COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1990-CR **Cir. Ct. No. 2012CF2932**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENDEL C. BIVENS,

DEFENDANT-APPELLANT.

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

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Kendel Bivens appeals from an amended judgment of conviction for one count of child enticement and four counts of

having sex with a child who is age sixteen or older, contrary to WIS. STAT. §§ 948.07(3) and 948.09 (2011-12).[1] Bivens also appeals from an order denying his postconviction motion for relief. Bivens argues that he is entitled to resentencing because the trial court denied Bivens "his due process right to object to, and comment upon, the information in the presentence report at the time of sentencing." (Capitalization and underlining omitted.) In the alternative, Bivens argues that he is entitled to an evidentiary hearing on his claim that his trial counsel provided ineffective assistance by failing to investigate and rebut certain statements in the presentence investigation report ("PSI"). We reject Bivens's arguments and affirm the amended judgment and order.

BACKGROUND

¶2 Seventeen-year-old Bivens and three co-defendants were charged with a variety of sex crimes concerning a sixteen-year-old female victim who has cognitive limitations.[2] The criminal complaint alleged that on June 3, 2012, Bivens had sexual intercourse with the victim in Bivens's home, directed her to have oral sex with another man in the home, and later arranged for the victim to perform oral sex on numerous men in Bivens's parked car. The complaint alleged that the oral sex acts in Bivens's car were recorded on cell phones and later posted to a co-defendant's Facebook page. Bivens was charged with three felonies in connection with these events: (1) second-degree sexual assault, for having sexual

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

[2] The criminal complaint indicated that the victim's foster mother, a special education teacher who is familiar with numerous educational evaluations of the victim, told the police that the victim "has the cognitive functioning of a 7-9 year old child."

intercourse with the victim; (2) child enticement, for causing the victim to go into a vehicle with the intent to expose a sex organ to her; and (3) sexual exploitation of a child by inducing a child to engage in sexually explicit conduct for the purpose of displaying the conduct.

¶3 Bivens's co-defendants—including two men who told police that Bivens invited men to have oral sex with the victim in his car—were convicted after entering into plea agreements with the State. Bivens ultimately pleaded guilty to reduced charges, including: (1) one count of child enticement, a Class D felony; and (2) four counts of having sex with a child age sixteen or older, a Class A misdemeanor.[3] In exchange for Bivens's guilty pleas, the State agreed to recommend a specific sentence on the felony count: five years of initial confinement, concurrent with a revocation sentence Bivens was serving, with the length of extended supervision left to the trial court's discretion. The State further agreed not to make a specific recommendation concerning the four misdemeanors.

¶4 At the plea hearing, the parties discussed the factual bases for the charges. The four misdemeanors were based on Bivens having sexual intercourse with the victim at his home twice on June 3, 2012, and twice in April or May of 2012. The basis for the felony enticement charge was causing the victim to go into a room of Bivens's home so he could expose his genitals to her. In short, the five charges to which Bivens pleaded guilty did not relate to what occurred in Bivens's car. When the trial court asked about relying on the criminal complaint

[3] Pursuant to the plea agreement, the trial court also dismissed a single count of second-degree sexual assault as a party to a crime with an offense date of March 31, 2012, which had been charged in a separate complaint and which involved the same victim. *See* ***State v. Bivens***, No. 2012CF2998 (Milwaukee Cnty. Cir. Ct.).

to provide a factual basis for the charges, trial counsel replied: "Judge, as it relates to what he's plead[ed] to, any other portion of the criminal complaint, we have no objection. There are other acts alleged in the complaint."

¶5 The trial court ordered a PSI without a sentencing recommendation. When the parties returned for sentencing, trial counsel expressed concern that the PSI discussed the criminal complaint, including allegations concerning what occurred in Bivens's car, which trial counsel said "we have objected to and contested … all along." Trial counsel argued that the PSI's discussion of those allegations and the impact of those allegations on Bivens's COMPAS score would have a detrimental effect on Bivens's programming in prison and the conditions of his release. Trial counsel also asserted that the PSI could lead to Bivens being subjected to a WIS. STAT. ch. 980 proceeding, which trial counsel said he did not discuss with Bivens when he pleaded guilty.

¶6 Based on those concerns, Bivens moved to withdraw his guilty pleas. The parties filed written briefs. Trial counsel subsequently withdrew from the case after it appeared he might be called as a witness. Bivens's next attorney filed a supplemental motion to withdraw the guilty pleas. However, at a subsequent status conference, the parties told the trial court that Bivens had decided to withdraw his motions and was seeking a sentencing date "sooner than later." The trial court spoke directly with Bivens about his decision, allowed him to withdraw his motions, and scheduled a sentencing date.

¶7 At sentencing, the State reviewed the crimes and the plea bargain. The State also told the trial court that it had reviewed the PSI. The trial court then asked trial counsel about the PSI, which led to this exchange:

> THE COURT: And, counsel, have you gone over the presentence report with your client? If you have, are there any additions or corrections?
>
> [Trial counsel]: I have not had an opportunity to go over it with him….
>
> ….
>
> THE COURT: You're going to have to do that. You're going to have to go over the presentence report.
>
> I know [prior counsel] obviously went over the presentence report with [Bivens] because he made an issue of it in one of the proceedings. It's probably best for you to go over it with him since you're new counsel with him.

¶8 The trial court gave trial counsel an opportunity to meet with Bivens. When they reconvened, the trial court asked trial counsel about the PSI:

> THE COURT: Okay. Counsel, have you had the opportunity to go over the [PSI] with your client? I know he had with his previous counsel. Have you had the chance to read it yourself and go over it with him?
>
> [Trial counsel]: I have, your honor.
>
> THE COURT: Okay. Is that correct, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You're ready to proceed to sentencing?
>
> Let's go ahead and proceed.

¶9 The State's sentencing recommendation was consistent with the plea bargain. Trial counsel recommended a global sentence of five years, with three to four years of extended supervision, and also recommended that the sentence be concurrent with his revocation sentence. In his sentencing remarks, trial counsel recognized that "the PSI was a source of contention," but he observed that the facts in the PSI were primarily a recitation of the complaint.

¶10 Bivens chose to exercise his right of allocution. He told the trial court that he was not aware the victim was cognitively delayed. He also said that he "didn't realize that [he] was committing a serious offense by having sex with a 16-year-old female." Bivens did not specifically discuss the allegations concerning what occurred in his car, but when the trial court asked whether it was Bivens's car, Bivens replied, "Yes."[4]

¶11 The trial court sentenced Bivens to two consecutive terms of nine months for the first two misdemeanors and two concurrent terms of nine months for the second two misdemeanors. For the felony, the trial court sentenced Bivens to seven years of initial confinement and six years of extended supervision, consecutive to the misdemeanors. All of the sentences were ordered to be served concurrently with Bivens's revocation sentence. In its sentencing remarks, the trial court referred to the assaults that occurred in Bivens's car and noted that Bivens had created the situation that allowed the young woman to be victimized and degraded.

¶12 Postconviction counsel was appointed for Bivens. Bivens filed a motion for postconviction relief asserting that he was entitled to resentencing because the trial court denied Bivens the opportunity to object to and comment on information in the PSI.[5] In the alternative, Bivens argued that his trial counsel performed deficiently by not adequately investigating the information in the PSI

[4] Bivens did discuss with the PSI writer the events that took place in his car. Bivens told the writer that he did not make the victim do anything and that he never recruited men to have oral sex with her. He said he was not present when the victim performed oral sex on the men in his car because he had gone "'to the park to meet up with some other girls.'"

[5] Bivens also challenged the imposition of DNA surcharges. The trial court subsequently vacated those surcharges and, therefore, we do not discuss them.

and by not bringing to the trial court's attention inaccuracies in the PSI. The trial court denied the motion in a written order, for reasons discussed below. This appeal follows.

DISCUSSION

I. Motion for resentencing based on alleged trial court error.

¶13 In his postconviction motion, Bivens cited numerous cases for the proposition that a trial court is required to afford a defendant "the opportunity to challenge statements and correct errors in a [PSI]." *See, e.g.*, ***State v. Melton***, 2013 WI 65, ¶29, 349 Wis. 2d 48, 834 N.W.2d 345 ("Some information in a PSI 'may be unverified and some of it may be inaccurate.... [A]ffording the defendant and defendant's counsel an opportunity to examine the contents of the report permits the defendant to challenge statements and correct errors.'") (citation omitted; bracketing and ellipses in ***Melton***). The parties agree that a defendant must have an opportunity to challenge information in the PSI; at issue in this case is whether Bivens was denied that opportunity.

¶14 Bivens's postconviction motion asserted that the trial court "improperly denied [Bivens] the right to object to, and comment about" the PSI. The motion stated: "[T]he trial court *never* asked either [Bivens] or his counsel if either, or both, of them had any additions or corrections to the report." (Italics used in place of underlining.) Bivens argued that the trial court erred because it "did not afford [Bivens] the opportunity to rebut the information in the [PSI] concerning the unpled misconduct concerning the June 3, 2012 vehicle incident."

