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DISTRICT IV

April 30, 2013

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

2010AP2077-CR

State of Wisconsin v. Noah Hans Frieden (L.C. # 2009CF11)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Noah Hans Frieden appeals a circuit court order denying his motion for sentence modification and a judgment convicting him of first-degree sexual assault of a person under the age of thirteen, after he entered a plea of no contest. *See* WIS. STAT. § 948.02(1)(e) (2011-12).¹ Frieden argues on appeal that he is entitled to sentence modification because the circuit court relied on inaccurate information in sentencing him. Based upon our review of the briefs and

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm.

A defendant has a constitutionally protected due process right to be sentenced based upon accurate information. *See United States v. Tucker*, 404 U.S. 443 (1972); WIS. CONST., art. I, § 8, cl. 1. However, a defendant moving for resentencing on the basis that the circuit court relied upon inaccurate information must establish both that there was information before the sentencing court that was inaccurate and that the circuit court actually relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

Frieden identifies statements in the sentencing transcript by his counsel, by the therapist who evaluated him, by the district attorney, and by the court that refer to Frieden's risk of reoffending as moderate. Frieden asserts that this characterization is inaccurate, and that his score on a risk assessment evaluation done prior to sentencing placed him at a low risk level. Frieden also lists a number of other statements made by the district attorney at the sentencing hearing that he believes to have been inaccurate, some of which referenced information contained in the pre-sentence investigation report.

The State contends that Frieden did not object at the sentencing hearing to the statements he now challenges and that, therefore, the issue has not been preserved for appeal. After reviewing the record, we conclude that the State is correct that no objection was made to the statements Frieden now disputes. Without reaching the question of whether the sentencing court relied on any allegedly inaccurate information in fashioning the sentence, because Frieden raises for the first time on appeal the argument that he was sentenced based on inaccurate information,

we need not and do not consider the issue. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52.

Frieden also argues that his sentence was improper because, he asserts, other defendants in cases similar to or more severe than his have received lesser sentences. Frieden references a case that he read about in the newspaper in which a Green Bay man received a sentence less severe than Frieden's for repeated sexual assault of a child. Frieden asserts that his sentence should be reduced because the crime he committed did not include penetration by force, as did the offense committed by the Green Bay individual, according to the newspaper account. Frieden references additional cases in the appendix of his brief, but offers no explanation of the facts of the other cases or the statutory offenses for which the other defendants were convicted.

Even if we assume, without deciding the issue, that a comparison to sentences in unrelated cases could provide a basis for modification of his sentence, we reject Frieden's argument as undeveloped. This court need not consider arguments that either are unsupported by adequate factual and legal citations or are otherwise undeveloped. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments); *Dieck v. Unified Sch. Dist. of Antigo*, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (unsupported factual assertions), *aff'd*, 165 Wis. 2d 458, 477 N.W.2d 613 (1991). While we make some allowances for the failings of parties who, as here, are not represented by counsel, “[w]e cannot serve as both advocate and judge,” *Pettit*, 171 Wis. 2d at 647, and will not scour the record to develop viable, fact-supported legal theories on the appellant's behalf, *State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39. Here, Frieden has failed to develop his argument that he was sentenced disproportionately compared with other defendants, and he does not support the argument with applicable law or specific facts. Therefore,

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals