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December 15, 2015

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

2015AP897-CR State of Wisconsin v. Sean Michael Waterman (L.C. # 2012CF2511)

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

Sean Michael Waterman appeals a judgment of conviction and an order denying Waterman's postconviction motion. Waterman contends that he was denied due process because he was sentenced based on inaccurate information and that his trial counsel was ineffective at sentencing. He argues that the circuit court erred by denying his postconviction motion without a 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 (2013-14).¹ We summarily affirm.

Waterman pled guilty to homicide by intoxicated use of a vehicle as part of a global plea agreement, with all other charges and citations pending against Waterman, including two counts of bail jumping arising from Waterman's conduct while released on bond in this case, dismissed but read-in for sentencing purposes. The court sentenced Waterman to ten years of initial confinement and five years of extended supervision. Waterman filed a postconviction motion for resentencing, arguing that the sentencing court relied on inaccurate information and that his trial counsel was ineffective by failing to correct the errors or argue mitigating factors. The circuit court denied the motion without a hearing.

Waterman contends that he was denied due process because the circuit court relied on the following inaccurate information at sentencing: (1) that Waterman consumed alcohol at a wedding reception while released on bond in the underlying homicide by intoxicated use of a vehicle case; and (2) that Waterman's blood alcohol concentration (BAC) was .286 at the time of the accident. We conclude that Waterman has not shown that any information presented to the sentencing court was inaccurate.

A defendant has a due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the

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

inaccurate information in the sentencing.”” *Id.*, ¶26 (quoting *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998)). We review de novo whether a defendant was denied due process at sentencing. *Id.*, ¶9.

Waterman contends that the State’s assertion at sentencing that Waterman had consumed alcohol at a wedding reception while released on bond was inaccurate. Waterman argues that the victim’s relatives falsely reported to police that Waterman consumed alcohol at the wedding, based on their animosity toward Waterman. He argues that the affidavits he submitted with his postconviction motion support his assertion that he had not consumed alcohol at the wedding reception. However, Waterman does not dispute that the victim’s relatives had reported to police that they observed Waterman consume alcohol at the wedding reception, nor does he contend that those relatives have recanted those statements. Rather, Waterman offers evidence that, at most, had it been presented at the sentencing hearing, would have raised a factual dispute, which the circuit court would have resolved. See *State v. Anderson*, 222 Wis. 2d 403, 412, 588 N.W.2d 75 (Ct. App. 1998) (“[T]he [circuit] court has an important fact[-]finding role to perform if facts relevant to the sentencing decision are in dispute. In that setting, the sentencing court must resolve such disputes.”). An assertion that undisputed information could have been placed into dispute by potentially conflicting information is not equivalent to showing that the original information was inaccurate. In sum, Waterman has not carried his burden of showing that the information presented to the court that Waterman consumed alcohol while on bond was inaccurate.

Waterman also contends that the information presented at sentencing that Waterman’s BAC was .286 at the time of the crash was inaccurate. Waterman contends that his BAC was .182 when tested by the State Hygiene Lab, and that there was no reliable evidence to support the

State's assertion that the hospital obtained a BAC test result of .286 upon his admission. However, the criminal complaint states that a responding sheriff's department deputy reported that the deputy was advised by hospital staff that Waterman's BAC was tested upon admission, and the result was .286. At the sentencing hearing, the State informed the court that the hospital obtained the .286 result by testing Waterman's BAC upon admission; that hospital blood testing results tend to be a little higher than the State Hygiene Lab blood testing results; and that the State Hygiene Lab obtained the .182 result by testing the BAC three hours after the crash. While Waterman contends that there is no reliable documentation to support the .286 BAC test result, he has not cited any authority for the proposition that the court could not rely on information in the complaint. *See State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993) (explaining that there is no "formal burden of proof requirement for factual findings which impact on a sentencing"). Moreover, the discrepancy between the two BAC test results was explained at the sentencing hearing, and Waterman has not provided any support for his assertion that the State's explanation at sentencing was inaccurate.

Next, Waterman contends that he was denied the effective assistance of counsel at sentencing because his trial counsel: (1) failed to present mitigating information as to the bail jumping charges; and (2) failed to dispute the State's assertion that Waterman's BAC was .286. We disagree.

A claim of ineffective assistance of counsel must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance was deficient if it "fell below an objective standard of reasonableness." *Id.* at 687-88. Prejudice is shown where counsel's errors

were so serious that they undermine our confidence in the outcome of the proceedings. *Id.* at 694.

First, we disagree with Waterman’s contention that his trial counsel was ineffective by failing to argue mitigating factors related to the bail jumping charges. Waterman cites *State v. Pote*, 2003 WI App 31, ¶34, 260 Wis. 2d 426, 659 N.W.2d 82, for the proposition that trial counsel is deficient by failing to call the court’s attention to relevant mitigating factors at sentencing. In *Pote*, however, we held that “counsel’s failure to bring to the court’s attention *any* of several mitigating circumstances relevant to sentencing” was deficient performance. *Id.* (emphasis added). Here, counsel highlighted several mitigating factors at the sentencing hearing, including Waterman’s good employment history, his difficult upbringing, the physical disability Waterman suffered as a result of the crash, and Waterman’s sincere remorse for his actions. As stated in *Pote*, we make “every effort ... to avoid determinations of ineffectiveness based on hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *Id.*, ¶15 (quoting *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990)). Moreover, “[i]n reviewing counsel’s performance, we judge the reasonableness of counsel’s conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation.” *Id.* Here, in light of all the circumstances, counsel’s performance was not deficient by choosing to highlight certain mitigating factors to the exclusion of others.

Next, we conclude that counsel’s failure to object to the information provided to the court at sentencing as to Waterman’s BAC was not deficient performance. As set forth above, the dispute over Waterman’s BAC was presented to the court, and Waterman has provided no

support for his claim that any of that information was inaccurate. Additionally, we are not persuaded that counsel was deficient by failing to object to the State's use of evidence as to the higher BAC test result. *See State v. Marhal*, 172 Wis. 2d 491, 502-03, 493 N.W.2d 758 (Ct. App. 1992) (the rules of evidence do not apply at sentencing, and the circuit court may consider unproven allegations against the defendant). Because there was no basis to object to the BAC information, counsel was not deficient by failing to object. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

For the reasons set forth above and the reasoning in the circuit court's order denying postconviction relief, we conclude that the circuit court properly exercised its discretion by denying Waterman's postconviction motion without a hearing. *See State v. Allen*, 2004 WI 106, ¶¶9, 12, 274 Wis. 2d 568, 682 N.W.2d 433 (if a postconviction motion is insufficient on its face to warrant relief, the circuit court may deny the motion without an evidentiary hearing).

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals