COURT OF APPEALS DECISION DATED AND FILED

MARCH 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-2849-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WADE C. DEVENEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Modified and, as modified, affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Wade C. Deveney has appealed from a judgment convicting him of one count of escape in violation of § 946.42(3)(a), STATS. The judgment was entered pursuant to a guilty plea. Deveney was sentenced to five years imprisonment. In an amendment to the judgment, he was given 320 days of sentence credit for time spent incarcerated in Missouri following his escape.

Attorney Barbara A. Cadwell, appellate counsel for Deveney, has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Deveney was served with a copy of the report and has filed a response. Based upon an independent review of the report, record and response as required by ***Anders*** and RULE 809.32, we conclude that no issue of arguable merit could be raised on appeal. The judgment of conviction, as modified by this court, is affirmed.[1]

Counsel's no merit report addresses four issues: (1) whether the trial court should have permitted Deveney to withdraw his guilty plea and granted him a trial; (2) whether the trial court properly exercised its discretion in sentencing Deveney; (3) whether Deveney is entitled to relief based on ineffective assistance of trial counsel; and (4) whether Deveney is entitled to credit against his escape sentence for time spent incarcerated in New Hampshire after his escape and before his return to Wisconsin for criminal proceedings on that charge. We have independently reviewed the record and conclude that counsel has correctly determined that the enumerated issues lack arguable merit.

The complaint against Deveney alleged that on April 15, 1994, he escaped from the McNaughton Correctional Institute, where he was in custody

[1] The written judgment of conviction states that Deveney was convicted of escape as a habitual criminal under § 939.62, STATS. The repeater allegation was derived from the criminal complaint. However, at the hearing at which Deveney entered his guilty plea, the trial court and parties agreed that escape is a charge to which the repeater allegation may not be added. With the consent of the parties the trial court then orally amended the information to allege only escape, and Deveney entered his guilty plea to that charge. Because the trial court clearly and unambiguously ordered judgment to be entered on the escape charge without a repeater allegation, its oral pronouncement controls the written judgment. *See* ***State v. Perry***, 136 Wis.2d 92, 114-15, 401 N.W.2d 748, 758 (1987). This court therefore orders that the written judgment of conviction as originally entered on August 19, 1996 and amended on August 11, 1997, be modified on remand to delete the reference to habitual criminality under § 939.62, and to indicate simply that Deveney pled guilty to escape in violation of § 946.42(3)(a), STATS.

serving a criminal sentence. Deveney made his initial appearance on the escape charge on July 30, 1996. In the interim between his escape and his return to Wisconsin, Deveney was arrested and held in a Missouri jail. Charges in Missouri were subsequently dismissed, and Deveney was released pursuant to an extradition bond arising from the Wisconsin charge. Rather than returning to Wisconsin, he went to New Hampshire, where he was arrested upon a new charge. He was ultimately convicted and sentenced to time served in New Hampshire, and was then returned to Wisconsin where he entered a guilty plea to the escape charge.

To be constitutional, a guilty plea must affirmatively be shown to be knowing, voluntary and intelligent. *See* ***State v. Bangert,*** 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). When accepting a guilty plea, the trial court must address the defendant personally to determine that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment if convicted. *See* § 971.08(1)(a), STATS. It must ascertain the defendant's understanding of the constitutional rights he is waiving after informing him of those rights or ascertaining that he knows what those rights are. *See* ***Bangert,*** 131 Wis.2d at 270-72, 389 N.W.2d at 24-25. Pursuant to § 971.08(1)(b), the trial court must also make such inquiry as satisfies it that the defendant has, in fact, committed the crime charged.

As thoroughly discussed in counsel's no merit report, these standards are clearly satisfied here. The complaint provided a factual basis for the guilty plea. Deveney was clearly informed of the nature and elements of the offense, the five year sentence and the $10,000 fine which could be imposed by the trial court, and the constitutional rights he was waiving. He expressed his understanding of those matters, and expressly admitted that the State could prove the elements of the escape charge. He acknowledged that the State had not agreed

to make any particular sentence recommendation and that he was pleading guilty "completely freely and voluntarily." In addition, he specifically denied that anyone made any threats or used any force to induce his guilty plea.

We also agree with counsel's conclusion that the trial court properly exercised its discretion in sentencing Deveney to five years in prison. Appellate courts have a strong policy against interference with the trial court's sentencing discretion and the court is presumed to have acted reasonably. *See* ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record. *See* ***id.*** at 622-23, 350 N.W.2d at 638-39.

