OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

February 22, 2024

To:

Hon. Michael P. Screnock
Circuit Court Judge
Electronic Notice

Carrie Wastlick
Clerk of Circuit Court
Sauk County Courthouse
Electronic Notice

Kieran M. O'Day
Electronic Notice

Gregory A. Petit
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP2226-CR State of Wisconsin v. Marcus Amor Hinton (L.C. # 2021CF58)

Before Blanchard, Graham, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Marcus Hinton, by counsel, appeals a judgment of conviction and a circuit court order denying his postconviction motion. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

Hinton was convicted of second-degree sexual assault of a child following a no contest plea. Neither Hinton nor the State requested a pre-sentence investigation report (PSI) pursuant to WIS. STAT. § 972.15. At sentencing, the parties jointly recommended a withheld sentence and

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

probation. The circuit court did not follow the joint recommendation. Instead, it imposed a sentence consisting of eight years of initial confinement followed by seven years of extended supervision. Hinton filed a postconviction motion alleging ineffective assistance of trial counsel. The court denied the postconviction motion without a hearing, and this appeal follows.

A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. To obtain an evidentiary hearing, the defendant's motion must allege, with specificity, both that counsel performed deficiently and that the deficiency was prejudicial. ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***Id.*** at 309-10.

Here, Hinton alleges that the circuit court erroneously exercised its discretion when it denied his request for an evidentiary hearing on the issue of ineffective assistance of trial counsel pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Hinton argues that his trial counsel was constitutionally ineffective because counsel failed to discuss with Hinton the potential benefits and purposes of a PSI. Hinton asserts that, if a PSI had been ordered, the court would have had the benefit at sentencing of mitigating information that a PSI could have included.

We are not persuaded by Hinton's ineffective assistance of counsel argument. First, the decision to order a PSI is not a "right" of the criminal defendant, as Hinton characterizes it, but rather a discretionary determination made by the circuit court. *See* WIS. STAT. § 972.15(1) ("After a conviction the court ***may*** order a presentence investigation …." (emphasis added)).

Thus, to the extent that Hinton argues that his counsel should have discussed with him the "right" to a PSI, this argument could not have merit because no such right exists.

Second, we assume deficient performance by trial counsel but conclude that Hinton cannot prevail on his ineffective assistance because Hinton cannot show prejudice. *See* ***State v. Jackson***, 2023 WI 3, ¶18, 405 Wis. 2d 458, 983 N.W.2d 608 ("[I]n assessing whether a defendant is entitled to a ***Machner*** hearing, we must assume that the factual claims made in support of the motion are true."). We assume the truth of Hinton's allegation that his trial attorney did not adequately advise him about the PSI and that it was deficient performance not to do so.[2] But as discussed in further detail below, Hinton does not identify mitigating information that might have been included in a PSI, if one had been ordered, that was not already considered by the circuit court at sentencing.

Hinton asserts that, if a PSI had been conducted, the circuit court would have been aware of mitigating factors such as his lack of a history of prior sexual assault, his work history, and his remorse. However, the record establishes that the court was aware of each of these factors. The court was aware of, and discussed at sentencing, the specifics of Hinton's lengthy criminal history. Hinton's trial counsel stated during his argument at sentencing that Hinton has a criminal record only in Wisconsin, and that several of his prior offenses occurred over 25 years

[2] While we resolve this appeal in part by assuming the facts in Hinton's favor regarding alleged deficiency, we observe that Hinton's assertion that his counsel did not discuss the option of a PSI with him is directly contradicted by the record. At the plea hearing, the circuit court asked Hinton's trial counsel if he had "discussed with Mr. Hinton the prospect of the [c]ourt ordering a presentence investigation." Counsel responded, "We did discuss that, Your Honor. Neither party is requesting that the [c]ourt do so." The court then asked Hinton directly, "[D]o you agree that the [c]ourt can proceed to sentencing without having the benefit of a presentence investigation?" Hinton responded in the affirmative. The court then asked Hinton if he had "[a]ny questions about that" and Hinton replied, "No." These exchanges reflect that Hinton discussed the option of a PSI with his counsel and that Hinton agreed that the court could proceed to sentencing without a PSI.

earlier. Hinton's counsel discussed on the record Hinton's education, his long history of self-employment, and the managerial position that Hinton had attained. Hinton's counsel also argued that, by pleading guilty, Hinton accepted responsibility for his actions. Hinton had the opportunity to address the court personally prior to the imposition of sentence, and he did so. Hinton told the court, "I'm sorry for what happened if it happened. I do not remember it, but if I did, I'm here to accept the consequences."

The proper test for prejudice in the context of a claim of ineffective assistance of counsel is whether "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***State v. Burton***, 2013 WI 61, ¶49, 349 Wis. 2d 1, 832 N.W.2d 611 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). Hinton fails to meet this standard because he has not demonstrated the existence of a mitigating factor that a PSI would have included that would likely have led to a different outcome at sentencing. The record of the sentencing hearing establishes that the circuit court considered and discussed, among other factors, Hinton's criminal history, education, and work history. We are satisfied that the court properly exercised its discretion when it rejected Hinton's ineffective assistance of counsel claim without ordering an evidentiary hearing.

We turn to Hinton's arguments that he was sentenced based on "incomplete" or inaccurate information and that the existence of a new factor entitles him to sentence modification. We have some difficulty following these arguments. Hinton conflates the legal standards that apply to each of these arguments, such that a clarifying discussion is necessary. When a defendant argues that the defendant was sentenced based on inaccurate information, the defendant has the initial burden of showing by clear and convincing evidence that inaccurate information was presented and relied upon at sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26,

291 Wis. 2d 179, 717 N.W.2d 1. If the defendant meets that initial burden, the burden shifts to the State to show that the error was harmless. ***Id.*** In contrast, the framework for evaluating a motion for sentence modification based on an alleged new factor requires the circuit court to consider first whether the defendant has demonstrated the existence of a new factor by clear and convincing evidence and, if so, whether that new factor justifies modification of the sentence. *See* ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828.

Hinton's arguments that he was sentenced based on inaccurate information and that he is entitled to sentence modification based on a new factor are both premised on his assertion that a PSI would have given the circuit court more complete or accurate information at sentencing. We have already explained why we conclude that Hinton failed to identify any mitigating factor or other specific information that would have led to a different result at sentencing. In addition, Hinton fails to develop his arguments with references to the accurate legal standards. This court need not consider arguments that are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (lack of record citations); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments). We reject as undeveloped Hinton's arguments that he was sentenced based on inaccurate information and that he is entitled to sentence modification based on a new factor.

In sum, Hinton fails to demonstrate that the circuit court erroneously exercised its discretion when it denied his postconviction motion without ordering an evidentiary hearing.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals