

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 26, 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. 02-0310-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-390

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. KLINGEISEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Christopher J. Klingeisen appeals from a judgment convicting him of one count of second-degree sexual assault contrary to WIS.

STAT. § 948.02(2) (1999-2000)¹ and one count of kidnapping by deceit contrary to WIS. STAT. § 940.31(1)(c) on his no contest pleas, and from an order denying his postconviction motion seeking sentence modification. He challenges his sentence. We affirm the judgment and the order.

¶2 The convictions arose from Klingeisen's sexual contact with fifteen-year-old Christopher J.B. and his enticement of Christopher's younger brother in 1999.² The criminal complaint alleged that after befriending Christopher, Klingeisen drove him to school on several occasions. On approximately five occasions, Klingeisen stopped the vehicle in a cemetery, secured Christopher's hands behind his back, placed a stocking cap over his eyes and had sexual contact with him. This conduct resulted in the sexual assault charges and the kidnapping charge.

¶3 When Christopher would no longer meet with him, Klingeisen offered Christopher's fourteen-year-old brother a ride to school. During the ride, Klingeisen tied the younger brother's hands behind his back, placed a hat over his eyes and placed his hand inside the boy's waistband, but did not have sexual contact with him. This conduct resulted in the child enticement charge which was later dismissed but read-in.

¶4 Klingeisen pled no contest to the counts involving Christopher. At the original sentencing, the circuit court sentenced Klingeisen to forty years, the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² The enticement charges involving Christopher's younger brother were dismissed but read-in at sentencing.

maximum possible term, for the sexual assault conviction and a consecutive forty-year term of probation for the kidnapping by deceit conviction. Klingeisen obtained resentencing after arguing that the circuit court relied on erroneous information at the original sentencing. At the resentencing hearing, the court imposed a prison term of thirty-two years for the sexual assault conviction to be followed by a forty-year term of probation for the kidnapping conviction.

¶5 Klingeisen challenged the second sentence on several grounds: (1) new factors justified resentencing; (2) the circuit court relied on inaccurate information and violated his due process rights; and (3) the prosecutor made false statements at sentencing. The court denied the sentence modification motion. Klingeisen appeals.

¶6 In his postconviction motion, Klingeisen claimed that the circuit court premised the thirty-two year sentence on his perceived mandatory release (MR) date. Klingeisen is wrong. At the resentencing hearing, the court found that Klingeisen needs sexual offender treatment while incarcerated and that if he did not take advantage of such treatment, the court would recommend that he remain incarcerated until his mandatory release date. The circuit court's reference to the MR date related to its clearly expressed concern that Klingeisen receive sex offender treatment before his release from prison, and that he remain incarcerated until at least his MR date in order to obtain that treatment.

¶7 Our interpretation of the circuit court's reference to Klingeisen's MR date is further supported by the court's rationale for denying Klingeisen's sentence modification motion. The court noted that it referred to the MR date after it imposed the sentence and that its remarks were intended to encourage Klingeisen to participate in sex offender treatment as soon as possible. The circuit court did

not consider the MR date in determining the length of Klingeisen's sentence. Klingeisen has not established the existence of a new factor or a due process violation relating to his MR date.

¶8 Klingeisen next argues that the circuit court relied on inaccurate information in sentencing.³ A defendant has a due process right to be sentenced based on accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)). Whether a defendant has been denied this due process right is a constitutional issue presenting 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).

¶9 A defendant who seeks resentencing because the court relied on inaccurate information must show that the information was inaccurate and that the court relied on it. *See id.* The defendant carries the burden of proving both prongs—inaccuracy of the information and prejudicial reliance by the sentencing court—by clear and convincing evidence. *Id.*

¶10 At sentencing, in the course of finding that the public must be protected from Klingeisen, the circuit court noted that Dr. Charles Lodl, a defense psychologist, had opined that Klingeisen “fantasized about kidnapping and holding either a male or female pubescent child for sexual purposes, and further acknowledged that he also fantasized about inducing fear in his victims and humiliating them.” In his sentence modification motion, Klingeisen challenged

³ The State argues that Klingeisen waived this claim by not objecting at sentencing. We decline to impose waiver, and we will address the claim on the merits.

the circuit court's reliance on Dr. Lodl because Dr. Lodl did not render this particular opinion.