The primary factors the trial court must consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. *See* ***id.*** at 623, 350 N.W.2d at 639. Within the context of these factors, the trial court may consider the defendant's past criminal record or history of undesirable behavior patterns and his personality, character and social traits. *See* ***id.*** at 623-24, 350 N.W.2d at 639. The weight to be given to each of the relevant factors is particularly within the wide discretion of the trial court. *See* ***State v. Curbello-Rodriguez,*** 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984). Imposition of a sentence may be based on any of the three primary factors after all relevant factors have been considered. *See* ***id.***

The trial court's sentencing decision reflects an appropriate consideration of the pertinent sentencing factors. The mere fact that the court placed primary weight on the fact that Deveney had spent almost all of his adult

life incarcerated for criminal offenses and continued to violate the law, as evidenced by this escape, provides no basis for relief from the sentence.[2]

In his response, Deveney objects that he was denied an adequate presentence report, that he was denied an opportunity to present witnesses at sentencing, and that the trial court improperly considered unsworn and unproven "other acts." However, a trial court is not required to order or use a presentence report. *See* ***Bruneau v. State***, 77 Wis.2d 166, 174, 252 N.W.2d 347, 351 (1977). It may consider other criminal conduct even though the defendant was never charged with it or convicted of it, and even if that conduct is the subject of pending charges. *See* ***Handel v. State***, 74 Wis.2d 699, 702-03, 247 N.W.2d 711, 713-14 (1976). In addition, although a defendant has a right to be sentenced based upon true and accurate information, *see* ***Bruneau***, 77 Wis.2d at 174-75, 252 N.W.2d at 351, presentation of information regarding the defendant's past conduct and history is not subject to the rules of evidence and other restrictions which govern trial, *see* ***State v. Marhal***, 172 Wis.2d 491, 502-03, 493 N.W.2d 758, 763-64 (Ct. App. 1992).

Deveney contends that his rights were violated when the trial court permitted the superintendent at the prison from which he escaped to provide information concerning Deveney's history and to express an opinion as to what

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[2] In his response, Deveney complains that the inmate who escaped with him from the McNaughton Correctional Institute received a lesser sentence. However, a disparity between the sentences of co-defendants is proper when the individual sentences are based upon individual culpability and the need for rehabilitation. *See* ***State v. Toliver***, 187 Wis.2d 346, 362, 523 N.W.2d 113, 119 (Ct. App. 1994). While Deveney argues at length that his co-escapee's criminal history was as bad or worse than his, even if true this factor alone provides no basis for disturbing Deveney's sentence, which was based upon a reasonable analysis by the trial court of the sentencing factors applicable to him, including the trial court's consideration that Deveney was older than his co-escapee, thus indicating that he had spent a greater number of years involved in crime and had failed to amend his character during that time.

sentence he believed was appropriate. However, the trial court's action was permissible since it told the parties that it would permit such input and permitted them to review the material before sentencing. *See* ***Rosado v. State***, 70 Wis.2d 280, 287, 224 N.W.2d 69, 72 (1975). Furthermore, to establish a due process violation, the defendant has the burden of proving by clear and convincing evidence that information supplied at sentencing was inaccurate and that it was prejudicial. *See* ***State v. Coolidge***, 173 Wis.2d 783, 789, 496 N.W.2d 701, 705 (Ct. App. 1993). Since our review of the transcripts of the sentencing and postconviction hearings has failed to uncover any basis for concluding that the trial court sentenced Deveney in reliance on inaccurate information, and since the various conclusory or immaterial allegations in Deveney's response are insufficient to establish a due process violation, no arguable basis exists to disturb the five year sentence imposed on Deveney.

We also agree with appellate counsel's contention that the trial court properly denied Deveney's postconviction motion seeking to withdraw his guilty plea and obtain a new trial. Deveney based this motion on two grounds: (1) that his plea was entered as a result of threats and coercion by jail and prison personnel; and (2) that his plea resulted from ineffective assistance by his trial counsel, who did not adequately investigate possible defenses to the escape charge, failed to protect him from harassment and threats by jail and prison personnel, and failed to advise him that the public defender would appoint new counsel for him when he expressed dissatisfaction with his trial counsel's performance.

A defendant is entitled to withdraw his guilty plea after sentencing only by showing, by clear and convincing evidence, that a manifest injustice has occurred. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996).

The manifest injustice test is met if the defendant was denied effective assistance of counsel. *See* ***id.*** The defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland,*** 466 U.S. at 687. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). The second inquiry focuses on whether counsel's performance affected the outcome of the plea process. *See* ***id.*** at 59. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis.2d at 312, 548 N.W.2d at 54.

