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**DISTRICT II**

August 10, 2016

To:

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

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2015AP1752-CR

State of Wisconsin v. Dylan Cole Drabek (L.C. # 2014CF661)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Dylan Cole Drabek appeals from an order denying his motion for postconviction relief. He seeks resentencing on several grounds. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm the order of the circuit court.

Drabek was convicted following a guilty plea to one count of armed robbery. The charge stemmed from his taking of money from a retail store clerk while armed with a can of pepper

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version.

spray, which he concealed and presented as a gun. The circuit court sentenced him to ten years of initial confinement followed by seven years of extended supervision.

Drabek subsequently filed a motion for postconviction relief seeking resentencing. He argued that: (1) his sentence was excessive; (2) the circuit court relied upon inaccurate information contained in the presentence investigation report (PSI); and (3) his trial counsel was ineffective for failing to challenge the inaccurate information. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

On appeal, Drabek renews the arguments made in his postconviction motion. We begin with his claim that his sentence was excessive.

When a defendant argues that a sentence is excessive, we will deem it an erroneous exercise of discretion only where 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.” *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). There is a presumption that a sentence “well within the limits of the maximum sentence” is not excessive. *Id.*, ¶31-32 (quoted source omitted).

Here, Drabek faced forty years of imprisonment, with a potential of twenty-five years of initial confinement. *See* WIS. STAT. §§ 943.32(2) and 973.01(2)(b)3. The circuit court imposed ten years of initial confinement, which is less than half of the time available. In light of this fact, as well as the aggravating factors cited in the circuit court’s decision (i.e., Drabek’s drug use, his failure to take advantage of the tools offered to him by his involvement with juvenile

supervision, and the crime's emotional and financial impact on the victim), we do not view the sentence imposed as excessive.

Drabek next contends that the circuit court relied upon inaccurate information contained in the PSI. Specifically, he takes issue with the PSI author's conclusion that he scored a ten out of ten on the COMPAS<sup>2</sup> tool's assessment of his risk of violent recidivism.

There are at least two problems with Drabek's second argument. First, he forfeited the issue by failing to raise it at sentencing.<sup>3</sup> See *State v. Mosley*, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996). Second, even if we were to look past that forfeiture, we are not persuaded that he has met his burden of showing that the information was inaccurate. See *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis.2d 179, 717 N.W.2d 1. At the hearing on his postconviction motion, Drabek called the PSI author's supervisor as a witness in an attempt to undermine the PSI author's conclusion. That attempt failed when the supervisor testified, "I believe that that risk score is accurate."

Drabek's final contention is that his trial counsel was ineffective for failing to challenge the inaccurate information. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

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<sup>2</sup> COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions."

<sup>3</sup> At sentencing, defense counsel informed the circuit court that he had reviewed the presentence report at length with Drabek and did not have any corrections other than the stated loss suffered by the victim. Drabek did not mention the presentence report in his allocution.

Given our rejection of Drabek's second argument, it follows that trial counsel was not deficient in failing to raise it. 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."). In any event, counsel implicitly addressed the PSI author's conclusion in his sentencing argument when he explained why the circumstances of the case called for probation rather than prison. Drabek has not demonstrated that his sentence would have been different had counsel used his suggested approach instead.

Upon the foregoing reasons,

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

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*