COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1915-CR **Cir. Ct. No. 2011CF3839**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROSALIND B. METCALF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and M. JOSEPH DONALD, Judges. *Affirmed.*

Before Curley, P.J., Brennan, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Rosalind B. Metcalf appeals a judgment of conviction entered upon her guilty pleas to one count of arson of property other than a building and one count of second-degree recklessly endangering safety. *See*

WIS. STAT. §§ 943.03, 941.30(2) (2013-14).[1] She also appeals orders denying her postconviction motions.[2] The only issues presented involve sentencing challenges. Metcalf fails to show that a new factor exists, that the sentencing court relied on inaccurate information, or that the circuit court erroneously exercised sentencing discretion. We affirm.

BACKGROUND

¶2 According to the criminal complaint, on May 16, 2013, at about 2:00 a.m., Metcalf slashed the tires and poured paint on a car belonging to L.K., the woman dating Metcalf's former boyfriend, T.H. Approximately one hour later, Metcalf poured gasoline on T.H.'s car, which was parked in L.K.'s garage, and then set the car on fire. The flames consumed the car and the garage and caused damage to nearby homes.

¶3 The State charged Metcalf with arson to a building and with criminal damage to property. Pursuant to a plea bargain, the State amended the arson charge to one count of arson to property other than a building and added a count of second-degree recklessly endangering safety. Metcalf pled guilty to those charges, and the State moved to dismiss and read in the charge of criminal damage to property.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Honorable Charles F. Kahn, Jr., imposed sentence and entered the judgment of conviction in this matter. The Honorable M. Joseph Donald presided over the postconviction proceedings and denied the motions for postconviction relief.

¶4 At sentencing, the State recommended prison without specifying a recommended term. Metcalf sought probation. The circuit court imposed the maximum available prison sentence for second-degree recklessly endangering safety, namely, an evenly-bifurcated ten-year term of imprisonment. *See* WIS. STAT. §§ 941.30(2), 939.50(3)(g). The circuit court imposed a maximum, forty-two-month prison sentence for arson of property other than a building, *see* WIS. STAT. §§ 943.03, 939.50(3)(i), but stayed that sentence in favor of a consecutive, three-year term of probation.

¶5 Metcalf moved for postconviction relief. The primary basis for the motion was her showing that, beginning in 1995 when she was fourteen years old and continuing for a two-year period, she was the victim of child sex trafficking. Metcalf argued that this information constituted a new factor warranting sentence modification and, relatedly, that her attorney was ineffective for failing to uncover this information and present it to the sentencing court. Alternatively, she claimed that, because the circuit court was unaware of her history as a sex trafficking victim, she was sentenced on the basis of inaccurate information and entitled to resentencing. As separate grounds for relief, Metcalf argued that the circuit court erroneously exercised its sentencing discretion by failing to give an adequate explanation for her sentences and by imposing an unduly harsh sentence for second-degree recklessly endangering safety. The circuit court denied the motion

in its entirety, and Metcalf filed a second motion, renewing and elaborating on her claims. The circuit court again denied relief, and she appeals.[3]

DISCUSSION

¶6 Metcalf first asserts that she is entitled to sentence modification based on an alleged new factor, namely, her history as the victim of child sex trafficking. A new factor is: "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Whether a fact or set of facts constitutes a new factor warranting sentencing relief is a question of law. ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828. We reject Metcalf's new factor claim because her history was known to her at the time of sentencing.

¶7 In ***Rosado***, the sentencing court did not learn about certain information known to the defendant because the defendant elected not to testify. *See* ***id.***, 70 Wis. 2d at 288-89. In postconviction proceedings, the defendant offered the information and claimed it was a new factor warranting a reduced sentence. ***Id.*** at 288. The ***Rosado*** court rejected the claim, explaining that the information was not a new factor because the defendant had the information at the

[3] In addition to the postconviction claims we have summarized above, Metcalf also unsuccessfully sought relief from her term of initial confinement on the ground that she was not receiving adequate mental health treatment in prison. She does not pursue that claim on appeal, and we deem the issue abandoned. Accordingly, we discuss it no further. *See* ***State v. Pozo***, 2002 WI App 279, ¶11, 258 Wis. 2d 796, 654 N.W.2d 12 (we do not consider issues appellant has abandoned).

time of sentencing but chose not to reveal the information until many months later. *See* ***id.*** at 288-89.

¶8 Like the defendant in ***Rosado***, Metcalf knew about the facts of her past but elected not to present certain facts to the sentencing court. Her decision to withhold information about her history as a victim of sex trafficking does not transform that information into a new factor warranting postconviction relief. A new factor must have been unknowingly overlooked at sentencing by all of the parties. *See* ***id.*** at 288. Although the circuit court may not have been aware of the information at issue here, Metcalf herself did not lack knowledge of her personal history. Therefore, that history is not a new factor. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673.

