COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2489 **Cir. Ct. No. 2011CF5323**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDDIE LEE SOLES, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Freddie Lee Soles, Jr., appeals a judgment convicting him of theft by false representation and fraud against a financial institution. He also appeals an order denying his motion for postconviction relief. He argues: (1) that he received ineffective assistance of counsel; (2) that the circuit court misused its discretion by treating his postconviction motion as a

collateral attack on the judgment of conviction; (3) that the circuit court misused its sentencing discretion because it imposed a sentence on him that was harsher than the sentences imposed on his co-defendants; and (4) that the circuit court misused its sentencing discretion because it failed to explain on the record at sentencing whether he was eligible for the Earned Release Program or the Challenge Incarceration Program. We affirm.

¶2 Soles pled guilty to theft by false representation and fraud against a financial institution in excess of $100,000, both as a party to a crime. On June 26, 2012, the circuit court sentenced him to five years of imprisonment on each count, to be served concurrently, with two years of initial confinement and three years of extended supervision. Soles' lawyer, John Forrestal, filed a notice of intent to pursue postconviction relief on September 4, 2012. The notice of intent should have been filed within twenty days of the date of sentencing. *See* WIS. STAT. RULE 809.30(2)(b) (2011-12).[1] Although we routinely grant retroactive extensions for filing notices of intent when the notice is filed within several months of sentencing, Forrestal did not seek an extension from this court on behalf of his client.

¶3 On September 6, 2012, a stipulation for restitution in the amount of $376,800 was filed with the circuit court, signed by Forrestal and the assistant district attorney, but not signed by Soles personally. The circuit court amended the judgment of conviction on September 11, 2012, to reflect the stipulation. On

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

September 12, 2012, the court received a letter from Soles in which he stated that he did not agree to the stipulation and wanted a hearing to address the issue.

¶4 When the notice of intent was filed on September 4, 2012, the matter was referred to the Office of the State Public Defender because Soles wanted appointed appellate counsel. In a letter dated September 14, 2012, the state public defender informed Soles that he was not financially eligible for appointed counsel. Soles then moved the circuit court for the appointment of counsel at county expense. On October 16, 2012, the circuit court denied his request.

¶5 On October 19, 2012, Soles filed a postconviction motion in the circuit court. Although captioned as a "Motion to Modify/Motion to Vacate Sentence," the motion addressed issues beyond sentencing. The circuit court treated the motion as a collateral attack on the judgment of conviction because Attorney Forrestal had not obtained an extension of the deadline for filing the notice of intent. The circuit court refused to consider some of the issues that Soles raised and denied the motion without a hearing on October 26, 2012. The decision pointed out that Soles had not provided the circuit court with sufficient information to determine whether Forrestal's actions in failing to timely file the notice of intent constituted ineffective assistance of counsel but that, in any event, Forrestal's actions did not prejudice Soles because he could seek reinstatement of his appellate rights with this court.

¶6 Apparently in response to the circuit court's suggestion, Soles then submitted a letter to this court dated October 30, 2012, asking that we "re-docket" his case. He explained that his lawyer did not timely file a notice of appeal, adversely affecting his constitutional rights. We denied Soles' motion for relief as unnecessary because the circuit court had denied Soles' motion for postconviction

relief only ten days earlier and the deadline for filing a notice of appeal is twenty days from the date that the circuit court decides a motion for postconviction relief on direct appeal. *See* WIS. STAT. RULE 809.30(2)(j). On November 14, 2012, Soles filed a notice of appeal.

¶7 As a preliminary matter, we address the procedural posture of this appeal. Soles is proceeding *pro se* because his request for the appointment of counsel was denied. If Soles had been represented, his lawyer would have sought and obtained an extension of the deadline for filing a notice of intent to pursue postconviction relief because we grant these extensions as a matter of course when they are made within several months of sentencing. After the circuit court issued its decision treating his motion as a collateral attack on the judgment of conviction, Soles then attempted to do what the circuit court had said he should do—seek redress in this court regarding the belatedly filed notice of intent. Soles instead moved to extend the time for filing the notice of appeal, as opposed to the notice of intent. Given the leniency we accord *pro se* litigants and Soles' attempt to obtain an extension of the deadline for filing the notice of intent by motion of October 30, 2012, we conclude that good cause is shown to retroactively extend the deadline for filing the notice of intent. This appeal will therefore proceed as a direct appeal pursuant to WIS. STAT. RULE 809.30.

¶8 Soles first argues that he received ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on

either ground. *See* ***id.*** at 697. A defendant is entitled to an evidentiary hearing on a motion for postconviction relief alleging ineffective assistance of counsel if the defendant alleges facts that, if true, would entitle him to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶9 Soles argues that his trial lawyer provided ineffective assistance of counsel because he did not obtain copies of cooperation agreements that his co-defendants entered into with the State. He cites WIS. STAT. § 971.23(1)(h) for the proposition that the prosecutor must turn over any exculpatory evidence within the State's possession to his attorney upon demand, and ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), which provides that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Soles contends that if his lawyer had been given the cooperation agreements, he could have used them to "impeach" his co-defendants and he would not have entered his plea to the charge.

¶10 Soles does not explain what these purported "cooperation agreements" were and it is unclear what agreements he is referring to based on the record before us. According to the prosecutor's statements at sentencing, Soles cooperated with the State and his cooperation was a factor in the decision of his co-defendants to plead guilty rather than proceeding to trial. The prosecutor also said that it was recommending a lighter sentence for Soles because he cooperated. Soles points to nothing indicating that his co-defendants had cooperation agreements. Moreover, Soles does not explain *why* these agreements, if they exist, would have caused him to go to trial rather than plead guilty. Therefore, we reject this argument.

¶11 Soles next argues that he received ineffective assistance of counsel because his lawyer failed to timely commence a direct appeal. As previously explained, this action is a direct appeal from Soles' conviction. Soles was not prejudiced by his lawyer's failure to seek an extension of the deadline for filing a notice of intent to pursue postconviction relief because we retroactively grant that extension in this opinion.

¶12 Soles' final ineffective assistance of counsel claim centers on his lawyer's actions during sentencing. He contends that his lawyer failed to "argue mitigation" at sentencing, failed to object to the sentencing decision, and failed to argue that he received a harsher sentence than that of his co-defendants. We reject these arguments. First, Soles' lawyer *did* argue that Soles should be shown leniency as compared to his co-defendants due to his lack of criminal record and the fact that he came forward to the police and gave an honest account of his criminal activity. Second, there was no reason for Soles' attorney to "object" at sentencing. Finally, Soles' lawyer did not provide ineffective assistance by failing to present argument about the sentences received by Soles' co-defendants because that argument would not have been successful, as explained in detail below.

¶13 Soles next argues that the circuit court misused its discretion by treating his postconviction motion as a collateral attack on his judgment of conviction. It was not a misuse of discretion for the circuit court to treat Soles' claim as a collateral attack under the circumstances that existed when it considered Soles' motion. Regardless, this issue has become moot because we have retroactively extended the deadline and this appeal is proceeding pursuant to the direct appeal statute. *See* WIS. STAT. RULE 809.30.

¶14 Soles next argues that the circuit court misused its sentencing discretion because it imposed a sentence on him that was harsher than the sentences that were imposed on his similarly situated co-defendants. "Equality of treatment under the Fourteenth amendment … requires substantially the same sentence for persons having substantially the same case histories." ***Jung v. State***, 32 Wis. 2d 541, 553, 145 N.W.2d 684 (1966). It "does not destroy the individualization of sentencing to fit the individual." ***Id.*** Soles contends that he was similarly situated to co-defendants Christopher Harrell and Richard Holder, but he received a longer sentence. Soles was not similarly situated to these two men. Harrell was convicted of one felony charge, theft by false representation, and Holder was convicted of one felony charge, forgery-uttering. In contrast, Soles was convicted of two felonies, both theft by false representation *and* forgery-uttering. Because Soles had been convicted of two charges rather than one charge, he received a longer sentence. There was no due process violation.

¶15 Soles next argues that the circuit court misused its sentencing discretion because it did not state on the record whether he was eligible for the Earned Release Program or the Challenge Incarceration Program. In denying the postconviction motion, the circuit court stated that it checked with the court reporter and it appeared from her audio notes that the circuit court stated that Soles was not eligible for either program, even though that information was not included in the transcript. The circuit court also noted that it filled out the "Written Explanation of Determinate Sentence" form indicating that Soles was not eligible for either program. Because the circuit court found Soles ineligible, as corroborated by the reporter's audio-notes of the hearing and the written form, we

reject Soles' argument that the circuit court misused its sentencing discretion by failing to determine his eligibility for these programs on the record.[2]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] The State briefly addresses several arguments that Soles raised in his motion for postconviction relief but did not raise on appeal. We do not address these issues because Soles did not discuss them in his brief to this court. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994) (issues raised in the circuit court but not briefed or argued are deemed abandoned).