

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 2, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2233-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 96CF961935**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JADE LAMONT COSBY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jade Lamont Cosby, *pro se*, appeals from a judgment of conviction, entered after his probation was revoked, for the delivery of a controlled substance-cocaine, contrary to WIS. STAT. § 961.41(1)(cm)1 (1995-

1996).<sup>1</sup> He also appeals from an order denying his postconviction motion for resentencing. Cosby claims that: (1) his trial counsel was ineffective because his counsel failed to ensure that the trial court sentenced Cosby based upon true and correct information; and (2) the trial court erroneously exercised its discretion when it did not provide Cosby with a copy of a sentencing-after-revocation memorandum so that Cosby could contest any alleged errors in the memorandum. We affirm.

## I. BACKGROUND

¶2 Jade Lamont Cosby was charged with the delivery of less than five grams of cocaine after he sold .13 grams of cocaine to an undercover police officer. After a police officer arrested Cosby, the officer saw Cosby drop a plastic baggie on the front seat of Cosby's car. The baggie contained an additional 2.21 grams of cocaine.

¶3 Cosby pled no contest, and was sentenced on August 21, 1996. At sentencing, Cosby's attorney indicated to the court that both he and Cosby had received and reviewed Cosby's presentence investigation report. Additionally, both Cosby and his attorney were given an opportunity to address the court. Cosby's trial attorney and the trial court made a few clarifications to information in the presentence investigation report, however, neither Cosby nor his attorney made objections to the information in the report. The trial court withheld sentence and placed Cosby on probation for three years, concluding that while Cosby was a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1995-1996 version unless otherwise noted.

danger to the community and himself, these interests would be protected because Cosby was “already serving a period of incarceration.”

¶4 Cosby’s probation was revoked three years later. A different trial court sentenced Cosby on December 9, 1999.<sup>2</sup> The court relied upon information in a sentencing-after-revocation memorandum prepared by the Department of Corrections when it sentenced Cosby. Again, both Cosby and his attorney addressed the court and again neither made any corrections to the information in the memorandum.

¶5 The court sentenced Cosby to ten years in prison. It imposed the maximum sentence based upon Cosby’s extensive criminal record and his multiple probation violations:

[Y]ou are a person who has been given the benefit of every chance. The entire juvenile code was written at the time you were caught up in the juvenile system, to rehabilitate you. It didn’t work one bit.

Probation, as an adult ... didn’t help one bit. You were revoked as soon as you were on probation. You broke every single rule.... Either release conditions, or probation conditions. You broke them all. After care conditions, you broke them all.... [T]he only breaks I see in your criminal record are when you’re incarcerated. Any significant break. That’s it.

## II. ANALYSIS

¶6 Cosby alleges that his trial counsel at the 1999 sentencing proceeding was ineffective because his counsel did not take the necessary steps to ensure that Cosby was sentenced based upon accurate information. Specifically,

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<sup>2</sup> The Honorable Laurence C. Gram, Jr., presided over the 1996 sentencing proceeding. The Honorable Jacqueline D. Schellinger presided over the 1999 sentencing proceeding and issued the judgment of conviction and order denying the postconviction motion.

Cosby claims that his trial counsel did not adequately review Cosby's 1996 sentencing record and did not determine whether the trial court intended to rely upon the 1996 presentence investigation report when it sentenced Cosby in 1999. Thus, Cosby claims that his trial counsel failed to inform the court of facts that Cosby allegedly contested in the 1996 presentence investigation report and, as a result, the trial court considered inaccurate information when it sentenced Cosby. Cosby also claims he is entitled to resentencing because his trial counsel did not prevent the trial court from sentencing him based upon alleged inaccurate information in the sentencing-after-revocation memorandum. We disagree.

¶7 The familiar two-pronged test for ineffective assistance of counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are “outside the wide range of professionally competent assistance.” *Id.* at 690. There is a “strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶8 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Strickland*, 466 U.S. at 687. In order to succeed, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶9 Our standard for reviewing this claim involves a mixed question of law and fact. *Johnson*, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact

will not be disturbed unless clearly erroneous. *Id.* The legal conclusions, however, as to whether counsel’s performance was deficient and prejudicial, present a question of law. *Id.*, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both *Strickland* prongs if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

¶10 Furthermore, a defendant has a due-process right to be sentenced on the basis of true and correct information. *State v. Perez*, 170 Wis. 2d 130, 138, 487 N.W.2d 630, 633 (Ct. App. 1992). To establish a due-process violation, the defendant has the burden of proving by clear and convincing evidence that the information used in sentencing was inaccurate and that he or she was prejudiced by the misinformation. *State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). *See also State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75, 77 (Ct. App. 1998) (“A defendant who requests resentencing must show that specific information in the PSI was inaccurate and that the court actually relied upon the inaccurate information in sentencing.”).

¶11 Here, Cosby does not show that he was prejudiced by his trial counsel’s failure to object to the alleged misinformation. First, the record refutes Cosby’s claim that he contested information in the 1996 presentence investigation report. When Cosby was sentenced in 1996, Cosby’s attorney told the court that both he and Cosby had reviewed the report and neither Cosby nor his attorney made any corrections or objections when they addressed the court. *See Perez*, 170 Wis. 2d at 138, 487 N.W.2d at 633 (safeguards in the sentencing process include the defendant’s and defense counsel’s presence at the sentencing hearing and the chance to refute inaccurate information).