A defendant must base a challenge to his representation on more than speculation. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 350 (Ct. App. 1994). A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of his case. *See* ***id.*** at 48, 527 N.W.2d at 349-50.

The trial court held an evidentiary hearing on Deveney's postconviction motion at which both Deveney and his trial counsel testified. Deveney was the sole witness who testified that he was subjected to threats or harassment when he was returned to Wisconsin and jailed on the escape charges.[3]

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[3] Deveney attaches to his response a postconviction letter written to him by trial counsel which he alleges establishes that trial counsel knew he was being harassed and threatened by jail and prison personnel and entered his guilty plea as a result. In fact, the letter refers only to the prison, and acknowledges simply that Deveney complained "of McNaughton harassing you." Acknowledging that Deveney made this claim in no manner establishes that the complaint was true. Moreover, Deveney has also claimed that the reason he fled from the prison camp in 1994 was because he was being harassed by prison officials and personnel. Trial counsel's statement may simply have been a reference to this claim. In no manner does it establish that threats or harassment occurred at the time Deveney entered his guilty plea and induced his plea.

At the conclusion of the hearing the trial court denied the motion, rejecting Deveney's claim that his plea was the result of threats and determining that counsel's representation was neither deficient nor prejudicial. It relied on the fact that Deveney had expressly denied the existence of any threats when he entered his guilty plea and that Deveney wanted to speed the disposition of the case, as established by his request to enter a guilty plea at his adjourned initial appearance, which was held only a few days after his return to Wisconsin and constituted his first appearance with counsel. At that hearing, Deveney stated that he wanted to plead guilty and "get this over with." His statements at that time also revealed that the guilty plea was his own proposal and not that of his trial counsel.

The trial court also rejected Deveney's claim that his trial counsel should have raised a defense of "temporary insanity." While Deveney testified in support of this claim that he fled from prison as a result of stress caused by his wife's behavior and a conspiracy of harassment by prison officials, the trial court reasonably found that nothing in the record supported a finding that Deveney did not appreciate the wrongfulness of his conduct and could not conform his conduct to the requirements of the law, as required for a defense under § 971.15(1), STATS. Absent such a showing (which also fails to find support in the lengthy materials attached by Deveney to his response), no basis exists to conclude that trial counsel

rendered deficient performance by failing to pursue such a defense. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).[4]

In his postconviction motion, Deveney also claimed that his trial counsel was ineffective for failing to inform him that the state public defender would appoint new counsel for him when he expressed dissatisfaction with trial counsel's performance. However, trial counsel testified at the postconviction hearing that Deveney never advised him that he wished to have new counsel, and simply wanted to get the plea entered quickly so he could get back to the prison system. This court knows of no authority which requires a trial attorney to independently inform a defendant of a right to request the appointment of substitute counsel.

In his response, Deveney adds to the ineffectiveness claims raised in his postconviction motion. Specifically, he claims that his trial counsel was ineffective because he did not inform Deveney that a sentence for escape is by law required to be consecutive to the remainder of the sentence the defendant was serving when he escaped. *See* § 946.42(4)(a), STATS. He contends that he was not aware of this fact until the sentencing hearing and would not have pled guilty if he had known. Deveney also contends that he was denied effective assistance of counsel at sentencing.

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[4] We also point out to Deveney that a knowing and voluntary guilty plea waives all defects leading up to the plea except jurisdictional defects, *see* ***State v. Bangert***, 131 Wis.2d 246, 293, 389 N.W.2d 12, 34 (1986), including claimed pre-plea incidents of ineffective trial counsel, except insofar as the alleged ineffectiveness relates to the voluntariness of the plea. *See* ***Smith v. Estelle***, 711 F.2d 677, 682 (5th Cir. 1983), *cert. denied*, ***Smith v. McKaskle***, 466 U.S. 906 (1984). Because Deveney's guilty plea was a knowing and voluntary waiver of his right to a trial and to present defenses at trial, he cannot now prevail on a claim that trial counsel was ineffective for failing to pursue a "temporary insanity" defense.

This court has located no Wisconsin case holding that a guilty plea was unknowing or involuntary based on a failure by counsel or the trial court to inform the defendant that the sentence could be or must be imposed consecutively to a sentence he was then serving. We also note that when it was pointed out by the prosecutor at sentencing that a consecutive sentence was mandated by statute, Deveney raised no objection and made no statement indicating that he was unaware of this fact when he entered his plea. In any event, Deveney failed to raise this issue at the postconviction hearing on his motion to withdraw his guilty plea, nor did he question trial counsel concerning it at that hearing. Preserving the testimony of counsel on a claim of ineffective assistance of counsel is a prerequisite to raising that claim on appeal. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Because the issue was not raised in the trial court, it may not be raised in this appeal and provides no basis for determining that this appeal has arguable merit. Deveney's claim that his trial counsel rendered ineffective assistance at sentencing fails for the same reasons.

In his response, Deveney also argues that the trial court should have granted him 329 days in sentence credit on his escape conviction for time spent incarcerated in New Hampshire between August 1995 and July 3, 1996. Attachments submitted by him indicate that complaints were issued by the state of New Hampshire on August 10, 1995, charging Deveney with a burglary in New Hampshire and as a fugitive from justice based on his escape from Wisconsin. On that same day, Deveney signed a written waiver of his extradition rights, declaring his willingness to be returned to Wisconsin without being under an extradition warrant. However, he was not returned to Wisconsin at that time because he was indicted on the new New Hampshire charge. He entered a plea bargain in that case on July 3, 1996, pleading guilty to receiving stolen property.

All but 329 days of his New Hampshire sentence was suspended, and he was given pretrial incarceration credit of 329 days, thus in effect being sentenced to time served. Pursuant to his waiver of his extradition rights, he was then transferred to Wisconsin.

Deveney contends that he is entitled to credit on his escape sentence for the 329 day period credited to the New Hampshire sentence. He states that "[i]n the normal circumstance, defendant would agree" that he was not entitled to credit for time spent in another state awaiting extradition to Wisconsin when he was being held during that time on charges which resulted in a new conviction in the other state. However, he contends that this case is unique, relying on an order from the New Hampshire court which is attached to his no merit response and states that the New Hampshire sentence "is concurrent to the defendant's sentence in the State of Wisconsin." He also relies on a "Notice of Intent to Enter Plea of Guilty" executed by him in New Hampshire which stated that he expected to receive a sentence "concurrent to any outstanding sentences, or pending matters in Wisconsin."

As correctly pointed out by counsel in her no merit report, since Deveney had not yet been convicted and sentenced for escape in this case when the New Hampshire sentence was issued, there existed no escape sentence to which the New Hampshire sentence could have been made concurrent. Moreover, contrary to Deveney's request, we cannot determine within the context of this appeal whether the New Hampshire sentence could properly be deemed concurrent to the Sawyer County burglary sentence which was being served by Deveney when he escaped. While that issue may possibly be raised within the context of proceedings in the Sawyer County case or may provide a basis for challenging the

New Hampshire conviction and sentence, it cannot be addressed within the context of an appeal from the escape conviction.[5]

In his response, Deveney also objects that Attorney Cadwell provided ineffective assistance by failing to raise or more thoroughly address some of the issues discussed above in the postconviction motion filed by her and at the hearing on that motion. However, claims of ineffectiveness in the postconviction representation provided by appointed counsel must be raised in the trial court in the context of a § 974.06, STATS., motion or a petition for a writ of habeas corpus filed in the trial court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). At this time, we consider only the arguable merit of the issues that have been properly preserved and brought before us within the context of this no merit appeal.

The remainder of Deveney's response discusses case law and issues which have no meaningful application to this case. It therefore provides no basis for concluding that issues of arguable merit exist. This court's independent review of the record discloses no other potential issues for review.

The judgment of conviction, as modified, therefore is affirmed. The matter is remanded with directions to the clerk of the circuit court to modify the

[5] We cannot tell from this record whether Deveney has ever been granted presentence incarceration credit on either this escape sentence or the Sawyer County burglary sentence for the period between his conviction in New Hampshire on July 3, 1996 and his return to Wisconsin on July 29, 1996. However, at the sentencing hearing the trial court indicated that the issue of whether Deveney was entitled to any credit on the escape sentence for time spent in New Hampshire should be resolved by the Department of Corrections. Section 973.155(5), STATS., permits a defendant to petition the Department of Corrections for credit, and to challenge the department's determination in the sentencing court if the department is unable to determine whether credit should be granted or otherwise refuses to award credit. This procedure provides Deveney with an adequate remedy if he has not been afforded proper credit for the period between July 3, 1996 and July 29, 1996.

written judgment of conviction as originally entered on August 19, 1996 and amended on August 11, 1997, to delete the habitual criminality reference to § 939.62, STATS., and to indicate simply that Deveney pled guilty to escape in violation of § 946.42(3)(a), STATS. Attorney Barbara A. Cadwell is relieved of any further representation of Deveney on appeal.

By the Court.—Judgment modified and, as modified, affirmed.