¶11 In its decision denying Klingeisen's sentence modification motion, the circuit court noted that the record also contained the report and opinions of Karen Bitá, a licensed psychotherapist who conducted a psychosexual evaluation of Klingeisen. The record reveals that it was Bitá who opined that Klingeisen fantasized about kidnapping children for sexual purposes, not Dr. Lodl. The court found that it relied upon information properly before it, even if the source of the information was misidentified.

¶12 We conclude that Klingeisen has not met his burden to show that the circuit court relied on inaccurate information in sentencing. At most, the circuit court mistakenly attributed the opinion of one expert to another, but the opinion was properly before the court in any event. The court was entitled to weigh this opinion at sentencing.

¶13 Klingeisen next contends that the prosecutor made various misstatements during sentencing which amounted to prosecutorial misconduct and a due process violation.⁴

¶14 During his examination of Dr. Lodl, the prosecutor asked Dr. Lodl if he was familiar with the police reports and whether he had read the passage that stated that before he met the victims in this case, Klingeisen approached a teenage boy in Wal-Mart and started talking to him about rape and kidnapping. Klingeisen

⁴ The State argues that Klingeisen waived this argument by not objecting at sentencing. We decline to impose waiver, and we will address the merits of the argument.

argues that the prosecutor knew or should have known that it was the boy who approached him, not the other way around as alleged by the prosecutor.

¶15 At the postconviction motion hearing, the prosecutor stated that these remarks were an attempt to demonstrate that Klingeisen had the same type of discussion with the victims in this case as he did with the boy at Wal-Mart. The court found that the evidence before the court was that Klingeisen initiated the discussion about kidnapping and rape with the teenager at Wal-Mart, and that the prosecutor's remarks did not rise to the level of a false statement or argument.

¶16 We conclude that the prosecutor's remarks did not constitute prosecutorial misconduct or a due process violation. The prosecutor was attempting to highlight that Klingeisen had a propensity to strike up conversations with teenage boys about being raped and kidnapped. These are the allegations against Klingeisen in this case. Whether Klingeisen approached the boy in Wal-Mart or the boy approached him is not crucial. It is the substance of the Wal-Mart encounter which was central to the prosecutor's remarks.

¶17 Klingeisen next argues that the prosecutor falsely asserted that he lied to the presentence report author or to Bitá about having viewed pornography on his computer. At the postconviction motion hearing, the prosecutor conceded that he made a misstatement in this regard. In its ruling on the postconviction motion, the court noted that it never understood the prosecutor's argument during sentencing relating to pornography on the computer. However, the court found that Bitá reported that Klingeisen raised with her the topic of pornography on the computer. The court discounted the prosecutor's argument in light of information in Bitá's report that Klingeisen had an interest in pornography. We conclude that the court did not rely on the State's unclear argument in sentencing Klingeisen and

did not mention pornography in its sentencing rationale. Therefore, even if the prosecutor misstated the facts, the misstatement had no effect on the sentencing.

¶18 Finally, Klingeisen argues that the prosecutor falsely argued that Klingeisen was lying when he denied that evidence would be found in his truck. A police detective stated in an affidavit that when he interviewed Klingeisen, Klingeisen told him that police would find a gun, knife, ax, duct tape, plastic garbage ties and hats in his truck. However, when the detective spoke with Klingeisen the next day, Klingeisen stated that he could not recall where the plastic ties and hats could be found, effectively denying that this evidence would be found in his truck. Given this record, the court found that the prosecutor did not misstate the record or make a false statement. We agree. Furthermore, the sentencing record reveals that the court did not rely upon this statement.

¶19 We reject Klingeisen's challenges to his sentence and affirm.

By the Court.—Judgment and order affirmed.

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

