COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1918-CR **Cir. Ct. No. 2008CF104**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK J. ROHM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Judgment affirmed in part, reversed in part; order reversed, and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Derrick Rohm appeals a judgment of conviction on ten counts of burglary contrary to WIS. STAT. § 943.10(1m)(a),[1] and an order denying his motion for postconviction relief. Rohm argues the circuit court failed to provide sufficient reasons for the length of confinement ordered, relied on inaccurate information at sentencing, and erroneously exercised its discretion when ordering significant restitution to insurers, and contends his trial counsel provided ineffective assistance. We conclude the circuit court set forth sufficient reasons for the sentence. However, we also conclude the court prejudicially relied on inaccurate information at sentencing, and erred when setting restitution. We therefore reverse and remand for resentencing and reconsideration of restitution. Because we reverse on these other grounds, we do not reach Rohm's ineffective assistance of counsel argument.

BACKGROUND

¶2 Rohm and a friend, Anthony Spoerl, went on a crime spree, burglarizing approximately sixty unoccupied homes. When caught, Rohm admitted his involvement in the burglaries and cooperated with law enforcement. However, he consistently denied taking part in two shooting incidents where rounds were fired into occupied homes. Spoerl was charged in the shooting incidents, but Rohm was not. Rohm was charged in three cases with thirty-five various counts of burglary, attempted burglary, criminal damage to property, and possession of THC.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Rohm agreed to plead guilty to ten counts of burglary, with the twenty-five remaining counts being dismissed but read in.[2] The State recommended a thirty-year sentence, as follows: twenty years' imprisonment, of which eight to ten years would be initial confinement and ten to twelve years would be extended supervision, followed by ten years' probation. At the plea hearing, the State informed the court, "There is also an agreement that certain charges, or referrals will not be pursued by the District Attorney and therefore a formal read-in to be prepared and submitted to the Court at the time of sentencing." Neither the State nor defense counsel specified what these other incidents were, the court did not identify them when accepting the plea agreement, and no "formal read-in" was ever submitted to the court.

¶4 The presentence investigation report indicated Rohm had six uncharged referrals, including the two shooting incidents, that were read in for sentencing purposes.[3] The report also included victim impact statements pertaining to the shootings and emphasized the shootings in support of its prison recommendation. The report recommended a thirty-seven to forty-seven-year sentence consisting of fifteen to twenty years' confinement and fifteen to twenty years' extended supervision, followed by seven years' probation.

[2] All six charges in Outagamie County case Nos. 2008CF15 and 2008CM89 were dismissed but read-in.

[3] The report stated this information was obtained from the State's file.

¶5 The circuit court followed the low end of the presentence investigation's sentence recommendation, and repeated the report's reasoning nearly verbatim, indicating in part:[4]

> Not only did you break into homes and businesses stealing others' belongings, damage the property of others, you were also involved in two separate homes that were shot at and hit at the time these homes were occupied. You have shown a complete reckless disregard for yourself and others. … Your actions show no regard for others or safety of (sic) property of these victims. Your actions were dangerous and you're dangerous.

The court sentenced Rohm to a cumulative thirty-seven-year sentence, consisting of fifteen years' initial confinement and fifteen years' extended supervision, followed by seven years' probation. Following a restitution hearing, the court also ordered Rohm to pay approximately $115,000 restitution. The circuit court denied Rohm's motion for postconviction relief, which raised the same four issues now presented on appeal.

DISCUSSION

¶6 Rohm argues the circuit court failed to provide sufficient reasons for the length of confinement ordered, relied on inaccurate information at sentencing, and erroneously exercised its discretion when ordering significant restitution to insurers, and contends his trial counsel provided ineffective assistance.

¶7 ***State v. Gallion***, 2004 WI 42, ¶¶40-46, 270 Wis. 2d 535, 678 N.W.2d 197, "set[s] forth the basic framework for sentencing and emphasize[s]

[4] We do not mean to suggest it is improper to rely on a presentence investigation report's language. We merely note it here to demonstrate the fact, and extent, of the circuit court's reliance on the report. We do not, however, recite here the entirety of the circuit court's statement mirroring the presentence investigation report language.

the need for the court to set forth its rationale on the record." ***State v. Taylor***, 2006 WI 22, ¶53, 289 Wis. 2d 34, 710 N.W.2d 466 (Bradley, J. concurring). A sentence should provide "for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶44. "What has previously been satisfied with implied rationale must now be set forth on the record." ***Id.***, ¶38. Thus, appellate courts must refrain from inferring the trial court's unstated reasoning. ***State v. Ziegler***, 2006 WI App 49, ¶25, 289 Wis. 2d 594, 712 N.W.2d 76.

¶8 We are satisfied that discretion was in fact exercised here and that the circuit court adequately set forth the basis for its exercise of discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶4. The court explained it balanced Rohm's mental health issues, family background, and treatment needs against his juvenile record, numerous crimes and victims, and danger to the community. The court also emphasized the seriousness and repetitive nature of Rohm's offenses, detailing facts of the crimes. The court then explained why it rejected Rohm's proposed treatment alternative to prison and again emphasized its concern for protecting society from Rohm.

¶9 Rohm asserts the circuit court failed to adequately explain why a fifteen-year confinement term was necessary, as opposed to a shorter term such as five years. We recognize the requirement that "if a circuit court imposes jail or prison, it shall explain why the duration of incarceration should be expected to advance the objectives it has specified." ***Id.***, ¶45. ***Gallion*** does not, however, require mathematical precision in explaining a court's sentence. ***Id.***, ¶49.