¶15 In its written order, the trial court disagreed with Bivens's characterization of the sentencing hearing, noting that the court had, in fact,

"asked the defense if there were any additions or corrections to the report." The trial court continued: "The court reasonably could have expected to be informed of any additions or corrections after the defendant had reviewed it with counsel."

¶16 We agree with the trial court. The transcript indicates that the trial court explicitly asked the defense whether it had "any additions or corrections." When trial counsel indicated he had not gone through the PSI with Bivens, the trial court gave trial counsel an opportunity to do so. When the case was recalled, the trial court asked whether they were ready to proceed, and neither trial counsel nor Bivens indicated they had corrections or additions or other issues they wanted to raise concerning the PSI. It is clear that Bivens and his trial counsel were given an opportunity to challenge statements in the PSI. Bivens is not entitled to resentencing based on alleged trial court error.

II. Motion alleging ineffective assistance of trial counsel.

¶17 The parties agree that a trial court may consider unproven offenses at sentencing, but the defendant still "has a due process right to be sentenced based on accurate information." *See* ***State v. Harris***, 2012 WI App 79, ¶13, 343 Wis. 2d 479, 819 N.W.2d 350. "A defendant who requests resentencing due to the [trial] 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 inaccurate information in the sentencing.'" ***Id.*** (citations and one set of quotation marks omitted; brackets in original). Where, as here, trial counsel did not bring the alleged inaccuracies to the trial court's attention at sentencing, "we analyze the resentencing issue under the guise of ineffective assistance of counsel." ***Id.***, ¶14.

¶18 To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency

prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Id.*** at 697. An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective representation on appeal." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A motion for a ***Machner*** hearing may, at the discretion of the trial court, be denied "'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

¶19 With those standards in mind, we turn to our analysis of Bivens's postconviction motion, which included as attachments six reports plus an affidavit from a private investigator. Bivens argued that if trial counsel had adequately investigated the facts alleged in the PSI and had presented the information in those reports to the trial court at sentencing, the trial court would have learned that the PSI was inaccurate with respect to Bivens's involvement in the sexual assaults that occurred in his car. Bivens's motion asserted that because those factual inaccuracies were not brought to the trial court's attention, the trial "focused solely upon the inaccurate aggravating factors," which resulted in Bivens receiving "a greater sentence than otherwise."

¶20 The trial court rejected Bivens's argument that the reports he submitted with his postconviction motion "would have rebutted material facts in the criminal complaint that he contends were erroneous." The trial court discussed some of those documents, such as statements by two men that the victim was "'obsessed'" with the defendant and "would 'stalk' the defendant." (One set of

quotation marks omitted.) The trial court said that none of the statements "establish that the material facts were inaccurate." The trial court explained:

> The general scenario of what occurred the day that the victim accompanied the defendant in his vehicle when he allowed her to become involved in sucking on a bevy of young male penises cannot be minimized, and the overall picture is what the court relied on when it fashioned its sentence. Nothing in the defendant's current submissions would have undermined the court's assessment of the defendant's character, to wit, involving himself in this situation, his complete awareness of what was happening, and allowing it to happen when he was already on supervision for another offense.

¶21 On appeal, Bivens discusses the documents he submitted with his postconviction motion, highlighting key statements he believes undermine statements in the PSI. We have examined each of the documents and will briefly discuss them here.

¶22 One of the documents is an affidavit from a defense investigator who was hired by Bivens's original trial counsel to conduct interviews with numerous individuals in 2012. The investigator states that after new counsel was appointed for Bivens in December 2013, the investigator offered to provide assistance, but trial counsel did not return her calls.

¶23 Three of the documents are defense investigator reports concerning interviews with men who knew the victim and Bivens. One young man who was found delinquent for having oral sex with the same victim told the investigator that Bivens "was not 'in charge' of [the victim's] activities in any way, and that [the victim] 'was just doing what she wanted to do.'" The juvenile also said that Bivens did not ask the juvenile for money in exchange for the sexual activity.

¶24 Another young man told the defense investigator that the victim "was determined to make [Bivens] into her boyfriend" and "followed [Bivens] around to get his attention." The man said that the victim propositioned many men and that "plenty of people, including [Bivens], tried … to get her to chill with the sexual activity."

¶25 A third juvenile told the investigator that he saw the victim at Bivens's home on numerous occasions and that the victim "was just having sex with anybody who wanted to have sex with her." The juvenile also said that another man invited other men to Bivens's house to have sex with the victim.

¶26 In addition to those three reports, Bivens submitted a report detailing the investigator's interview with the victim's great-grandmother, who said that while the victim is "'slow,'" she is not "so 'slow' that she cannot learn." She also said that the victim "is highly 'sexual'" and noted that the victim had been raped by two or three boys in a different incident.

¶27 Bivens's motion also included two reports documenting interviews with the victim. One report details the forensic interview a police officer conducted with the victim on June 4, 2012. The report states that the victim told the officer that on June 3, 2012, she, Bivens, and another young man were lying on a bed in Bivens's house when Bivens "whispered in her ear that she should" perform oral sex on the other man, which she did. The report states that the victim said that Bivens "was on the bed with them and that he set an alarm on her phone so she would know when to stop." The victim told the officer that "she felt upset and did not want to do it, but that she did it for [Bivens]." The victim said that later that day, when she and Bivens were alone, she had sexual intercourse with him.

¶28 The victim also told the officer that she and Bivens left Bivens's house in his car and that she had oral sex with a friend of Bivens in the backseat while they were driving. She said that after Bivens parked the car, another friend of Bivens asked a crowd of young men if they wanted to have oral sex with the victim. The victim said that Bivens "had walked to a house across the street and said to call him if something happened." The victim said that she did not want to perform oral sex on the men who came to the car, but she told the officer that "she was kind of afraid of [Bivens] because she had heard from people that he hits girls[,] although she said that she did not know of anyone that had happened to."

¶29 The second report concerning an interview with the victim was written by the defense investigator in December 2012. The report indicates that the victim said that Bivens's "friends raped me." The report states that the victim said that Bivens "was not there because he went to his other friend's house" and that Bivens "did not do anything to help somebody rape her." The victim said that it was Bivens's friend who "called everybody to the car," not Bivens. The victim also said that she had received therapy to try to "forget" Bivens, but "she cannot do it." She said that Bivens "is her friend" and "she just wants a chance to start their friendship over again."

¶30 On appeal, Bivens asserts that the reports refute what was presented in the PSI. He focuses on two specific issues. First, he argues that the reports establish that he "never pimped … out" the victim. He contends that another man invited individuals to the car to have oral sex with the victim. He asserts: "No one ever forced her to have oral sex." Second, Bivens argues the reports prove that "the victim was not extremely vulnerable, much less vulnerable at all." (Emphasis omitted.)

¶31 In response, the State argues that even if we assume that trial counsel performed deficiently by not challenging certain facts in the PSI, Bivens cannot prove he was prejudiced because he has not shown "that the information in the PSI and complaint about the gang rape was in fact inaccurate." The State asserts: "The most he has been able to show is that some of this information may be inconsistent with or contradicted by other information."

¶32 We agree with the State and the trial court that even if we accept as true the statements in the reports, Bivens has not proven that the information in the PSI was inaccurate. The fact that the victim—a minor—may have offered oral sex to some young men at some point, or may have expressed romantic interest in Bivens, does not change the fact that she was filmed performing oral sex on multiple young men in Bivens's car. Further, the fact that Bivens may have gone to another person's house after parking the car does not disprove information in the PSI indicating that he drove the victim to the location or that the victim had oral sex with a man in the car while Bivens was driving. In addition, the reports do not fully contradict the statements of numerous individuals that Bivens, whether at his home or elsewhere, at times directed the victim to perform oral sex on other men.

¶33 The reports also do not refute the fact that the victim was cognitively delayed or vulnerable. While the victim's great-grandmother told the investigator that the victim has the ability to learn, she also said the victim was slow and noted that the victim has a short attention span and "has screaming and hollering outbursts." The great-grandmother's observations do not disprove information in the PSI that the victim's educational test scores indicate she has the cognitive abilities of a child between the ages of seven and nine.

¶34 Like the trial court, we recognize that the reports and the PSI contain contradictions on minor facts, such as whether it was Bivens or his friend who invited men to have oral sex with the victim in Bivens's car. But as the trial court noted in its order denying the postconviction motion, the trial court at sentencing "never specified it was the defendant who let it be known throughout the neighborhood that there was a 'flipper' in [Bivens's] car."[6]

¶35 In summary, the allegations in Bivens's motion and attachments do not demonstrate that the information in the PSI was inaccurate. Accordingly, Bivens has not shown that he was prejudiced by the fact that trial counsel did not offer the information in the reports at sentencing. Therefore, it was within the trial court's discretion to deny Bivens's motion without a ***Machner*** hearing, and we discern no erroneous exercise of that discretion. We affirm the amended judgment and the order denying Bivens's postconviction motion.

By the Court.—Judgment and order affirmed.

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

[6] The criminal complaint indicates that a "flipper" is "a person who provides sexual favors."