¶12 Second, the record of the 1999 sentencing proceeding shows that the trial court did not rely upon the presentence investigation report when it sentenced Cosby. There is no reference anywhere in the record to the presentence investigation report from 1996. Moreover, the trial court indicated that it was relying upon information in the sentencing-after-revocation memorandum prepared by the Department of Corrections: “I’m looking at this probation officer’s report and I’m wondering why in the world you weren’t revoked if you had nineteen positive urine tests.” Thus, Cosby fails to show that the trial court relied upon the 1996 presentence investigation report or how any information in the report was incorrect.

¶13 Finally, any inaccuracies that the post-revocation court relied upon in the sentencing-after-revocation memorandum were *de minimis*. Cosby claims that: (1) the court determined that Cosby was convicted of attempting to operate a vehicle without the owner’s consent in 1999, while he was actually sentenced for this offense in 1992; and (2) the court determined that Cosby had been “picked up” for two counts of strong-armed robbery, while Cosby had actually been convicted for one count of attempted strong-armed robbery. Cosby has not shown how these errors prejudiced him.

¶14 The sentencing court determined that Cosby was convicted of operating a vehicle without the owner’s consent in 1999, however, it corrected this statement in its very next sentence: “[Y]ou were given six months probation, when [the operating a vehicle without the owner’s consent case] came to resolution ... in August of [nineteen] ninety two.” (Emphasis added.) Moreover, the record shows that the court imposed the maximum sentence of ten years because of Cosby’s utter failure to comply with the terms of probation, both in this case and in past cases. It did not rely upon specific offenses, such as Cosby’s

conviction for attempted strong-armed robbery, when it determined its sentence. Rather, it considered the overall fact that Cosby had committed additional offenses while on probation: “Probation, as an adult ... didn’t help one bit. You were revoked as soon as you were on probation.”<sup>3</sup> Thus, Cosby fails to show how his sentence would have been different had the court been aware of the minor inconsistencies in his conviction information. Accordingly, Cosby has not demonstrated a “reasonable probability” that but for his trial lawyer’s failure to object to the misinformation “the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

¶15 In a related argument, Cosby claims that the 1999 sentencing court erroneously exercised its discretion when it denied his postconviction motion for resentencing because the court failed to provide Cosby with a copy of the sentencing-after-revocation memorandum. Cosby argues that, as a result of this omission, he was denied the opportunity to challenge the accuracy of the information in the memorandum. Cosby also appears to allege that the trial court erred because it failed to ask him if he had received or reviewed the memorandum. Again, we disagree.

¶16 “An [erroneous exercise] of discretion occurs when the trial court fails to consider the proper factors or makes a mistake with respect to the facts upon which the [sentence] is based. An [erroneous exercise] of discretion also occurs when the trial court applies an erroneous interpretation of the law.”

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<sup>3</sup> Indeed, the sentencing-after-revocation memorandum indicated that, while on probation, Cosby tested positive for or admitted to using marijuana nineteen times; failed to report to alcohol and drug treatment at least five times; failed to seek employment; and had arrests or encounters with law enforcement agents for public drinking, disorderly conduct, obstructing an officer, theft, and operating a vehicle after his operative privileges were revoked.

*Long v. Wasielewski*, 147 Wis. 2d 57, 61, 432 N.W.2d 615, 616 (Ct. App. 1988). “We will not find an erroneous exercise of discretion if the record shows that the trial court exercised its discretion and that there is a reasonable basis for its decision.” *Nelson v. Taff*, 175 Wis. 2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993).

¶17 Cosby’s claim fails for two reasons. First, there is no affirmative duty on a trial court to ensure that a copy of the presentence investigation report is timely delivered to the defendant. *State v. Flores*, 158 Wis. 2d 636, 642, 462 N.W.2d 899, 901 (Ct. App. 1990), *overruled on other grounds by State v. Knight*, 168 Wis. 2d 509, 519–520 n.6, 484 N.W.2d 540, 544 n.6 (1992). Rather, a defendant must allege that he or she affirmatively sought access to the presentence investigation report and was subsequently denied access to it. *Id.*, 158 Wis. 2d at 643–644, 462 N.W.2d at 902. Here, there is no evidence that Cosby ever requested a copy of the sentencing-after-revocation memorandum or that the trial court denied Cosby access to the memorandum. Indeed, Cosby’s attorney made references to information contained in the memorandum during sentencing, so we presume that Cosby had access to the memorandum.

¶18 Second, Cosby does not allege what information in the memorandum he would have challenged or how any alleged misinformation would have affected his sentence. As noted above, Cosby was present at the 1999 sentencing proceeding and could have objected to any incorrect information that the trial court relied upon. As further noted, Cosby has not shown how he was prejudiced by the trial court’s alleged failure to provide him with a copy of the sentencing-after-revocation memorandum. Accordingly, there is a reasonable basis for the trial court’s decision and it did not erroneously exercise its discretion when it denied Cosby’s postconviction motion for resentencing.



*By the Court.*—Judgment and order affirmed.

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