¶9 Metcalf next restates her new factor claim as an allegation of ineffective assistance of counsel, arguing: "if this court deems this [new factor] issue waived because of the late disclosure, [then Metcalf] asserts that trial counsel was ineffective for failing to thoroughly investigate possible mitigating facts and present[] them at sentencing." Metcalf offers no other analysis in support of her claim that trial counsel was ineffective in regard to the alleged new factor. We normally do not address issues that are inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶10 Moreover, were we to consider the merits of Metcalf's skeletal allegation that trial counsel was ineffective, we would reject the claim as meritless. To show ineffective assistance of counsel, a convicted person must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Both prongs of the analysis are questions of law. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449

N.W.2d 845 (1990). Here, Metcalf cannot show prejudice from any alleged deficiency on the part of her trial counsel in failing to investigate her past. She had ample opportunity herself to present her history of victimization to the sentencing court: she cooperated with the preparation of a presentence investigation report and she exercised her right to allocution at sentencing. She elected not to use those opportunities to disclose the history that she now claims should have been investigated by her trial counsel. A lawyer is not ineffective for failing to investigate something that the defendant knew but did not reveal. *See* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390.

¶11 Next, Metcalf reframes her claim as an allegation that she was sentenced on the basis of inaccurate information because the sentencing court never learned she was once a victim of sex trafficking. A defendant has a due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a denial of this right, the defendant must show both that the disputed information was inaccurate and that the sentencing court actually relied on the inaccurate information. *See* ***id.***, ¶26. Whether a defendant has been denied the due process right to be sentenced on accurate information is a constitutional question we review *de novo*. ***Id.***, ¶9.

¶12 Preliminarily, we observe that the right to due process protects against arbitrary, wrongful, and unfair action by the government. *See* ***State ex rel. Greer v. Wiedenhoeft***, 2014 WI 19, ¶¶57, 62, 353 Wis. 2d 307, 845 N.W.2d 373. Here, however, Metcalf concedes that "she never disclosed th[e] important information" that she was a victim of sex trafficking. Thus, the circuit court sentenced her without that information because of the choices she made, not because the State acted improperly.

¶13 Moreover, "[w]hether the circuit court 'actually relied' on ... incorrect information at sentencing, according to the case law, turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" ***State v. Travis***, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491 (footnote and citations omitted). Here, Metcalf fails to show that the sentencing court explicitly took into account any inaccurate information that she was not a victim of sex trafficking. Rather, Metcalf shows only that she was sentenced based on information that she now views as incomplete. Indeed, she describes the sentencing process as including a "huge gap in the information provided." Metcalf, however, does not cite a case—and we know of none—supporting the proposition that offenders must be resentenced merely because the circuit court had less than complete information about them. As the State points out, a sentencing court can never possess the entirety of information about a defendant's life. Nothing in ***Tiepelman*** or its progeny transforms that reality into a due process violation.

¶14 Next, Metcalf claims that the circuit court erroneously exercised its sentencing discretion by relying on improper sentencing factors and by "failing to adequately explain how the sentence imposed related to [the] sentencing objectives." We disagree.

¶15 A circuit court has broad sentencing discretion. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. We will affirm a circuit court's exercise of sentencing discretion so long as "the facts of record indicate that the [circuit] court 'engaged in a process of reasoning based on legally relevant factors.'" ***Id.*** (citation omitted). That reasoning process involves choosing the sentencing objectives, which include "the protection of the community,

punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of factors concerning the defendant, the offense, and the community.[4] *See* ***Gallion***, 270 Wis. 2d 535, ¶43 n.11. The circuit court may determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. We search the record for reasons to sustain the circuit court's exercise of sentencing discretion. *See* ***Odom***, 294 Wis. 2d 844, ¶8.

¶16 In this case, the circuit court imposed an evenly-bifurcated ten-year term of imprisonment for second-degree recklessly endangering safety and a consecutive three-year term of probation for arson. In Metcalf's view, the circuit court imposed these penalties without adequate explanation and without weighing the relevant sentencing objectives. The record does not support the claim.

---

[4] The sentencing factors include:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Gallion, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted).

¶17 Before selecting the specific penalties for Metcalf's crimes, the circuit court conducted a thorough review of the mandatory sentencing factors. The circuit court considered the gravity of the offenses, deeming Metcalf's actions "serious" and "awful," and the circuit court emphasized that, although Metcalf did not kill or physically injure anyone, she caused "terror" and "great emotional harm." The circuit court also emphasized Metcalf's behavior immediately after setting the fire: "she didn't even call the fire department. She didn't even call [the victims] ... to say 'get out of the house....' She did nothing to mitigate damage at the time." The circuit court considered the need to protect the community, specifically recognizing that COMPAS, an analytical tool used as part of the presentence investigation process, produced a finding that she was at low risk to reoffend.[5] The circuit court observed, however, that "we know what she's capable of which is starting a fire in [the victim's] car and also, of course, slashing the tires." The circuit court examined numerous aspects of Metcalf's character, noting her strong work history, her acceptance of responsibility, and her expressions of remorse. The circuit court further recognized that she had a high school diploma and that she was a good mother to two children. Nonetheless, the court expressed unease about two incidents of violence in Metcalf's past, including a battery as a juvenile and a conviction as a young adult for battery by use of a dangerous weapon. Finally, the circuit court noted with grave concern early in the sentencing proceeding that Metcalf had appeared as a witness against T.H. in an unrelated administrative hearing regarding his community supervision and had lied under oath about setting the fire.