¶10 Rather, the supreme court explained, "Because we recognize the difficulty in providing a reasoned explanation in isolation, we encourage circuit courts to refer to information provided by others. Courts may use counsels' recommendations for the nature and duration of the sentence and the recommendations of the presentence report as touchstones in their reasoning." ***Id.***, ¶47. The circuit court did precisely that here, referring to the presentence report and repeating much of it nearly verbatim.

¶11 Additionally, Rohm overstates the disputed sentencing range when he compares five and fifteen years' confinement. Rohm agreed to plead guilty knowing the State was recommending eight to ten years' confinement. The circuit court's reference to, and reliance on, the presentence investigation report adequately explains the court's departure from a ten-year confinement recommendation to fifteen years' confinement, and satisfies the minimal requirements of ***Gallion***.

¶12 Although we conclude the circuit court adequately set forth its sentencing rationale, we nonetheless remand for resentencing because the court relied on improper grounds in arriving at the sentence. 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. To establish a violation of this right, the defendant must show that inaccurate information was presented at sentencing and that the sentencing court actually relied on the inaccurate information. ***Id.***, ¶26. If the defendant makes both showings, the burden shifts to the State to prove that the reliance on inaccurate information was harmless beyond a reasonable doubt. ***Id.***

¶13 Rohm argues the presentence investigation report and the circuit court incorrectly treated the shooting incidents as admitted conduct that was read in for sentencing purposes. The State concedes, by its silence, that the conduct was neither admitted nor read in. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Further, as Rohm aptly notes, while read in crimes and pending charges may be included in the presentence report, "[a]rrest records that did not lead to conviction and not confirmed by the client may not be used as a source of information." WIS. ADMIN. CODE § DOC 328.29(3) (Dec. 2006).

¶14 As our prior discussion of the sentencing makes clear, the circuit court relied on the shooting incidents at sentencing. Again, the State fails to address this second component of the analysis, and we deem it conceded.

¶15 The State asserts only that "the shooting incidents were not the deciding factor in the sentence imposed by the court, or even a significant consideration." This assertion ignores both the factual record and legal standard. Based on the objective record, the State cannot demonstrate that the court's reliance on the inaccurate information was harmless beyond a reasonable doubt. The presentence investigation report relied significantly on the shooting incidents, and the circuit court, in turn, relied significantly on that report. A substantial portion of the circuit court's sentencing comments mirrored the report's emphasis on the shooting incidents and conclusion that Rohm was dangerous. Consideration of the shooting incidents clearly contributed to the conclusion Rohm was dangerous. We therefore reverse the sentence and remand for resentencing before a different judge. *See* ***State v. Matson***, 2003 WI App 253, ¶34, 268 Wis. 2d 725, 674 N.W.2d 51. Further, the sentencing court may not

consider the existing, tainted presentence investigation report. If on remand the court orders the preparation of a new report, it shall be prepared by a different agent.[5]

¶16 Rohm next argues his trial counsel was ineffective for failing to present significant evidence rebutting the claim that he was involved in the shooting incidents. Because we reverse and remand for resentencing on other grounds, we do not reach this argument. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

¶17 Finally, Rohm argues the court erred when ordering restitution payments to insurance companies without first considering the proper standard set forth in WIS. STAT. § 973.20(5)(d). Subsection 973.20(1r) sets forth the general requirement that, in the absence of substantial reasons not to do so, a court shall order restitution to a victim. However, an insurance company that makes payments on behalf of an insured victim is not itself a victim entitled to restitution. *See* WIS. STAT. § 950.02(4)(a); ***State v. Gribble***, 2001 WI App 227, ¶71, 248 Wis. 2d 409, 636 N.W.2d 488 (definition of victim in § 950.02(4)(a) applies to § 973.20(1r)). Rather, reimbursement to an insurer may only be awarded "[i]f justice so requires." WIS. STAT. § 973.20(5)(d).

¶18 Once again, the State fails to respond to Rohm's argument, instead setting up and responding to a straw argument not made by Rohm.[6] Thus, the

[5] The State offers no objection to Rohm's requests for a new judge at resentencing and a new presentence investigation report.

State also concedes this argument. In any event, we agree with Rohm that the circuit court erroneously exercised its discretion by failing to consider the proper standard in WIS. STAT. § 973.20(5)(d) before ordering restitution payments to insurers.

¶19 Further, addressing the issue at the postconviction motion hearing, the circuit court failed to explain why, in this case, justice required payments to the insurance companies. The court commented only that it believed it was appropriate and beneficial to society for insurance companies to be compensated. Of course, insurance companies are different from victims because they are paid to accept financial risks. Insurers are also regular players in the legal system and can recover from the offender in civil court regardless of any failure to award them restitution. More importantly, the circuit court's treatment effectively rewrites the statutes, making insurers victims in every case, and nullifying the requirement that courts only award reimbursement in those cases where "justice so requires." The court made no attempt to apply that standard to the facts of this case or explain why the ordered payments would further the primary purposes of restitution, rehabilitating offenders and making victims whole. *See* ***Huggett v. State***, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978). Therefore, we reverse the portion of restitution constituting reimbursement to insurers.

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[6] The State argues Rohm forfeited the argument that the circuit court failed to consider his financial ability to pay. Not only did Rohm not make such an argument on appeal, but the State twice misrepresents the record when it asserts Rohm failed to challenge his ability to pay and conceded the amount of restitution due. Rohm did argue he had a limited ability to pay, and only conceded the $15,000 amount due the victims, not the entire $115,000 ordered by the court.

The State would be better served to admit error, rather than responding on appeal with a meritless brief. This only undermines our trust in the State's briefs to this court.

By the Court.— Judgment affirmed in part, reversed in part; order reversed, and cause remanded.

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