COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP746-CR

Cir. Ct. No. 2002CF1906
2002CF2800

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARON D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Laron Harris appeals from the order denying his postconviction motion. He argues on appeal that the trial court: (1) violated his constitutional rights when, at a resentencing hearing that was required due to inaccurate information being conveyed to the court at the original sentencing, the

trial court decreased his initial confinement by eight months, but increased his extended supervision by the same amount; (2) acted contrary to WIS. STAT. § 968.20(1) (2001-02)[1] and in violation of his rights to due process and fundamental fairness when, without notice, the trial court rescinded its order returning Harris's money that was confiscated at the time of his arrest; (3) failed to give him sentence credit for the time he was released and assisting the police; and (4) "relied upon inaccurate and disputed information in concluding he was a danger to the community" at the resentencing proceeding, and "also erroneously exercised its sentencing discretion." Finally, Harris claims that he is entitled to a new sentencing hearing because of the ineffectiveness of his trial attorney. We affirm.

I. BACKGROUND.

¶2 On April 5, 2002, Harris was charged with one count of felony possession of cocaine with the intent to deliver, contrary to WIS. STAT. §§ 961.16(2)(b)1. and 961.41(lm)(cm)1., and one count of misdemeanor possession of tetrahydrocannabinols (marijuana), contrary to WIS. STAT. §§ 961.01(14), 961.14(4)(t), and 961.41(3g)(e), as a result of an encounter with the police who were looking for a suspect wanted on a felony. (Case No. 02CF1906.) According to the criminal complaint, the police officer, who was searching for someone else, saw Harris standing in the bushes. Harris asked the officer who he was, and when the officer responded that he was "the police," Harris ran through some yards and around a garage. The officer gave chase and saw Harris throw

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

two baggies to the ground. After Harris was apprehended, the police recovered the two baggies and discovered that one contained twenty-three individually wrapped chunks of what turned out to be cocaine, and the other baggie contained marijuana.

¶3 Shortly after his arrest, Harris was charged with possession of tetrahydrocannabinols (marijuana) with intent to deliver, second or subsequent offense, contrary to WIS. STAT. §§ 961.01(14), 961.14(4)(t), 961.41(lm)(h)1., and 961.48, as a result of an unrelated incident. (Case No. 02CF2800.) In August 2002, Harris entered no contest pleas to the felony charge and the misdemeanor charge in Case No. 02CF1906 and the felony charge in Case No. 02CF2800.[2] The court ordered a presentence investigation. Prior to sentencing, Harris's bail was reduced to $125 on each case, and he was released in order to assist the police. At one point after his release, an officer communicated with the trial court that Harris was not cooperating. A bench warrant was issued for Harris's arrest and his bail was forfeited, but he turned himself in to the court. Thereafter, cash bail was set and Harris remained in custody.

¶4 However, while in custody, Harris did assist the police in obtaining confessions from two drug dealers, and as a result, the State agreed to reduce its sentencing recommendation from ten years to between six and six-and-one-half years. Due to the parties' joint request for a sentencing adjournment, Harris was not sentenced until March 2003. At that time, the judge sentenced him in Case No. 02CF1906 to five years of initial confinement and two years of extended supervision on the felony count, and six months of incarceration on the

[2] The two cases were consolidated prior to the plea hearing.

misdemeanor count, to be served concurrently; however, both were to be served consecutively to the sentence on the felony charge in Case No. 02CF2800 of two years of initial confinement and one year of extended supervision. The trial court also ordered that $3105 seized from Harris when he was arrested be confiscated and donated to a crime prevention organization.

¶5 Approximately seven months later, Harris filed a postconviction motion seeking a modification of his sentence as well as sentencing credit, and he requested that the seized monies be restored to him. After a four-month delay, as the result of several snafus and court congestion, the trial court modified the sentence as to the felony count in Case No. 02CF1906 and ordered Harris to serve four-and-one-half years of initial confinement and two-and-one-half years of extended supervision. Thus, the trial court reduced the original initial confinement period by six months, but added six months to the term of extended supervision. As to Case No. 02CF2800, the trial court reduced the initial confinement period by two months and increased the extended supervision period by two months. It also ordered the $3105 returned to Harris, noting that if the money had been federally seized, Harris would have to pursue the appropriate avenues for recovery. The order relating to the return of Harris's money was rescinded without notice in March 2004. All other requests, including Harris's subsequent *pro se* motions seeking reconsideration and the opportunity to be eligible for the earned release program, were denied.

¶6 Nothing further occurred until this court received a letter from Harris who sought a "late" appeal. Consequently, on February 15, 2006, this court ordered an attorney assigned to Harris's case by the public defender's office to file a brief status report. Months later, in October 2006, a postconviction motion was filed in which Harris, now with new counsel, sought resentencing. The trial court

ordered briefs to be filed by both parties. On March 6, 2007, the trial court issued a written decision and order granting Harris two additional days of sentence credit and reinstating $1500 that had been paid for bail and previously forfeited.

II. ANALYSIS.

A. Harris's resentencing did not violate his constitutional rights.

¶7 As noted, after Harris had been sentenced, he brought a postconviction motion claiming, inter alia, that he was sentenced on the basis of inaccurate information because the trial court believed that the money which Harris possessed at the time of his arrest was obtained by drug dealing. Eventually the trial court agreed with Harris that the money he had when he was arrested was not the product of drug dealing as the court initially believed, but rather, consisted of money he received from his tax return. Consequently, the trial court resentenced him. In Case No. 02CF1906, the trial court kept the same sentence (seven years) on the felony count, but reduced his period of incarceration by six months to four-and-one-half years of confinement, and increased his term of extended supervision by six months, to two-and-one-half years. Similarly, in Case No. 02CF2800, the trial court kept the same sentence (three years), but reduced his period of incarceration by two months, resulting in an initial-confinement period of twenty-two months. Meanwhile, the trial court increased his term of extended supervision by two months, resulting in an extended-supervision period of fourteen months.

¶8 Harris submits that by doing so, the trial court increased his sentence and thus triggered a violation of his constitutional rights. Specifically, he argues that by increasing the term of his extended supervision, he was subjected to double jeopardy and his due process rights were violated. This is so, he submits, because

he had a legitimate expectation of finality in his sentence, and it would appear he had been penalized for pursuing his right to be sentenced on accurate information.

¶9 When a claim is made that a sentence has been unlawfully increased and constitutes a violation of a defendant's protection against double jeopardy and the right to due process, this is a question of law that is reviewed *de novo*. *See* ***State v. Church***, 2003 WI 74, ¶17, 262 Wis. 2d 678, 665 N.W.2d 141; ***State v. Jones***, 2002 WI App 208, ¶8, 257 Wis. 2d 163, 650 N.W.2d 844. Further, the question of whether the double jeopardy clause has been violated by an increased sentence turns on the "legitimacy of a defendant's expectation of finality in that sentence." ***Jones***, 257 Wis. 2d 163, ¶10.

¶10 While we agree with Harris that ordinarily a trial court cannot increase a sentence at a resentencing hearing unless "the reasons for … doing so … affirmatively appear" and the "factual data upon which the increased sentence is based must be made part of the record," *see* ***North Carolina v. Pearce***, 395 U.S. 711, 726 (1969), we part company with his analysis because Harris's sentence was not increased. Harris's argument that because his term of extended supervision was increased his sentence was increased is belied by the sentencing law. WISCONSIN STAT. § 973.01 (amended Feb. 1, 2003) defines a sentence as:

> **Bifurcated sentence of imprisonment and extended supervision. (1)** BIFURCATED SENTENCE REQUIRED. Except as provided in sub. (3), whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, or a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.
>
> **(2)** STRUCTURE OF BIFURCATED SENTENCES. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. *The total length of a bifurcated sentence equals the length of the term of*

> *confinement in prison plus the length of the term of extended supervision.*

(Emphasis added.) Harris's term of extended supervision is not a separate sentence, but rather, part of the bifurcated sentence. Indeed, in its resentencing comments, the trial court explained its intentions: "I am going to adjust downward that initial term of confinement. That is my reasoning for doing so. The total term of imprisonment remains the same." As the State notes, Harris "thus attempts to recast a reduction in his term of confinement without a reduction in the total sentence as an increase in sentence." Because Harris's underlying premise is incorrect, his sentence was not increased, we reject his argument that his constitutional rights were implicated by the resentencing.

B. The rescission of the order returning $3105 to Harris was due to the fact the money was no longer under State control.

¶11 Harris complains that the trial court rescinded its order returning to him $3105 that was found in Harris's possession when he was arrested. Originally at sentencing the trial court ordered the money to be turned over to a crime prevention organization. On February 17, 2004, the trial court was persuaded that the money was not the result of Harris's drug dealing, but rather, consisted of money returned to him as a tax refund, and ordered the money returned to him. On March 11, 2004, the trial court rescinded its order returning the money to Harris.[3] Although Harris was not given an opportunity to be heard on the issue, the order was in response to Harris's *pro se* motion seeking the return of the money. The trial court stated in the order that the money had not been sent to a

[3] A more appropriate way of conveying this information might have been to write to Harris and advise him of what the court learned from its apparent investigation into the matter. In any event, the court concluded it had no jurisdiction.

crime prevention organization, as the court originally ordered; instead, the money was seized by the federal government. Implicit in the order was the court's belief that since the State no longer had the money, the court had no authority to order the federal government to return it.

¶12 At the hearing when the trial court ordered the money returned to Harris, it warned: "If those monies have been federally seized, Mr. Harris has to go through a different method to attempt to secure those [funds]." The inability of the trial court to return the money to Harris is not a due process violation. If Harris wishes to obtain the money, he will have to deal with the federal authorities. The State cannot return the money to him because the State no longer has the money.

C. The trial court properly denied Harris's request for sentencing credit for time spent out on bail during which he was to have assisted police.

¶13 Harris argues that he is entitled to credit for the period of time he was released on bail in order to assist the police. He theorizes that he was in "constructive custody" when he was temporarily released to assist police and, thus, is entitled to sentence credit. He acknowledges that the holding in ***State v. Magnuson***, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, sets forth the bright-line rule of when one is entitled to sentence credit. However, Harris attempts to distinguish the facts in ***Magnuson*** from those present here.

¶14 As noted, Harris's bond was reduced to $125 cash bail on each case, and he was released on September 13, 2002, to assist the police. Several conditions were placed on Harris while he was out on bail, including cooperating with the police, contacting them every other day, and partaking in weekly drug testing. Approximately one month after Harris was released, the trial court was

alerted that Harris was not cooperating with police, bail was forfeited, and a bench warrant was ordered for his arrest.[4] Eventually, Harris turned himself in and new cash bail was set.[5] Harris seeks sentence credit for the time he was released on bail until the time he turned himself in.

¶15 Sentencing credit is governed by WIS. STAT. § 973.155(1)(a), which states: "A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Thus, whether Harris is entitled to sentencing credit involves application of a statute to undisputed facts, an issue of law subject to *de novo* review. *See* ***State v. Dentici***, 2002 WI App 77, ¶4, 251 Wis. 2d 436, 643 N.W.2d 180. "[F]or sentence credit purposes an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." ***Magnuson***, 233 Wis. 2d 40, ¶25.

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[4] Harris's attorney attempted to leave a message with Harris to come to court for a bail hearing, but Harris did not appear.

[5] There is some confusion about the bail that was forfeited. The judgment roll and the transcripts support the conclusion that bail had been reduced in both cases to $250 when Harris was released, ostensibly to assist the Milwaukee Police. The judgment roll contains the following ambiguous entry for October 25, 2002, suggesting that bail in the amount of $1500 was forfeited:

> Bench warrant issued[.]
>
> Defendant failing to appear, Court ordered a bench warrant to issue. State's motion for Judgment of Bond Forfeiture 30 days after notification from Clerk of Circuit Court's Office is granted by the Court. COURT ORDERED DEFENDANT REMANDED TO THE JUDGE ON RETURN OF THE BENCH WARRANT.
>
> Cash bond ordered forfeited[.]
>
> Cash bond ordered to be forfeited in the amount of [$]1500.00.

In any event, the $1500 bail was later reinstated.

¶16 In ***Magnuson***, Magnuson was released into the custody of a pastor, where he lived for approximately six months. ***Id.***, ¶8. During this time, he was also electronically monitored. ***Id.***, ¶6. In a postconviction motion, Magnuson sought sentencing credit for these six months. ***Id.***, ¶9. The supreme court concluded that Magnuson was not eligible for credit for the time he was released into the custody of his pastor because he was not subject to an escape charge. ***Id.***, ¶32. Harris attempts to distinguish the holding in ***Magnuson*** from the facts here, arguing, "It is clearly beyond dispute that unlike ***Magnuson***, Harris' release was temporary. Therefore, the period of his temporary release constitutes 'constructive custody,' as defined in the escape statute." (Underlining omitted; italics added.) We disagree.

¶17 The central holding in ***Magnuson*** is that sentencing credit will be given if, during the period requested, a party could be charged with escape. ***Id.***, ¶31. Like Harris,

> [Magnuson] was not in danger of being charged with escape under any applicable statute. Although Magnuson could suffer negative legal consequences for leaving his home detention with electronic monitoring or for violating his other release conditions, we do not believe that these consequences transformed his situation into custody for entitlement to sentence credit.

Id., ¶46. Because Harris could not have been charged with escape, Harris is not entitled to any additional sentence credit.

D. The trial court's minor mistakes in reciting Harris's past criminal record voiced during the resentencing hearing are harmless.

¶18 Harris contends that he is entitled to another sentencing hearing because the trial court misstated the number of resisting/obstructing citations that Harris had received—the court said five to six, when the documents reflect only

four—and the trial court mistakenly claimed that Harris had picked up citations every year between 1994 and 2002, when in fact there were no citations between August 2000 and April/May 2002. In addition, Harris believes that a factual dispute was left unresolved concerning the level of assistance that Harris gave to the police, and that the trial court resolved this dispute against Harris. We disagree.

¶19 "A defendant has a constitutionally protected 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. We review whether a defendant has been denied this constitutional right *de novo*. ***Id.***

> "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.'" Once actual reliance on inaccurate information is shown, the burden then shifts to the [S]tate to prove the error was harmless.

Id., ¶26 (citation omitted).

¶20 "[T]he standard for evaluating [harmless error] is the same whether the error is constitutional, statutory, or otherwise." ***State v. Harvey***, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189. An error is harmless if it does not affect the defendant's substantial rights. WIS. STAT. § 805.18 (2005-06).

¶21 The transcript of the first sentencing hearing is thirty-four pages long. It reflects that the trial court erroneously miscalculated the number of obstructing/resisting citations Harris received and the years in which those citations were obtained. However, a review of the entire transcript reveals that the trial court was not relying on the number of citations or the particular years in

which they were issued, but rather, the pattern that was presented by looking over Harris's entire criminal record. The trial court was concerned with the pattern that was emerging from a review of Harris's troubles with the law. After reviewing all of the information presented, the trial court commented that the community had to be protected from Harris, and that he is "someone who believes he can act with impunity." The trial court did not rely on any particular citation or year in reaching its sentencing decision. Thus, here, the errors were harmless, as an error is harmless if there is no reasonable possibility that it contributed to the outcome. The trial court's missteps in reciting the number of citations and the years in which they were issued did not contribute to the outcome. Rather, it was the pattern that the trial court saw from the various police contacts and the type of contacts that led to Harris's initial sentences.

¶22 Finally, the record belies Harris's argument that a factual dispute existed as to the degree of cooperation he had with law enforcement. The trial court was mindful that, while in custody, Harris had helped the police secure the confessions of two drug dealers. Indeed, the State said it was reducing its recommendation on the strength of that assistance. Harris argues that the trial court should have determined why Harris did not assist the police when released on bail. At the bail hearing, Harris's attorney explained why Harris could not help the police when released from custody, e.g., a target drug dealer was arrested, and Harris was concerned about his safety. Harris argues a factual dispute existed as to why he failed to initially help the police. While Harris had an excuse for his failure to help police when he was released from custody, the fact remains that he was not as helpful to police when originally released as he was once his bail was forfeited, and he was in custody. The trial court was mindful of his later assistance, and Harris was given credit for his assistance. The trial court was not

required to delve into the details of Harris's police assistance when released earlier. The fact is that Harris's assistance was not productive until later.

E. Harris's attorney was not ineffective.

¶23 Harris contends that he is entitled to a new sentencing hearing because of his attorney's ineffectiveness. Specifically, Harris faults his attorney for not correcting the inaccurate information recounted by the judge concerning the number of citations he received and the years in which he got them. Harris also claims that his attorney should have made the trial court aware of his police cooperation. Further, he submits that the prosecutor's comments, which appeared to support the sentencing recommendation of the PSI writer rather than the plea negotiation, should have been objected to, and that his attorney was ineffective for failing to do so.

¶24 To support a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficiency was prejudicial. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. Whether counsel's performance was ineffective presents a mixed question of fact and law. ***Id.***, ¶15. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See* ***id.*** However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. ***Id.***

¶25 We have already determined that the minor flaws in the trial court's sentencing comments were harmless. Consequently, Harris's trial attorney's failure to correct the trial court in its recitation of Harris's record does not give rise to a valid claim of ineffective assistance of counsel because he can show no

prejudice. With regard to the State's sentencing remarks, our review of the record does not reveal any breach of the plea negotiations. The prosecutor explained why the State was reducing its original recommendation. The prosecutor also explained why prison time was appropriate.

¶26 Here, the plea bargain and what the prosecutor told the trial court are not disputed. Thus, our inquiry is whether, as a matter of law, the prosecutor's comments "substantial[ly] and material[ly]" breached the plea bargain. ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733 (whether State's conduct materially and substantially breached plea bargain is a question of law). A prosecutor may not do indirectly "what [he] promised not to do directly, i.e., convey a message to the trial court that a defendant's actions warrant a more severe sentence than that recommended." ***State v. Ferguson***, 166 Wis. 2d 317, 322, 479 N.W.2d 241 (Ct. App. 1991) (citation and internal quotation marks omitted). However, "[a]t sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot 'be immunized by a plea agreement between the defendant and the [S]tate.'" ***Id.*** at 324 (citation omitted). "A plea agreement which does not allow the sentencing court to be apprised of relevant information is void as against public policy." ***Id.***

¶27 The prosecutor steadfastly urged the court to follow the plea negotiation. However, the prosecutor was free to explain that Harris deserved to spend time in jail. Because the State's remarks did not "substantial[ly] and material[ly]" breach the plea bargain, no ineffectiveness occurred when Harris's attorney failed to object.

¶28 For the reasons stated, the postconviction order is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.