

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

November 19, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3525-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARMANDO T. TREVINO, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS and DONALD J. HASSIN, JR., Judges.
Affirmed.

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Armando T. Trevino, Jr., appeals from a judgment convicting him of first-degree sexual assault of a child on his guilty plea¹ and from

¹ The judgment was entered by Judge J. Mac Davis.

an order denying his postconviction motion for sentence modification.² We reject Trevino's appellate challenge to his sentence and affirm the judgment and the order.

The complaint charged Trevino with three counts of first-degree sexual assault of a child under thirteen contrary to § 948.02(1), STATS. The offenses allegedly occurred between January 1, 1991, and October 1, 1994. In exchange for Trevino's waiver of the preliminary examination, the State filed a single count information alleging the same dates of occurrence. Trevino pled guilty to that information. At the plea hearing, Trevino agreed in a colloquy with the trial court that the complaint would be the factual basis for his plea. During the colloquy, the trial court specifically recited the dates between which the assaults occurred. Trevino received a twenty-five year sentence and his sentence modification motion was denied.

Trevino raises the following challenges to his sentence: (1) the sentence violates constitutional protections against ex post facto provisions because the trial court based his sentence on an increased maximum penalty which took effect during the period of the charged offenses;³ (2) the date of the offenses should be determined with greater specificity because it is likely the offenses occurred in early to mid-1993, prior to the effective date of the increase in the maximum penalty for the felony; (3) the trial court misused its discretion when it based the sentence on the increased maximum penalty; (4) trial counsel was

² The order was entered by Judge Donald J. Hassin, Jr.

³ Effective April 20, 1994, the maximum penalty for a Class B felony (the grade of felony of which Trevino was convicted) increased from twenty to forty years. *See* 1993 Wis. Act 194, §§ 9 and 9359.

ineffective at sentencing; (5) he was sentenced based on inaccurate information in the presentence investigation report (PSI) and conflicting sentencing matrices; and (6) postsentencing evaluations regarding his potential to reoffend constituted new factors warranting sentence modification.

We conclude that by pleading guilty to an information which alleged occurrences in a time period which included the effective date of an increase in the maximum penalty, Trevino waived his right to challenge his sentence on the basis that the increased penalty did not apply. A knowing and voluntary guilty plea waives all nonjurisdictional defects and defenses, including constitutional rights. *See State v. Skamfer*, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). The fact that the information alleges offense dates some distance apart does not constitute a jurisdictional defect—the exception to the guilty plea waiver rule.⁴ We further conclude that Trevino’s plea waived his right to challenge the specificity of the offense dates. Having so held, we also conclude that the trial court did not misuse its discretion in imposing a sentence in recognition that the maximum penalty was forty years.⁵

We turn to Trevino’s claim that his trial counsel was ineffective at sentencing for (1) failing to challenge the PSI writer’s opinion that Trevino was an extreme risk to reoffend, (2) not presenting evidence that his risk of reoffending

⁴ A court does not have criminal subject matter jurisdiction over a nonexistent offense. *See State v. Cvorovic*, 158 Wis.2d 630, 634, 462 N.W.2d 897, 898 (Ct. App. 1990). Here, Trevino does not contend that the information does not charge a crime. Therefore, the circuit court had jurisdiction and any other defects in the complaint were waived by Trevino’s guilty plea. *See State v. Bonds*, 161 Wis.2d 605, 610, 469 N.W.2d 184, 186 (Ct. App.), *rev’d on other grounds*, 165 Wis.2d 27, 477 N.W.2d 265 (1991).

⁵ We note that in the Request to Enter Plea and Waiver of Rights form, Trevino acknowledged that the maximum penalty was forty years in prison. At sentencing, the trial court noted that Trevino had pled to a forty-year felony.

was moderate, and (3) allowing Trevino to be sentenced based on inaccurate information.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *See State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). The final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. *See Knight*, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541.

Trevino focuses his appellate challenge on counsel's alleged failure to counter the PSI author's opinion that Trevino was an extreme risk to reoffend. The record does not bear out that counsel left this opinion unchallenged. First, we must note the exact opinion rendered by the PSI author. The author stated that in interviewing Trevino for the report, she formed the opinion that Trevino "has minimized the impact of the sexual assaults on the young victim and continues to rationalize his sexual assaultive behavior." She noted that Trevino minimized the number of assaults that occurred and showed no empathy or remorse for the victim. The PSI author continued, "even though Trevino had been involved in sex

offender treatment, he was unable to demonstrate any victim empathy and continues to rationalize his sexual assaultive behavior and his continued use of drugs and alcohol. Therefore, this agent believes that Trevino is an extreme risk to reoffend.”

At the postconviction motion hearing, defense counsel called Trevino’s treating psychologist, Dr. Peter Kenny, who testified about Trevino’s counseling, expressions of remorse and empathy for his victim, and opined that Trevino could benefit from psychotherapy and alcohol and drug treatment. This testimony directly addressed the PSI author’s opinion that these elements were missing from Trevino’s character and made him an extreme risk of reoffending. In addition to presenting the opinion of Trevino’s treating psychologist, trial counsel’s cross-examination of the PSI author revealed that she did not speak with Kenny prior to preparing the report to determine whether Kenny believed Trevino had expressed remorse. The author also admitted that she did not contact Trevino’s alcohol and drug counselor and did not know what the counselor believed Trevino needed in terms of treatment. The author also conceded that she did not have a psychology degree.

In his argument at sentencing, trial counsel asked the court to disregard the PSI author’s opinions and recommendations because her report was inaccurate and did not address Trevino’s treatment. Counsel also noted the PSI author’s concern that Trevino was an extreme risk to reoffend even though he had been involved in sex offender treatment. Counsel pointed out that Trevino attended the sex offender program on one occasion and was precluded from attending further sessions because of a probation hold. Counsel argued that the author’s statement that Trevino had not demonstrated any remorse was inaccurate based upon the testimony Kenny and counsel’s own observations of Trevino

during the course of his representation. Counsel challenged the PSI author's ability to assess whether Trevino would reoffend. In exercising his right of allocution, Trevino expressed remorse and empathy.

In sentencing Trevino, the trial court considered Trevino's prior criminal offenses, his serious substance abuse problem, his previous failure on probation, the gravity of the offense, Trevino's statement to the PSI author that he assaulted the victim strictly for self-gratification and because the child had a difficult life anyway, and the need to protect the public. The trial court felt that Trevino was at risk of reoffending because he committed numerous offenses until he was caught and because Kenny noted that Trevino still has questions regarding sexual identity. The trial court imposed a twenty-five year sentence.

Trevino argues that the appropriate way to counter the PSI author's opinion that he would reoffend would have been to have him evaluated by a sex offender therapist and present the results of that evaluation at the sentencing hearing. At the postconviction motion hearing, trial counsel testified that he did not ask Kenny to testify about the risk that Trevino would reoffend because he was not aware of a distinction in the literature involving sex offenders between risk of reoffense and treatability. Trial counsel also admitted that he did not have Trevino evaluated by a sex offender treatment provider. Trevino also presented expert testimony that he is a moderate risk to reoffend and an excellent candidate for treatment, which would further reduce the risk of reoffending. Trevino argued that had such evidence been presented at the sentencing hearing, the trial court would have had more than the lay opinion of the PSI author and the district attorney regarding the risk of reoffending.

In ruling on the ineffective assistance of counsel motion, the trial court noted that trial counsel took several approaches to countering the unfavorable PSI. The trial court reviewed the evidence and argument presented at the sentencing hearing and acknowledged that trial counsel did not offer an expert's opinion on the question of Trevino's risk of reoffending. However, the trial court found that there was no record indicating that sex offenders should be routinely evaluated prior to sentencing for risk of reoffending. The court noted the vigor with which trial counsel challenged the PSI and attempted to show that Trevino was treatable. The trial court concluded that Trevino did not meet his burden to show that trial counsel's performance was deficient.

We agree with the trial court's findings, which are not clearly erroneous on this record. Although postconviction counsel might have taken another approach to challenge the PSI, this does not mean that trial counsel's performance was deficient. We review counsel's performance from counsel's perspective at the time of trial and Trevino has not demonstrated that counsel did not act reasonably within professional norms. *See Johnson*, 153 Wis.2d at 127, 449 N.W.2d at 847-48. Having found that counsel's performance was not deficient, we need not address the prejudice prong of the *Strickland* analysis.

Trevino next argues that his sentencing proceeding was fundamentally unfair because he was sentenced on the basis of inaccurate information. He also argues that a dispute regarding the sentencing matrix negatively impacted sentencing. We do not address this claim because a defendant cannot challenge a sentence based on the use or nonuse of the sentencing guidelines or accompanying sentencing matrix. *See State v. Elam*, 195 Wis.2d 683, 685, 538 N.W.2d 249, 249 (1995).

Trevino's brief notes numerous alleged inaccuracies in the PSI. A defendant who claims that he or she was sentenced on the basis of inaccurate information must prove that the information was inaccurate and that the circuit court relied upon the inaccurate information in imposing the sentence. *See State v. Harris*, 174 Wis.2d 367, 378, 497 N.W.2d 742, 746 (Ct. App. 1993). Trevino suggests that the reliability of the entire PSI is questionable in light of these alleged inaccuracies. However, this is not the test. The test is whether the trial court relied upon any of this allegedly inaccurate information in sentencing Trevino. Trevino does not direct us to that part of the sentencing record which indicates that the trial court relied upon any of this information, and we have not located any portion of the sentencing record so indicating.

Finally, Trevino argues that a postsentencing evaluation stating that he is a low or moderate risk of reoffending is a new factor entitling him to sentence modification. A new factor is a fact relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing, *see State v. Kaster*, 148 Wis.2d 789, 803, 436 N.W.2d 891, 897 (Ct. App. 1989), or which frustrates the sentencing court's intent, *see State v. Michels*, 150 Wis.2d 94, 100, 441 N.W.2d 278, 281 (Ct. App. 1989). Whether a fact constitutes a new factor is a question of law which we decide independently of the trial court. *See Michels*, 150 Wis.2d at 97, 441 N.W.2d at 279.

That a subsequent evaluation determined that Trevino was at less risk of reoffending than the PSI author opined does not necessarily frustrate the purpose of the trial court's sentence. In sentencing Trevino, the trial court was concerned with *any* risk of reoffending. Furthermore, we note that the likelihood of reoffending was but one factor the trial court considered in exercising its sentencing discretion. *See State v. Thompson*, 172 Wis.2d 257, 264, 493 N.W.2d

729, 732 (Ct. App. 1992) (weight of sentencing considerations is within the trial court's discretion).

By the Court.—Judgment and order affirmed.

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

