COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP785-CR **Cir. Ct. No. 2010CF3455**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL JOSHUA SCHLEMM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Samuel Joshua Schlemm appeals from a judgment of conviction for two counts of first-degree recklessly endangering safety by use

of a dangerous weapon, contrary to WIS. STAT. §§ 941.30(1) and 939.63(1)(b) (2009-10).[1] He also appeals from an order denying his motion for postconviction relief. Schlemm seeks resentencing on grounds that the trial court relied on inaccurate information concerning the crimes and misinterpreted the statute related to risk reduction sentences. We conclude that Schlemm is not entitled to resentencing. Therefore, we affirm.

BACKGROUND

¶2 Schlemm was accused of stabbing Joshua Allen and Matthew Szucs in an alley. According to the criminal complaint, Allen and Szucs were walking back to their vehicle after watching some fireworks. A red vehicle drove by and one of the passengers threw a bottle that hit Szucs in the face. Allen and Szucs got into their car and followed the red vehicle, which drove into an alley. Shortly thereafter, the red vehicle's four male occupants exited their vehicle and approached Allen and Szucs's car. One of the men, later identified by Allen and Szucs as Schlemm, stabbed Szucs as he sat in the passenger seat. When Allen got out of his car to stop Schlemm, Schlemm stabbed him as well.

¶3 Schlemm denied being present for the incident and the case went to trial. A jury found Schlemm guilty and the case proceeded to sentencing.

¶4 At sentencing, Schlemm continued to maintain his innocence. The State in its argument noted that it is unknown why the bottle was thrown at Szucs and Allen and why they were stabbed. The State asked rhetorically:

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> Is the defendant with his friends? Were they drunk and they just reacted poorly? I don't know. Did the victim[s] stumble upon something they shouldn't have and the defendant basically stabbed [them] to send a message? I don't know. I mean, that's the big unanswered question that only the defendant knows.

The trial court echoed some of these unknowns in its sentencing comments, stating:

> As to the rehabilitative needs, I have no idea if you have any drug or alcohol problems. You deny it. You have used some drugs in the past. I'm suspicious that this was possibly an incident where they came across a drug buy and you thought that they were involved or the police. I have no idea. No one knows.
>
> You have smoked marijuana in the past. And prior to your arrest you were smoking about six marijuana blunts daily. And you also in the past snorted cocaine on several occasions, but you said you didn't like it. You deny selling drugs, but I have no idea if you were buying it.
>
> It is a bizarre set of circumstances. I mean, July 4th fireworks, [bottle] being thrown, the victims following you and suddenly pulling over and suddenly they're stabbed. It's – It's – There's more to it than we know, and we'll never know the entire story.

¶5 The trial court sentenced Schlemm to five years of initial confinement and five years of extended supervision for the crime against the more seriously injured Szucs, and it imposed a consecutive sentence of two years of initial confinement and three years of extended supervision for the crime against Allen.

¶6 The trial court said that it would not make Schlemm eligible for boot camp, the earned release program, or a risk reduction sentence. With respect to the risk reduction sentence, it explained:

> A risk reduction sentence would shorten the period of time on extended supervision. And I think we need the eight

> years on extended supervision to make sure that the victims are protected. Plus there's a great deal of money that has to be paid back to the victim.

¶7 Schlemm obtained new counsel and filed a motion for postconviction relief. He argued that the trial court erroneously exercised its sentencing discretion "by imposing an excessive sentence where, as here, the court's speculation as to the defendant's alleged participation in an interrupted drug deal is not supported by the record and where the court's decision not to impose a risk reduction sentence was based on an erroneous view of the law."[2] The trial court denied the motion in a written order, for reasons explained below. This appeal follows.

DISCUSSION

¶8 Schlemm argues that he is entitled to resentencing based on two alleged sentencing errors: (1) the trial court questioned whether Schlemm may have been involved in a drug deal in the alley; and (2) when the trial court refused to impose a risk reduction sentence, it erroneously stated that giving Schlemm a risk reduction sentence would reduce the time he would spend on extended supervision. We consider each issue in turn.[3]

[2] Schlemm also sought to reverse his convictions on other grounds. He has not raised those arguments on appeal and, therefore, we do not discuss them. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

[3] The State argues that this court need not consider the merits of Schlemm's arguments because he did not object at sentencing and therefore forfeited his objection. We decline to apply forfeiture in this case.

I. Trial court's comments about Schlemm's presence in the alley.

¶9 Schlemm argues that the trial court erred "by concluding that the defendant may have been engaged in some sort of drug deal at the time of the incident." He asserts that "[t]he record is absolutely devoid of any testimony or evidence of any kind from which the court could draw such a conclusion, other than through the exercise of entirely unsupported speculation." He concludes that "[t]o the extent that the court imposed a sentence in this case based upon the defendant's alleged behavior in lashing out when the victims here interrupted a drug deal, the absence of any information from which any finder of fact could have found such a set of facts leads inexorably to the conclusion that the court erroneously exercised its discretion." We are not convinced that Schlemm is entitled to resentencing.

¶10 Our supreme court has recognized that a defendant who is seeking resentencing due to the trial court's alleged use of inaccurate information "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (citations and two sets of quotation marks omitted). "Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless." ***Id.*** Applying those standards here, we conclude that even if the trial court's suspicion that Schlemm was involved in a drug deal in the alley was erroneous, Schlemm has not shown that the trial court actually relied on that suspicion at sentencing.

¶11 In its order denying Schlemm's postconviction motion, the trial court explained:

> Although the court questioned whether an interrupted drug buy may have motivated the defendant's violent conduct,

> the court repeatedly acknowledged that it had no idea if the defendant was involved in a drug deal or if he was high at the time the incident occurred. The record shows that the court relied upon the defendant's past drug use in assessing his rehabilitative needs and did not form a belief one way or another as to whether he was involved in a drug buy at the time. Consequently, the court did not rely upon inaccurate sentencing information in this case.

We agree with the trial court's assessment. The trial court's sentencing comments indicated that it did not know whether the incident was related to drugs, and the trial court did not state that it was sentencing Schlemm based on its suspicions. The trial court reiterated that belief in its postconviction order. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The trial court has another opportunity to explain its sentence when challenged by postconviction motion.). Schlemm has not shown that the trial court actually relied on inaccurate information at sentencing and, therefore, he is not entitled to resentencing. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶26.

II. Trial court's comments concerning a risk reduction sentence.

¶12 When the trial court told Schlemm that he was not eligible for a risk reduction sentence, it said: "A risk reduction sentence would shorten the period of time on extended supervision. And I think we need the eight years on extended supervision to make sure that the victims are protected." This was a misstatement of the law, as the trial court acknowledged in its order denying the postconviction motion. Specifically, a risk reduction sentence reduces only the initial confinement portion of a defendant's sentence and it has no effect on the length of

the period of extended supervision. *See* WIS. STAT. § 302.042(4) (2009-10)[4] ("The department shall release an inmate who is serving a risk reduction sentence to extended supervision when he or she serves not less than 75 percent of the term of confinement portion of his or her sentence imposed under s. 973.01 and the department determines that he or she has completed the programming or treatment under his or her plan and that the inmate maintained a good conduct record during his or her term of confinement.").

¶13 While the trial court misstated the effect of a risk reduction sentence, it does not automatically follow that Schlemm is entitled to resentencing. As the State explains:

> [S]entencing errors can be harmless when they do not affect the substantial rights of the defendant. ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. An error is harmless if there is no reasonable probability that it contributed to the sentence imposed. [***State v.***] ***Payette***, [2008 WI App 106, ¶46,] 313 Wis. 2d 39, [756 N.W.2d 423]. There is no contribution when the result would have been the same if the error had not occurred. ***State v. Weed***, 2003 WI 85, ¶¶29, 32, 263 Wis. 2d 434, 666 N.W.2d 485; ***State v. Harvey***, 2002 WI 93, ¶¶46, 49, 254 Wis. 2d 442, 647 N.W.2d 189.

(Bolding added and one citation omitted).

¶14 The trial court in this case had an opportunity to consider its error when it decided Schlemm's postconviction motion. *See* ***Fuerst***, 181 Wis. 2d at 915. It acknowledged that it had misstated the effect of a risk reduction sentence

[4] Effective August 3, 2011, the legislature repealed the law permitting trial courts to impose risk reduction sentences. *See* 2011 Wis. Act 38, §§ 13, 92. However, Schlemm's sentencing occurred on January 19, 2011, and it is undisputed that the trial court could have imposed a risk reduction sentence.

on extended supervision, but it concluded that Schlemm was nonetheless not entitled to resentencing. The trial court explained:

> Protection of the victims was one of the goals of the *entire* sentence in this case, not just the period of extended supervision. The court intended for the defendant to serve the full period of initial confinement and extended supe[r]vision in order to further that goal and the goals of punishment, deterrence and rehabilitation. Despite the court's misunderstanding about the operation of [WIS. STAT. §] 302.42(4), the court stands by its finding that a risk reduction sentence is not appropriate and denies the motion for resentencing on these grounds.

¶15 The State argues that the trial court's explanation makes clear that the trial court "refused to impose a risk reduction sentence because it wanted Schlemm to serve the full fifteen years to which he was sentenced, including both the full seven years of confinement and the full eight years of extended supervision." We agree with this assessment. The trial court at the sentencing hearing refused to find Schlemm eligible for the challenge incarceration program, the earned release program, and the risk reduction program. There is nothing in the trial court's original sentencing remarks that suggests it was open to allowing Schlemm to be released early from either initial confinement or extended supervision, and the trial court reiterated that decision in its order denying the postconviction motion. *See* ***Fuerst***, 181 Wis. 2d at 915.

¶16 We conclude that the trial court's misstatement of the law at sentencing was harmless because there is no reasonable probability that it contributed to the sentence imposed. *See* ***Sherman***, 310 Wis. 2d 248, ¶8; ***Payette***, 313 Wis. 2d 39, ¶46. The original sentencing transcript and the trial court's written order denying Schlemm's postconviction motion demonstrate that the result would have been the same if the error had not occurred. *See* ***Weed***, 263 Wis. 2d 434, ¶¶29, 32; ***Harvey***, 254 Wis. 2d 442, ¶¶46, 49.

By the Court.—Judgment and order affirmed.

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