347 Wis. 2d 142, 832 N.W.2d 491 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information.").

Beasley also argued that he had a "sufficient reason" for failing to assert his inaccurate information claim in prior proceedings, so as to overcome the procedural bar for successive postconviction motions under WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Specifically, he argued that he only recently had the opportunity to sufficiently review his PSI and discovered the inaccuracy as to his August 1993 juvenile adjudication. He also argued that his postconviction counsel was ineffective by failing to identify and raise the claim that he was sentenced based on inaccurate information, asserting that it is "clearly stronger" than the issues that were raised on appeal. *See* ***State v. Romero-Georgana***, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668.

Beasley requested that the circuit court "modify his sentence to allow eligibility for release on Extended Supervision" or, "[i]n the alternative," that the court hold a ***Machner***[4] hearing for Beasley "to pursue an ineffective claim against postconviction counsel for counsel's failure to previously bring this issue to the attention of the Courts."

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The circuit court identified Beasley's motion as a "motion for post-conviction relief under WIS. STAT. § 974.06, alleging that the [sentencing] court in 2001 relied upon inaccurate information in his [PSI], entitling him to a sentence modification and eligibility for extended supervision." The court denied the motion without a hearing "because an independent review of the record conclusively establishes that Mr. Beasley is not entitled to relief." The court determined that the motion was brought under WIS. STAT. § 974.06, and that Beasley had not overcome the procedural bar under ***Escalona*** for bringing the successive postconviction motion.

Beasley argues that the circuit court erred by denying his postconviction motion without a hearing. He contends that his due process rights were violated because he was sentenced on the basis of inaccurate information. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶2. Specifically, Beasley argues that the sentencing court relied on inaccurate information from the presentence investigation report (PSI) that Beasley had a juvenile adjudication for *armed* robbery in August 1993, when in fact his August 1993 adjudication was for robbery. Beasley argues that the sentencing court relied on that inaccurate information in deeming him ineligible for release to extended supervision "despite his remarkably young age." He argues that the sentencing court's belief that Beasley was adjudicated delinquent for *armed* robbery in August 1993 led the court to believe that he could not be rehabilitated and thus to deny him eligibility for release to extended supervision. As relief, Beasley seeks sentence modification to make him eligible for extended supervision.

As an initial matter, we observe that Beasley's current postconviction motion, and his briefs on appeal, repeatedly merge two distinct types of motions—a motion for sentence modification based on a new factor, and a motion for resentencing based on inaccurate information resentencing motion. There are fundamental differences between a new factor

sentence modification motion and an inaccurate information resentencing motion, including the potential available forms of relief.

With a new factor motion, a defendant must demonstrate the existence of a new factor, and the relief upon such a demonstration may be sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. Significantly, a new factor motion invokes a circuit court's inherent authority to modify a sentence and can be brought at any time, and thus a claim for sentence modification based on a new factor is not subject to the procedural bar under WIS. STAT. § 974.06 and ***Escalona***. *See* ***State v. Noll***, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d 895; ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507.

In contrast, a motion alleging that the sentencing court relied on inaccurate information "must establish that there was information before the sentencing court that was inaccurate and that the … court actually relied on the inaccurate information," and the relief upon such a showing is resentencing. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶2. "A [sentencing] court actually relies on incorrect information when it gives 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***State v. Coffee***, 2020 WI 1, ¶38, 389 Wis. 2d 627, 937 N.W.2d 579 (quoted source omitted). If the defendant shows that the sentencing court actually relied on inaccurate information, then "'the burden shifts to the State to show that the error was harmless.'" ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (quoted source omitted). "'An error is harmless if there is no reasonable probability that it contributed to the outcome.'" ***Id.*** (quoted source omitted). "A defendant has a due process right to be sentenced upon accurate information," and thus a successful claim that the defendant was sentenced on inaccurate information warrants full resentencing. *See* ***id.***

However, a constitutional due process claim such as an inaccurate information resentencing motion, unlike a new factor motion, falls within the ambit of WIS. STAT. § 974.06 and, thus, may be procedurally barred by ***Escalona***. *See* ***State v. Crockett***, 2001 WI App 235, ¶¶6-10, 248 Wis. 2d 120, 635 N.W.2d 673.

Although Beasley asserts that he is seeking sentence modification, his postconviction motion and his appellate briefs do not develop any claim that there is a new factor that warrants a modification.[5] His motion and appellate briefing instead develop only the claim that Beasley was sentenced based on inaccurate information. Accordingly, we focus our analysis on whether the circuit court should have held a hearing on Beasley's claim that he is entitled to resentencing based on a due process violation for sentencing based on inaccurate information. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433 (defendant is entitled to a hearing on a postconviction motion if the allegations in the motion, if true, would entitle the defendant to relief). We conclude that the court did not err by denying the motion without a hearing.

[5] On appeal, Beasley's only reference to a "new factor" is his assertion, without supporting argument, that "[t]he correction of inaccurate information may constitute a new factor." Likewise, in his postconviction motion in the circuit court, although Beasley asserted that he sought sentence modification, he did not develop an argument that there was a new factor that warranted modification, and the circuit court limited its analysis to his claim that he was sentenced based on inaccurate information. Beasley does not argue that the circuit court erred by limiting its analysis to that claim.

We also note that, on appeal, Beasley requests that this court modify Beasley's sentence to make him eligible for extended supervision. That is not an available remedy. A successful inaccurate information resentencing claim results in a new sentencing hearing before the circuit court. *See* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1 (concluding that the defendant was denied due process because he was sentenced based on inaccurate information, and therefore remanding to the circuit court for resentencing). Similarly, the circuit court, not this court, exercises its discretion to determine whether sentence modification is warranted based on a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828.

