

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

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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. 2006AP1117-CR

Cir. Ct. No. 2000CF1632

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HURCEL STAPLES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Hurcel Staples appeals an order denying his postconviction motion for resentencing. This is Staples's second appeal. On his

first appeal, we reversed and remanded for resentencing. *State v. Staples*, No. 02-1330-CR, unpublished slip op. (WI App Aug. 5, 2003). Staples claims on this appeal that his trial lawyer was ineffective for not objecting when the second sentencing judge allegedly relied on inaccurate and incomplete information. We affirm.

I.

¶2 In December of 2000, Staples was tried before the Honorable Daniel L. Konkol for kidnapping, falsely imprisoning, and sexually assaulting then fourteen-year-old Jamie S. at his sister's apartment. Jamie S. testified that she was babysitting Staples's sister's children when Staples, who appeared to be drunk, grabbed her from behind and dragged her kicking and screaming into a bedroom. According to Jamie S., Staples then threw her onto a bed, took her pants and underwear off, and tried to have sexual intercourse with her.

¶3 Jamie S. testified that she then went to the bathroom to get away from Staples, but he waited outside and told her that her "time is up." When Jamie S. came out of the bathroom, she ran to the apartment door and tried to unlock it. Jamie S. told the jury that Staples threw her against a wall, dragged her back into the bedroom, and again tried to have sexual intercourse with her.

¶4 Staples testified at the trial and claimed that Jamie S. asked him to come to the bedroom, where, according to him, she told him that she had a crush on him and wanted to have sex with him. According to Staples, he told Jamie S. that she was too young for him. Staples denied having sexual contact with Jamie S.

¶5 The jury found Staples guilty of one count of second-degree sexual assault of a child for touching Jamie S.'s vaginal area. *See* WIS. STAT. § 948.02(2) (1999–2000). It acquitted Staples of kidnapping, false imprisonment, and one count of second-degree sexual assault of a child that alleged he touched Jamie S. with his penis. *See* WIS. STAT. §§ 940.31(1)(a), 940.30, 948.02(2) (1999–2000).

¶6 According to the presentence investigation report considered at the first sentencing, Staples's probation for an earlier conviction was revoked in part because Staples's nephew accused him of sexual assault. No charges, however, were filed against Staples in connection with that accusation. At the original sentencing hearing, the prosecutor told the trial court that Staples was not charged because the nephew was too young to testify. The prosecutor told the trial court, however, that he believed that Staples had assaulted his nephew. Judge Konkol sentenced Staples to twenty-five years in prison—fifteen years of initial confinement to be followed by ten years of extended supervision.

¶7 Staples appealed, claiming that he was sentenced based on inaccurate information. We agreed, pointing out that Staples's probation had not been revoked because of the sexual-assault allegation. *Staples*, No. 02-1330-CR, unpublished slip op. at 2. Rather, the administrative law judge concluded that the sexual-assault allegation had not been proven by a preponderance of the credible evidence, and revoked Staples's probation for other reasons. *Ibid.* We also noted that the prosecutor had not revealed to Judge Konkol that Staples's nephew had given several inconsistent statements that either could not be corroborated or were contradicted by others. *Ibid.* Accordingly, we reversed and remanded for resentencing, concluding:

Staples has demonstrated that he was sentenced on inaccurate information and that the trial court relied on that

information when it sentenced him. The [presentence investigation report] contained inaccurate information about whether Staples' probation was revoked as a result of the sexual assault allegation by Staples' nephew. Further, the State provided an incomplete statement to the court concerning the prosecutor's impressions of that incident. The trial court at sentencing specifically referred to that incident stating:

There was indication with regard to the defendant's arrest for first degree sexual assault of a child with regard to his sister's son, while he was not charged criminally with that, that was part of the basis for his revocation of probation.

So I think the defendant has some long-standing problems with regard to conforming his behavior to that of a law-abiding citizen with regard to sexually appropriate conduct....

....

The information was not accurate and the court relied on it. Staples' due process right to be sentenced on the basis of accurate information was violated and he, therefore, is entitled to be resentenced.

Id., No. 02-1330-CR, unpublished slip op. at 3–4 (second set of ellipses added).

