COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2922-CR **Cir. Ct. No. 88CF882191**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH S. BETTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN F. FOLEY and VICTOR MANIAN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Keith S. Betts appeals from the judgment of conviction entered after a jury convicted him of armed robbery, contrary to WIS. STAT. § 943.32(1)(a) and (2) (1987-88). Betts also appeals from the order denying his motion for postconviction relief. Betts claims: (1) a ***Machner*** hearing is

required to determine whether his trial counsel was ineffective; and (2) the trial court erroneously exercised its sentencing discretion by (a) relying on inaccurate information, (b) failing to adequately explain its deviation from the sentencing guidelines as required by WIS. STAT. § 973.012 (1987-88), and (c) imposing an unduly harsh sentence. Thus, Betts concludes that the trial court erred in denying his postconviction motion. We disagree and affirm.

I. BACKGROUND.

¶2 On June 12, 1988, an individual named Warren Bell was robbed of an automobile at gunpoint. He identified Betts as his assailant. Bell testified that Betts entered the parked vehicle in which he was sitting, pulled out a gun, and told him to give him whatever money he had. Bell became frightened and ran out of the vehicle. Betts then fired two shots at Bell, striking him once in the hip, and drove off in the automobile. Bell stated that the vehicle was owned by his girlfriend, Maura Rhodes. On January 27, 1989, Betts was convicted by a jury of one count of armed robbery. The trial court sentenced Betts to an indeterminate term in prison not to exceed twenty years, the maximum sentence for such a crime.

¶3 Betts directly appealed his conviction, *pro se*. This court rejected his arguments and summarily affirmed the judgment of conviction. *See* ***State v. Betts***, No. 89-1603-CR (Wis. Ct. App. July 10, 1990) (unpublished order). On September 18, 1990, the supreme court denied Betts's petition for review of that decision.

¶4 On February 17, 1994, Betts filed a WIS. STAT. § 974.06 motion for a new trial, arguing that: (1) he received ineffective assistance of counsel; and (2) in the alternative, he should be resentenced for alleged errors made by the trial court at his sentencing. *See* ***State v. Betts***, 94-2075, unpublished slip op. at 1

(Wis. Ct. App. October 31, 1995). The trial court denied the motion without an evidentiary hearing. ***Id.*** This court affirmed the denial because, pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 186, 517 N.W.2d 157 (1994), Betts had pursued a direct appeal and, therefore, could not obtain collateral review of these issues because they should have been raised in his direct appeal. ***Id.***

¶5 On February 14, 1997, Betts sought relief pursuant to a habeas corpus motion in the United States District Court of the Eastern District of Wisconsin. By order of February 22, 2000, a magistrate judge denied the habeas petition. However, the United States Court of Appeals for the Seventh Circuit later concluded that Betts had been denied his right to counsel in his direct appeal, and, therefore, ordered Betts's release unless this court reinstated his appellate rights with the assistance of counsel. *See* ***Betts v. Litscher***, 241 F.3d 594, 597 (7th Cir. 2001). By order dated March 13, 2001, this court reinstated Betts's direct appellate rights, including the appointment of appellate counsel. Betts then filed a postconviction motion in the trial court seeking a new trial or, alternatively, sentence relief. On September 27, 2001, the trial court denied his postconviction motion.

II. ANALYSIS.

A. It was within the trial court's discretion to deny Betts's postconviction motion without a ***Machner*** *hearing.*

¶6 Betts contends that a ***Machner*** hearing was required to determine whether his trial counsel was ineffective.[1] Namely, Betts alleges that his trial

[1] During a ***Machner*** hearing, trial counsel testifies and the postconviction hearing court determines whether trial counsel's actions were ineffective. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

counsel was ineffective for failing to investigate potentially exculpatory evidence; *i.e.*, that Betts was partial owner of the vehicle involved in his armed robbery conviction. Betts concludes that, had his trial counsel investigated and established that he was partial owner of the vehicle in question, he would not have been convicted of armed robbery because the State would have been unable to establish an element of the crime–intent to steal. We disagree.