We assume that Beasley has met his burden to show that the information before the sentencing court that Beasley was adjudicated delinquent of armed robbery in August 1993 was inaccurate, and that the court actually relied on that information in imposing sentence.[6] However, we conclude that the error was harmless because there is no reasonable probability that it contributed to the outcome of this case. *See* ***Coffee***, 389 Wis. 2d 627, ¶¶38-40 (concluding that the sentencing court actually relied on inaccurate information that Coffee had previously been arrested for armed robbery when the court "specifically referenced it twice," but that the State met its burden to prove that "'the sentencing court would have imposed the same sentence absent the error'" (quoted source omitted)). We focus on the sentencing transcript to determine whether the sentencing court's reliance on inaccurate information at sentencing was harmless. *See* ***id.***, ¶41.

The sentencing court considered that Beasley had a history of offenses beginning in 1993 of "crimes of interpersonal robbery, being armed, with threats of force, all of which are defined as extraordinarily serious offenses and which apparently the interventions of the juvenile justice system were unable to deter." The court stated: "In terms of the character of the defendant, the [PSI] reports that the record of the defendant, which is entirely as a juvenile because he was a juvenile, are serious offenses of violence and dishonesty." The court listed Beasley's juvenile

[6] The State asserts that the information before the court that Beasley was adjudicated delinquent of armed robbery in August 1993 was not inaccurate because the juvenile adjudication petition, which is attached to the State's response to Beasley's postconviction motion, indicates that the offense was originally charged as armed robbery and includes an allegation that a firearm was involved. However, as the Seventh Circuit explained in response to a similar argument in ***United States ex rel. Welch v. Lane***, 738 F.2d 863, 868-69 (7th Cir. 1984): "[T]here is simply no indication in the record that the sentencing judge looked behind the documentary record to the facts underlying the robbery conviction. And, as a reviewing court, we could not do so in the first instance. Of course, the mere fact that petitioner was originally charged with armed robbery is, without more, not a sufficiently reliable basis for us to conclude that the offense was actually an armed robbery."

adjudications as stated in the PSI: "In 1997 there was robbery with use of force, armed robbery and concealing identity. Party to the crime. In 1996 possession of a dangerous weapon by a child. *In 1993 armed robbery, party to the crime*. And in 1993 another robbery." (Emphasis added.) The court stated that Beasley's history demonstrated "a very consistent pattern" that was "amazingly long given [his] short life," that went "all the way back to 1993, and these events occurred in January 2000." Thus, while the court inaccurately stated that Beasley's August 1993 adjudication was for armed robbery, the court's reasoning remains accurate that Beasley had a history of robberies going back to 1993, that his offenses included armed robbery, and that the juvenile system had been unable to deter him from committing more offenses.

The sentencing court again referenced Beasley's juvenile history when it considered whether to make Beasley eligible for extended supervision. It specifically considered the "consistency of [Beasley's] violent offenses of robbery and being armed going back some seven years prior to this and the lack of remorse and the lack of truthfulness and taking responsibility." The court stated that, for those reasons, it determined that Beasley was "not at all a good candidate for rehabilitation." The court's rationale remains regardless of whether Beasley's August 1993 adjudication was for armed robbery or robbery. Either way, Beasley's offenses began with violent offenses of robberies in 1993 and continued with offenses involving "being armed" in 1996 (possession of a dangerous weapon by a child) and 1997 (robbery with use of force and armed robbery), and through the offenses in this case in January 2000.

Additionally, the sentencing court heavily weighed the seriousness of the offenses in this case, explaining:

> [T]he law does not know a more serious offense than first degree intentional homicide, and it can only be made worse by an

> accompanying attempted first degree intentional homicide, and made worse by the premeditation of going to the house for the express purpose, with a loaded gun, to commit a robbery, and to repeatedly both fire bullets into victims with whom you are face-to-face, without any feeling of compassion for the victims, and the repeated acts of firing the gun ….

The sentencing court specifically explained its decision to deny Beasley eligibility for release to extended supervision:

> I looked at the Department of Corrections recommendation for initial confinement of 45 to 50 years as being a highly speculative, if not theoretical, ray of hope that Mr. Beasley can be rehabilitated and in the late stages of his life could be released and expected not to harm others and not to commit new crimes.
>
> … [B]ut there is very strong unremitting evidence that Mr. Beasley is violent, unrepentant, and a high risk, at high risk to reoffend, and the public I don't think should have to take a chance that he will not be so disabled by age that he can do this again. I don't think that he deserves that chance, given all of the factors that I have referred to, including his lying, his blaming, and the underlying violence that he has engaged in.
>
> ….
>
> … In imposing this sentence, because this is one course of conduct, I am taking into account the use of firearms as a justification for it. I am taking into account the fact of the pre-meditation of the course of conduct. I am taking into account the repetitive nature of the discharge of the firing indiscriminately at [the victims].

The transcript clearly demonstrates that the sentencing court based its sentence on the seriousness of the offenses, Beasley's significant juvenile history involving violence and firearms, particularly given his young age (which remains true even absent the incorrect information that his August 1993 adjudication was for armed robbery), and his lack of remorse or repentance. Accordingly, we conclude beyond a reasonable doubt that "the sentencing court would have imposed the same sentence absent the error." ***Travis***, 347 Wis. 2d 142, ¶73. Thus,

we conclude that the error was harmless, and that the circuit court properly denied Beasley's postconviction motion without a hearing.

Therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals