COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2015AP2479 **Cir. Ct. No. 2007CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER T. SEILER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Christopher Seiler appeals pro se from a circuit court order denying without an evidentiary hearing his WIS. STAT. § 974.06 (2015-16)[1] motion (1) challenging a statement he made to his probation officer and alleging ineffective assistance of trial counsel relating to that statement, and (2) seeking resentencing because the circuit court relied upon inaccurate information at sentencing and his trial counsel was ineffective. We agree with the circuit court that Seiler's challenges to any aspect of the statement he made to his probation officer are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We further conclude that the circuit court did not rely upon inaccurate information at sentencing. We affirm.

¶2 In 2014, we affirmed Seiler's 2007 conviction for second-degree sexual assault of a child. ***State v. Seiler***, No. 2013AP1911-CR, unpublished slip op. (Wis. Ct. App. Jul. 23, 2014) (***Seiler I***).

¶3 We review whether the circuit court erroneously denied Seiler's 2015 WIS. STAT. § 974.06 motion without an evidentiary hearing. A circuit court must hold an evidentiary hearing if the § 974.06 motion alleges "sufficient facts that, if true, show that the defendant is entitled to relief." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion does not allege such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court has the discretion to grant or deny the motion. ***Id.*** (citation omitted). We examine the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

sufficiency of the motion de novo. ***State v. Sulla***, 2016 WI 46, ¶23, 369 Wis. 2d 225, 880 N.W.2d 659.

Statement to Probation Officer

¶4 In his WIS. STAT. § 974.06 motion, Seiler alleged that his trial counsel was ineffective because counsel failed to investigate and object to the use of his statement to his probation agent, a statement Seiler contends was used to further the investigation into the second-degree sexual assault offense to which he pled no contest. In denying Seiler's § 974.06 motion without a hearing, the circuit court determined that Seiler had failed to allege a sufficient reason for not raising this issue in his previous appeal and applied the ***Escalona-Naranjo*** bar. In addition, the court concluded that Seiler was attempting to relitigate an issue decided by this court in ***Seiler I.***

¶5 Seiler's 2015 claim that his trial counsel was ineffective in relation to the probation statement is a variation on the claims asserted and addressed in ***Seiler I***. Challenges to the probation statement, no matter how argued, cannot be relitigated. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). In ***Seiler I***, we addressed Seiler's claim that his trial counsel was ineffective "in failing to challenge the evidence against [him] on grounds that it was the product of compelled self-incrimination." ***Seiler I***, unpublished slip op. ¶10. Additionally, ***Seiler I*** establishes that there were sources of information about the incident that were developed independently of Seiler's statement to his probation officer. ***Id.***, unpublished slip op. ¶¶6-7.

¶6 We further apply ***Balliette*** and ***Escalona-Naranjo*** to hold that an evidentiary hearing was not required before denying Seiler's WIS. STAT. § 974.06 motion. ***Escalona-Naranjo*** provides:

> [A]ll claims of error that a criminal defendant can bring should be consolidated into one motion or appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.

State v. Lo, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756 (citing ***Escalona-Naranjo***, 185 Wis. 2d at 185). Seiler's § 974.06 motion did not show a sufficient reason for not raising this issue in his prior appeal.

¶7 The circuit court did not misuse its discretion in rejecting this ineffective assistance claim without a hearing because the record conclusively demonstrates that the issue is barred under ***Witkowski*** and ***Escalona-Naranjo***, and Seiler is not entitled to relief. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

Challenge to Sentence

¶8 In his WIS. STAT. § 974.06 motion, Seiler alleged that the circuit court relied upon inaccurate information at sentencing.[2] In denying the WIS. STAT. § 974.06 sentence challenge without a hearing, the circuit court noted that its sentencing remarks were based upon the court's own prior dealings with Seiler and were the court's opinion about Seiler's character and personality. The court

[2] Because the circuit court did not rely upon inaccurate information, we do not address Seiler's WIS. STAT. § 974.06 claim that his trial counsel was ineffective for not objecting to the inaccurate information upon which the circuit court allegedly relied. Similarly, we do not address Seiler's claim that his postconviction counsel was ineffective with regard to this issue.

imposed a thirty-five-year sentence (twenty years of initial confinement and fifteen years of extended supervision), consecutive to any other sentence.

¶9 Our analysis is informed by the following. The circuit court cannot be expected to conduct a sentencing in a vacuum. The court has the responsibility "to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980).

¶10 Seiler premises several of his arguments upon his contention that the circuit court agreed to consider at sentencing only a two-page memorandum prepared two years earlier by Seiler's probation agent.[3] Seiler contends that the circuit court was somehow bound by a stipulation of the parties only to consider this memorandum and nothing else at sentencing. Seiler overstates the circuit court's "agreement." A review of the plea hearing transcript places the use of this memorandum in its proper context. After accepting Seiler's no contest plea, the circuit court inquired whether a presentence investigation report would be prepared or whether the circuit court should consult Seiler's older case files. Trial counsel noted that Seiler had been sentenced a few months prior in other cases and, at that time, Seiler's probation supervisor had submitted a thorough memorandum. The court agreed to rely upon that memorandum. The court noted that it might also look at Seiler's old case files.

¶11 The probation supervisor's memorandum states that Seiler had multiple treatment opportunities, had increasingly strong disposition toward

[3] Seiler's WIS. STAT. § 974.06 motion represents that the memorandum attached to the motion is the probation supervisor's memorandum discussed at sentencing.

criminal thinking, and he disregarded the consequences of his conduct for the victims, past and present, his children and the community. The memorandum also touches on substance abuse issues when it refers to Seiler's attempt to evade detection of drug use.

¶12 A circuit court has "an enhanced need for more complete information … at the time of sentencing." ***State v. Gallion***, 2004 WI 42, ¶34, 270 Wis. 2d 535, 678 N.W.2d 197. Seiler does not offer authority for his suggestion that the circuit court was precluded from considering anything other than the probation agent's memorandum or that a circuit court cannot consider prior matters heard by the court.[4] The circuit court was familiar with Seiler from prior matters and appearances, some of which the court handled. Resentencing was not required in relation to the court's use of the probation supervisor's memorandum.

¶13 The rest of Seiler's WIS. STAT. § 974.06 sentencing challenges require reviewing the sentencing itself. In sentencing Seiler to thirty-five years, the court considered the severity of the offense, a forty-year felony, WIS. STAT. § 948.02(2) (2007-08), WIS. STAT. § 939.50(3)(c) (2007-08), Seiler's prior sex offenses against children, and his lack of success on probation after incarceration for prior sex offenses. The court noted that Seiler's probation agent was unaware that Seiler had borrowed money from the victim's uncle. The court considered Seiler's character as informed by the following: the day before he was arrested in this case, Seiler met with his probation agent to review his supervision rules. The court considered that the public required protecting from Seiler due to his repeated sexual offenses against children and his failure either to address the issues that

[4] At sentencing, the victim's parents spoke to the court and offered their view on Seiler.

lead him to criminal conduct or make progress in treatment relating to those issues. The court also reviewed a prior probation revocation file. All of the circuit court's sentencing considerations were appropriate. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was for the circuit court to determine in its discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶14 While there is a due process right to be sentenced on the basis of accurate information, ***State v. Alexander***, 2015 WI 6, ¶18, 360 Wis. 2d 292, 858 N.W.2d 662, not every sentencing remark rises to the level of a due process violation. Rather, Seiler must prove by clear and convincing evidence that based on the entire sentencing transcript, "the circuit court gave explicit attention" to inaccurate information and that this information "formed part of the basis for the sentence." ***Id.***, ¶30 (citation omitted). We may also consider the circuit court's statements in response to Seiler's motion challenging his sentence. ***Id.*** We "independently review the record of the sentencing hearing to determine the existence of any actual reliance on inaccurate information." ***State v. Travis***, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491.

¶15 Seiler argues that the court relied upon information relating to his substance abuse issues set out in the record of the certiorari review of Seiler's probation revocation as opposed to limiting itself to the information contained in the probation revocation memorandum. The circuit court noted that Seiler had "controlled substance problems." As discussed above, the circuit court did not agree to limit the information it would consider at sentencing; the court and the parties only agreed to forego a new presentence investigation report. The substance abuse issue was alluded to in the memorandum and was known to the court as a result of its prior dealings with Seiler and review of Seiler's old case

files. Furthermore, the court's reference to Seiler's substance abuse issues was passing and not a heavily weighed factor in imposing sentence. Rather, the reference speaks to Seiler's character and behavior, which were proper considerations. ***Elias***, 93 Wis. 2d at 285. Seiler does not demonstrate by clear and convincing evidence that the court's reference to his substance abuse issues was inaccurate.

¶16 Seiler also overstates the circuit court's references to several other matters. We conclude that these four references, discussed below, do not require resentencing.

¶17 First, Seiler argues that the circuit court inaccurately stated that he did not think his probation should have been revoked in an underlying case. Again, Seiler overstates the court's remark. The circuit court said that Seiler did not necessarily agree that his probation should be revoked. This was the circuit court's opinion even if Seiler did not agree.

¶18 Second, Seiler argues that the circuit court relied upon inaccurate information that his probation agent was not aware that Seiler borrowed money from the victim's uncle. Our review of the sentencing transcript reveals that the focus of this remark was the breach of trust arising from the sexual assault of the victim after her uncle had assisted him, not that Seiler had borrowed money.

¶19 Third, Seiler complains that the circuit court erroneously described him as "litigious." The circuit court described Seiler's character as someone who believes he has been aggrieved. This was the circuit court's opinion.

¶20 Fourth, Seiler complains that the circuit court relied upon the statement to his probation agent. This is an overstatement of the record. The

sentencing record to which Seiler cites contains the following statement of the circuit court: the court observed that the day before he was arrested, Seiler met with his agent to review his supervision rules. The court's remark does not derive from anything that implicates the Fifth Amendment. Rather, the remark relates to Seiler's knowledge of his supervision rules which absolutely precluded being in the presence of the fifteen-year-old victim regardless of his intentions or his conduct. The circuit court was not required to believe Seiler's explanation for being with the victim in a secluded spot (allegedly to assist the victim's uncle in some fashion).

¶21 Viewed in context, the circuit court based its sentence on matters other than those cited by Seiler. "The sentencing transcript clearly reflects that the basis of [Seiler's] sentence overall was [Seiler's] history of criminal offenses and his failure to correct his behavior." *See* ***Alexander***, 360 Wis. 2d 292, ¶33.

¶22 The circuit court did not misuse its discretion in rejecting the sentencing issue without a hearing because Seiler was not entitled to relief. ***Balliette***, 336 Wis. 2d 358, ¶18.

Challenge to Postconviction Counsel

¶23 In his WIS. STAT. § 974.06 motion, Seiler alleged that his postconviction counsel was ineffective for not challenging the representation afforded by his trial counsel in relation to the probation statement and sentencing issues discussed above. The circuit court rejected this claim.

¶24 Having held above that these claims were either barred or lacking in merit, we conclude that Seiler cannot meet his burden to show prejudice arising

from allegedly deficient performance by his postconviction counsel. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.[5]

By the Court.—Order affirmed.

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

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").