¶7 The question of whether a trial court must hold an evidentiary hearing involves a two-part test and necessitates a mixed standard of review:

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any of the three factors enumerated in ***Nelson***. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

State v. Bentley, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996) (citations omitted). In ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), the supreme court outlined three factors that a circuit court should consider in exercising its discretion:

> [I]f the defendant fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 497-98.

¶8 Therefore, we must determine whether Betts's motion alleged facts which, if true, would establish a claim for ineffective assistance of counsel. In order to establish a claim for ineffective assistance of counsel, Betts must prove: (1) deficient performance, and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. 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. *See* ***id.*** at 687. In other words, "[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." ***Id.*** at 694.

¶9 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant, are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687. If the defendant fails to establish prejudice, we need not determine whether defense counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697 (stating that if the defendant fails to prove one prong, we need not address the other prong).

¶10 While we acknowledge that Wisconsin recognizes a limited "self-help" defense to a charge of armed robbery, the record conclusively demonstrates

that Betts would not have been entitled to such a defense. This "self-help" defense is outlined in ***Edwards v. State***, 49 Wis. 2d 105, 181 N.W.2d 383 (1970):

> While it is true a person ought not be encouraged to take the law in his own hands to collect a debt by gun point or by intimidation, we do not think that is the issue. The question is what is the nature of the specific intent necessary to establish the crime of robbery…. If a person seeks to repossess himself of specific property *which he owns and to which he has the present right of possession* and the means he uses involves a gun or force, he might not have the intention to steal. While the reclamation of specific removable property at gunpoint by the owner may not be armed robbery, such self-help may and generally does constitute a lesser crime than robbery.

Id. at 112-13 (emphasis added). Accordingly, ***Edwards*** holds that it is only a defense to the charge of robbery if the repossessor owns the property *and* has the present right of possession. However, such is not the case when a defendant, at gunpoint, secures property to which he does not have the right of possession.

¶11 In his argument to this court, Betts asserts that "he had purchased the vehicle involved in the incident along with Mr. Bell and they placed the vehicle in the name of Maura Rhodes." Moreover, Betts concludes that "he and Mr. Bell … maintained joint ownership of the vehicle." Assuming these facts to be true, Betts would not have had a superior right of possession nor been justified in taking the property from Bell by the use of force. *See* ***Tallman v. Barnes***, 54 Wis. 181, 185, 11 N.W. 478 (1882) ("It is well settled in law that one tenant in common has no right to take personal property from his co-tenant by force; but if he can get possession without a resort to force, then he can hold it and protect his possession by force."). Accordingly, evidence that Betts was joint owner of the vehicle in question would have been insufficient to support an ***Edwards*** self-help defense.

¶12 Therefore, even if Betts's trial counsel had established that Betts was partial owner of the vehicle, the result of the proceeding would not have been different. Because Betts has failed to establish a reasonable probability that the result of the proceeding would have been different, we conclude that Betts was not prejudiced by his trial counsel's performance. Thus, the trial court properly exercised its discretion in denying Betts's postconviction motion without a hearing.

B. The trial court did not erroneously exercise its sentencing discretion.

¶13 Next, Betts contends that the trial court erroneously based its sentence upon inaccurate information contained in the presentence investigation report regarding his alleged gang involvement. The presentence report contained information that, while in prison, Betts possessed material referencing gang involvement in the Black Gangster Disciples, and that he went by the name of "Prince KB," indicating a high rank in the gang. When presented with this information at sentencing, the trial court stated:

> Just a minute. Could we take a minute break here? This – If you could take the defendant back for just one moment. I am very worried about the security here. This guy is a gang leader. He has nothing to lose. This guy is a very dangerous defendant. All right.

When sentencing resumed, the defense responded to these allegations. Defense counsel stated that, according to Betts, "he is not at all affiliated in any gang organization." However, when the court afforded Betts an opportunity to speak, he declined to address the court or further challenge the presentence report. Betts now argues that when his defense counsel indicated that Betts denied any gang involvement, the trial court should have held a hearing on the matter, *sua sponte*. We disagree.

¶14 "Defendants have a due process right to be sentenced on the basis of accurate information." ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). "However, a defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." ***Id.*** Further, in imposing sentence, a trial court may consider, *inter alia*, other unproven offenses, conduct for which the defendant has been acquitted, and uncorroborated hearsay, as long as the defendant has an opportunity to rebut the evidence. *See* ***State v. Damaske***, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997). This constitutional issue presents a question of law, which we review *de novo*. ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993).

¶15 Here, Betts had adequate opportunity to rebut the allegation of his gang involvement – Betts and his counsel were present at the sentencing, were presented with a copy of the presentence investigation report, and had several opportunities to address the allegation. *See* ***State v. Perez***, 170 Wis. 2d 130, 141, 487 N.W.2d 630 (Ct. App. 1992). Additionally, Betts has failed to establish that the trial court relied on the alleged inaccurate information in the sentencing. Although Betts argues that the trial court "clearly demonstrated … prejudice through taking extra security precautions," he fails to link this security concern to the sentence imposed. Our independent review of the record reveals that the trial court never mentioned Betts's alleged gang involvement in its sentencing decision. Thus, Betts has failed to establish that the trial court relied on inaccurate information in sentencing.

¶16 Betts also contends the trial court violated WIS. STAT. § 973.012 (1987-88) by failing to explain its deviation from the sentencing guidelines. This

argument is without merit. In ***State v. Halbert***, 147 Wis. 2d 123, 132, 432 N.W.2d 633 (Ct. App. 1988), this court held that "a trial court's compliance or non-compliance with sec. 973.012, Stats., is not an appellate issue." This decision was based on the clear meaning of WIS. STAT. § 973.012 (1987-88), which states:

> **Use of guidelines by judges.** Beginning on November 1, 1985, a sentencing court, when imposing a sentence, shall take the guidelines established under s. 973.011 into consideration. If the court does not impose a sentence in accordance with the recommendations in the guidelines, the court shall state on the record its reasons for deviating from the guidelines. *There shall be no right to appeal on the basis of the trial court's decision to render a sentence that does not fall within the sentencing guidelines*.

(Emphasis added.) Despite Betts's argument to the contrary, ***Halbert*** is precedential and has not been overruled. *See* ***State v. Elam***, 195 Wis. 2d 683, 685-86, 538 N.W.2d 249 (1995). Accordingly, we reject this argument.

¶17 Finally, Betts contends that his sentence is unduly harsh. When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Generally, a trial court has discretion in determining the length of sentence within the permissible range set by statute, *see* ***id.***, and our review is limited to determining whether the trial court erroneously exercised that discretion, *see* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶18 In exercising its discretion, the trial court should consider three primary factors when sentencing: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the

public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court may also properly consider the following factors, *inter alia*: the defendant's past criminal offenses, any history of undesirable behavior patterns, the defendant's need for rehabilitative control, the defendant's age and educational background, the results of a presentence investigation, and the right of the public. *See* ***Harris***, 119 Wis. 2d at 623-24. Thus, this court may conclude that the trial court has erroneously exercised its sentencing discretion where: (1) it fails to state on the record the relevant and material factors which influenced the court's decision; (2) it relies upon factors which are totally irrelevant or immaterial to the type of decision to be made; or (3) it gives too much weight to one factor on the face of other contravening considerations. *See* ***Ocanas***, 70 Wis. 2d at 187.

¶19 Here, we conclude that Betts's sentence is not unduly harsh. The sentence imposed was within the permissible range set by WIS. STAT. §§ 943.32(1)(a) and (2), and 939.50(3)(b) (1987-88). Further, the trial court considered the appropriate sentencing factors. Accordingly, the trial court properly denied Betts's postconviction motion.

¶20 Based upon the foregoing, the trial court is affirmed.

By the Court.—Judgment and order affirmed.

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