COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1437-CR **Cir. Ct. No. 2012CF687**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOUSANI C. TATUM, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Tousani Tatum, Sr. appeals from a judgment convicting him of manufacturing/delivering cocaine and from an order denying without a hearing his claim that his trial counsel was ineffective at sentencing. We affirm.

¶2 On October 25, 2012, Tatum pled guilty to the drug offense. The State agreed to recommend seven years: two years of confinement and five years of extended supervision. Tatum was free to argue about the sentence. Tatum absconded from Wisconsin before sentencing, and he was apprehended in Illinois on February 19, 2015. Tatum appeared for sentencing on the drug offense on July 15, 2015. The circuit court sentenced Tatum to twelve and one-half years (seven and one-half years of initial incarceration and five years of extended supervision).[1] The circuit court denied without a hearing Tatum's postconviction motion alleging ineffective assistance of counsel at sentencing.

¶3 On appeal, Tatum argues that the circuit court erred in denying his postconviction motion alleging ineffective assistance of trial counsel without a hearing. A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

[1] In imposing sentence, the circuit court noted the gravity of the offense, Tatum's poor character, extensive criminal history, recidivism, significant criminal thinking and failure to take responsibility for his conduct. The court characterized Tatum as a "scam artist" and heavily criticized Tatum's presentation of himself as the victim. The court also considered five dismissed and read-in offenses, that Tatum absconded after the plea hearing, the need to protect the community, and Tatum's failure to take advantage of treatment opportunities. The court expressed its displeasure that it could not impose more than the twelve and one-half year sentence available. The court denied Tatum access to the Substance Abuse Program because the court did not believe Tatum would comply with the program. The court also declined to deem Tatum eligible for any program that would result in early release from confinement.

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

¶4 As relevant to this appeal, Tatum's postconviction motion sought resentencing because his trial counsel failed to make numerous sentencing arguments: (1) counsel failed to inform the court of Tatum's alleged assistance in a shooting investigation; (2) counsel did not review the presentence investigation report with Tatum until after the sentencing hearing began, and Tatum did not have adequate time to review the document; (3) counsel told Tatum to focus on the prior conviction information in the presentence investigation report and ignore the other portions which counsel characterized as "opinion" even though these portions contained inaccurate information;[2] (4) the circuit court relied upon inaccurate information in the presentence investigation report at sentencing; (5) counsel failed to mention Tatum's significant health issues and need for an organ transplant; and (6) counsel failed to object to Tatum's appearance at sentencing in shackles and high-security jail attire.

¶5 An ineffective assistance of counsel claim has two prongs: a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

[2] This issue is not adequately raised on appeal. We do not address it.

¶6 In rejecting these claims without a hearing, the circuit court concluded that the record conclusively demonstrated that Tatum was not entitled to relief. On the record at sentencing, Tatum confirmed the adequacy of his review of the presentence investigation report, offered corrections and stated that there was nothing else he wanted to correct. The court found that the presentence investigation report was properly disclosed to Tatum, and he had an adequate opportunity to review it and state his objections. We further agree with the circuit court that Tatum's postconviction motion did not allege either a factual basis to dispute the presentence investigation report's reference to a December 22, 1993 Chicago arrest or that the circuit court's consideration of this arrest impacted the sentence. Other than arguing that Tatum had insufficient time to review the presentence investigation report, which we have addressed above, Tatum does not argue that any specific aspect of the presentence investigation report contained inaccuracies. Tatum did not meet his burden to show that the circuit court actually relied upon inaccurate information at sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶28, 291 Wis. 2d 179, 717 N.W.2d 1.

¶7 With regard to trial counsel's failure to object to Tatum's attire and shackles at sentencing, the circuit court noted the absence of authority for the proposition that a defendant who appears for sentencing in jail attire and shackles is somehow prejudiced. A defendant's appearance at sentencing is distinguishable from a defendant's appearance before the jury wearing in-custody attire and/or shackles. *See* ***State v. Reed***, 2002 WI App 209, ¶¶9-10, 256 Wis. 2d 1019, 650 N.W.2d 885. Tatum did not establish an ineffective assistance claim requiring an evidentiary hearing.

¶8 With regard to trial counsel's failure to mention that Tatum assisted law enforcement in another matter, the circuit court concluded that Tatum did not

provide any evidentiary support for this claim. Even though counsel did not mention this alleged assistance, counsel did argue Tatum's good character at sentencing. In addition, the court received good character attestations from Tatum and his family members. We agree with the circuit court that in the absence of evidence that Tatum cooperated with law enforcement and in light of the record before the court about Tatum's good character, this ineffective assistance claim did not require an evidentiary hearing.

¶9 With regard to trial counsel's failure to mention evidence of Tatum's health and medical needs, the circuit court concluded that it had adequate information on this topic. At sentencing, counsel mentioned Tatum's numerous health issues, Tatum informed the court that he required an organ transplant, and the presentence investigation report also referred to Tatum's health problems. The claim did not warrant an evidentiary hearing.

¶10 Tatum argues that he should have had an evidentiary hearing on his claim that his trial counsel failed to object to the prosecutor's sentencing argument. Tatum alleges that argument undercut the State's agreed-upon sentencing recommendation. At sentencing, the prosecutor spoke at length about the relevant sentencing considerations, including Tatum's history of criminal offenses, his character, and that he absconded after pleading guilty in this case. Nevertheless, the prosecutor adhered to the agreed-upon recommendation of seven years. We agree with the circuit court that the record does not substantiate Tatum's claim that the prosecutor undercut the plea agreement. ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278. Rather, the prosecutor appropriately provided the circuit court with relevant post-plea information which the circuit court could consider. ***State v. Liukonen***, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 686 N.W.2d 689. As there was no breach of the plea agreement, the

circuit court properly denied Tatum's related ineffective assistance claim without a hearing.

¶11 In his reply brief, Tatum argues for the first time on appeal that the circuit court erroneously relied upon the COMPAS[3] assessment presented in the presentence investigation report. The State filed a sur-reply brief addressing this issue. While we normally decline to address issues raised for the first time on appeal, ***State v. Rogers***, 196 Wis. 2d 817, 826-27, 539 N.W.2d 897 (Ct. App. 1995), we will depart from this approach in this case to address the merits of Tatum's claim.

¶12 At sentencing, the circuit court stated the following:

> As to protection of the community, I have no, given the COMPAS scores in the presentence report and the potential for recidivism that they're recommending here, it's what I would have come up with without fancy graphics and everything else.

The court also expressed disappointment that given Tatum's history of offenses, correctional experiences and addiction treatment failures, the court could not impose more than the maximum available sentence. The court gave numerous reasons for the sentence unrelated to the COMPAS assessment in the presentence investigation report.

¶13 We agree with the State that the circuit court's reference to the COMPAS assessment complied with the requirements of ***State v. Loomis***, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, *cert. denied*, 137 S. Ct. 2290 (2017), an opinion released after Tatum's July 2015 sentencing. A circuit court may use the

[3] Correctional Offender Management Profiling for Alternative Sanctions.

COMPAS risk assessment as long as the assessment is not determinative of the sentence. ***Id.***, ¶88. As discussed above, the record confirms that Tatum received an individualized sentence based upon appropriate sentencing factors. The circuit court noted that the COMPAS assessment confirmed its previously expressed view that Tatum was a recidivist from whom the public required protection. ***Id.***, ¶¶88, 90.

¶14 We conclude that the circuit court did not err in denying Tatum's postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).