COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2681 **Cir. Ct. No. 2007CF10**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT C. DUNBERG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Scott Dunberg, pro se, appeals an order denying his WIS. STAT. § 974.06 (2009-10)[1] motion for postconviction relief. Dunberg argues the circuit court failed to comply with the federal rules of criminal

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

procedure and relied on inaccurate information at sentencing. Dunberg additionally claims his trial counsel was ineffective by failing to challenge inaccuracies in the presentence investigation report and to object to an inaccurate comment the court made at sentencing. We reject these arguments and affirm the order.

BACKGROUND

¶2 In 2007, Dunberg was convicted upon his no contest plea to two counts of second-degree sexual assault of a child. The court imposed concurrent twenty-three-year sentences, consisting of thirteen years' initial confinement and ten years' extended supervision. Dunberg did not pursue a direct appeal. Dunberg's WIS. STAT. § 974.06 motion for postconviction relief was denied after a hearing. This appeal follows.

DISCUSSION

¶3 Dunberg argues the circuit court failed to comply with FED. R. CRIM. P. 32 by not personally asking Dunberg if he had an opportunity to read the PSI, had time to review it with his attorney or wished to challenge any of its contents. We are not persuaded. The federal rules of criminal procedure do not apply to state criminal proceedings. *See* FED. R. CRIM. P. 1 (limiting scope of federal rules to criminal proceedings in United States district courts, United States courts of appeals, and United States Supreme Court). Further, Dunberg cannot raise a statutory violation claim in his WIS. STAT. § 974.06 motion because those motions are limited to constitutional and jurisdictional issues. *See* ***State v. Johnson***, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981).

¶4 Citing ***State v. Skaff***, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989), Dunberg nevertheless argues that defendants appearing with or without counsel have a due process right to read the PSI prior to sentencing. ***Skaff***, however, did not impose an affirmative duty on the circuit court to provide the defendant access to the PSI. "Rather, ***Skaff*** holds that a denial of a defendant's access to a PSI may not be premised upon a 'blanket rule' denying such access or excused because access was granted to the defendant's counsel." ***State v. Thompson***, 158 Wis. 2d 698, 700-01, 463 N.W.2d 402 (Ct. App. 1990). In any event, the record shows that the court ensured defense counsel had been provided a copy of the PSI and that Dunberg reviewed it with counsel.

¶5 Next, Dunberg contends the sentencing court relied on two pieces of false information. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To be entitled to resentencing, however, Dunberg must show that the information was inaccurate and that the circuit court actually relied on the inaccurate information at sentencing. ***Id.***, ¶26.

¶6 First, Dunberg challenges the sentencing court's reliance on a comment in the PSI relating to the victim's sister. Dunberg, however, fails to explain how the information was false. We do not address undeveloped claims. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). To the extent Dunberg attempts to incorporate by reference arguments made in his postconviction motion, "for-reasons-stated elsewhere" arguments are inadequate and this court generally declines to address them. *See* ***Ellsworth v. Schelbrock***, 229 Wis. 2d 542, 566, 600 N.W.2d 247 (Ct. App. 1999). Further, even looking at Dunberg's motion, it is no more helpful in developing this argument because it merely asserts, without any proof, that the information was false.

¶7 The second piece of information challenged by Dunberg is the sentencing court's statement that he had "penis in vagina" contact with the victim. At the postconviction hearing, the court discussed the challenged comment, acknowledging that it likely sounded to the court reporter as if the court said penis "in" vagina. The court continued: "[W]here that information came from was in the PSI which talked about an incident of you rubbing your penis against her vagina, and then ejaculating on her. And I characterize that as penis 'and' vagina." The court further stated it would have used a different term if talking about penetration and it understood that Dunberg did not have "sexual intercourse" with the victim. The court later noted it "never regarded this as a case of sexual intercourse with a minor."

¶8 Given the circuit court's comments, Dunberg's argument fails. A court may explain its sentence in postconviction proceedings and disavow its reliance on any allegedly inaccurate information. *See, e.g.*, ***State v. Lechner***, 217 Wis. 2d 392, 422-23, 576 N.W.2d 912 (1998); ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). We accept the circuit court's explanation that the word "in" was a typographical error for the word "and," and that the court neither thought Dunberg had sexual intercourse with the victim nor punished him for it. While Dunberg claims the court could not conclude there was a typographical error in the transcript, he points to no authority that it may not. The court knew what it said at sentencing. Ultimately, the court was aware of Dunberg's actions and punished him accordingly.

¶9 Finally, Dunberg challenges the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Dunberg must show that his counsel's performance was not within the range of competence demanded of

attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶10 First, Dunberg contends trial counsel was ineffective by failing to challenge inaccuracies in the presentence investigation report. His challenges to the PSI's accuracy, however, are wholly conclusory and undeveloped. Although Dunberg contends he relayed inaccuracies to counsel, he fails to indicate what they were or how they were false. Dunberg, therefore, cannot show that any objection to them would have merit. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (to establish counsel was ineffective for failing to object, defendant must show objection would have succeeded).

¶11 Second, Dunberg contends trial counsel was ineffective for failing to object to the court's "penis in vagina" comment at sentencing. Because Dunberg is not entitled to relief on the merits of his claim that the sentencing court relied on what it deemed a typographical error, Dunberg's derivative ineffective assistance argument must fail.

By the Court.—Order affirmed.

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