[5] "COMPAS stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" ***State v. Samsa***, 2015 WI App 6, ¶1 n.1, 359 Wis. 2d 580, 859 N.W.2d 149.

¶18 The circuit court believed it needed to "teach [Metcalf] a lesson," that is, to punish her. The circuit court acknowledged that Metcalf "probably recognizes how awful the situation is," but the circuit court decided it was "sure incarceration is necessary ... to make sure that she knows for sure without any doubt how awful and vicious and mean spirited and unnecessary this [criminal behavior] is." The circuit court elaborated on these concerns in its postconviction decisions. *Cf.* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has an opportunity to explain a sentence further when challenged by postconviction motion). In rejecting Metcalf's postconviction claims, the circuit court explained that the sentencing judge was "most concerned with the overall reaction by the defendant toward the victims, her anger[,] ... her unreasonable and violent acts of retaliation and [the sentencing judge] believed that justice would not be served in the public's eye unless a substantial sentence were imposed." Further, "the fact that she initially lied about her involvement reflects on her character and need for punishment and rehabilitation." In sum, the record reflects an entirely reasonable discussion of relevant sentencing factors in relation to appropriate sentencing goals.

¶19 Metcalf argues, however, that the circuit court considered an improper sentencing factor. Specifically, she complains that the circuit court discussed what it called an "oh my goodness" factor, which, the circuit court explained, requires taking into account whether the public will respond to a particular sentence by "saying 'oh my goodness, this is awful, [the court system is] out of control, we cannot trust it.'" Metcalf claims "there is no such factor under Wisconsin sentencing law" and that the circuit court's discussion of such a factor reflects an erroneous exercise of discretion. She is wrong. Wisconsin law has long recognized that a sentencing court may take into account "the needs and

rights of the public." ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992).

¶20 Nonetheless, Metcalf asserts that the circuit court's consideration of the public's concerns reveals that the circuit court improperly imposed a harsh sentence to "send a message to the community that [the judge] will not be soft on crime." Metcalf misconstrues the circuit court's sentencing remarks. The circuit court explained that Metcalf earned a maximum sentence for second-degree recklessly endangering safety "because of the number of people whose lives were endangered." The circuit court's explanation is supported by the record, which shows that Metcalf started a fire in a residential area, that numerous people were sleeping in nearby homes at the time, and that two of those homes sustained fire damage. The gravity of the offense is an entirely proper consideration at sentencing.

¶21 Although Metcalf insists that the circuit court did not adequately explain its sentencing decisions, the record shows that the circuit court considered a wide range of relevant and proper sentencing factors and imposed an aggregate penalty that reflected an appropriate assessment of the facts and circumstances in this case. Metcalf's real complaint is that the circuit court declined to give overriding weight to the factors she views as mitigating, but the circuit court's decision to balance the sentencing factors differently from the way she hoped is not an erroneous exercise of discretion. *See* ***Odom***, 294 Wis. 2d 844, ¶8 (our inquiry is whether the circuit court exercised discretion, not whether another court might have exercised discretion differently).

¶22 Last, Metcalf asserts that her sentence for second-degree recklessly endangering safety is unduly harsh. A sentence is unduly harsh when it is '"so

excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). In this case, Metcalf received a sentence within the statutory limits and a presumption therefore exists that the sentence is not unduly harsh. *See* ***id.***, ¶32. It is her burden to demonstrate that the sentencing court erred. *See* ***State v. Mata***, 2001 WI App 184, ¶13, 247 Wis. 2d 1, 632 N.W.2d 872. She fails to carry that burden here.

¶23 Metcalf asserts that "the record is void [sic] of any rationale as to why a maximum sentence was warranted in this case," but, as we have seen, the circuit court stated exactly why it believed a maximum sentence was necessary: "because of the number of people whose lives were endangered, the maximum penalty is appropriate." That decision rested with the circuit court. As the supreme court has reminded us on multiple occasions: "'[w]hat constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual.'" *See* ***State v. Cummings***, 2014 WI 88, ¶75, 357 Wis. 2d 1, 850 N.W.2d 915 (citation and one set of quotation marks omitted). Given the extent of the danger that Metcalf created when she set a car on fire late at night in a residential neighborhood and then left the scene without sounding an alarm, we cannot say that a penalty of five years of initial confinement and five years of extended supervision is shocking to the sensibilities of a civilized public. For all the foregoing reasons, we affirm.

By the Court.—Judgment and orders affirmed.

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