¶8 Staples was resentenced by the Honorable Mary M. Kuhnmuensch. At the resentencing hearing, Judge Kuhnmuensch told the parties that she had reviewed, among other things: Staples's file, the procedural history of the case, our decision, a pre-sentence report prepared by a defense investigator, and a psychological evaluation of Staples by Michael S. Kotkin, Ph.D., who was retained on Staples's behalf. Judge Kuhnmuensch acknowledged that she had not read the transcript from the first sentencing: "I haven't read Judge Konkol's sentencing. I don't know, other than what the court of appeals referenced from part of his sentencing of [the defendant], I was not here for the trial." Judge

Kuhnmuench then sentenced Staples to twenty-five years in prison—fifteen years of initial confinement to be followed by ten years of extended supervision.

II.

¶9 Staples claims that his trial lawyer gave him ineffective representation by not objecting when the second sentencing judge allegedly relied on inaccurate and incomplete information. A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Moreover, a defendant claiming that a sentencing court relied on inaccurate information must show that: (1) the information was inaccurate, and (2) the sentencing court actually relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7.

¶10 Whether a lawyer’s performance was deficient and prejudicial, and whether a defendant has been sentenced based on inaccurate information are questions of law that we review *de novo*. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845, 848 (1990) (ineffective assistance of counsel); *Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3 (inaccurate information). We apply these principles to assess Staples’s claims.

A.

¶11 Staples contends that his trial lawyer should have asked the second sentencing judge to review the trial and original sentencing transcripts under *State v. Reynolds*, 2002 WI App 15, 249 Wis. 2d 798, 643 N.W.2d 165 (Ct. App. 2001) (reconfinement after revocation). *See also State v. Brown*, 2006 WI 131, ¶38, ____

Wis. 2d ___, ___, 725 N.W.2d 262, 272 (where a reconfinement court did not impose the original sentence, the reconfinement court should review the original sentencing transcript) (decided after the resentencing in this case). Staples argues that had the trial court done so, he would have been sentenced based on “fair, accurate and complete information.” See *Reynolds*, 2002 WI App 15, ¶10, 249 Wis. 2d at 807, 643 N.W.2d at 169–170. Staples’s contention fails on two grounds.

¶12 First, the authorities on which Staples relies involve reconfinements after revocation, so the factors considered by the sentencing judge are important. See *Brown*, 2006 WI 131, ¶38, ___ Wis. 2d at ___, 725 N.W.2d at 272. Where the reconfinement court is not the original sentencing court, the reconfinement judge should understand the things considered by the original sentencing judge. *Ibid.* Thus, the reconfinement judge “should consider” the sentencing transcript. See *ibid.*; see also *State v. Gee*, 2007 WI App 32, ¶15, ___ Wis. 2d ___, ___, 729 N.W.2d 424, 430 (holding that *Brown* created a *per se* rule, thereby transforming *Brown*’s “should consider” recommendation into a must-command). Here, however, we do not have a continuation of the original sentencing; our reversal and vacatur of the original sentencing started anew the sentencing court’s obligation to reasonably exercise its sentencing discretion based on information material to the sentencing decision. See *State v. Carter*, 208 Wis. 2d 142, 146–147, 560 N.W.2d 256, 258 (1997) (resentencing occurs when a court imposes a new sentence after the initial sentence has been held invalid).

¶13 Second, although it is true that sometimes the hearing on which the vacated sentencing was based might give important information to the second sentencing judge, a defendant who claims that his or her lawyer was ineffective by not asking the second sentencing judge to review the original-sentencing transcript

has to show what that review would have revealed and how the defendant was prejudiced under *Strickland*. See *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994). Staples has pointed to nothing in the original sentencing transcript that would have affected the sentence from which this appeal is taken.

B.

¶14 Staples also argues that his trial lawyer should have objected when the prosecutor at the second sentencing hearing allegedly inaccurately characterized an incident that happened when Staples was eight years old. At the second sentencing hearing, the prosecutor told the trial court:

We have another report from Dr. Kotkin. Dr. Kotkin frequently writes reports in sexual assault cases. They all seem to have the same result. The defendant does not show the tendencies or a pattern of behavior that would indicate that he is a potential repeat sexual offender. So the conclusion of Dr. Kotkin is always the same.

In this case, Dr. Kotkin does lay out, although in somewhat of a watered-down fashion, the defendant's criminal history. And I think most notable are on page five, numbers one and two. The defendant was involved in an incident when he was eight years of age where he and several other boys were involved in restraining and touching a female.

Well, that's sort of what happened. They actually held the female down and they touched her sexually. Dr. Kotkin brushes over the sexual portion of that, but it was definitely a sexual touching. I don't think the court should necessarily put a whole lot of weight on that particular incident because the defendant was so young at the time.

And I think it's difficult to attach a lot of weight to the behavior of an 8-year-old when sentencing him when he's now, I believe, 21 probably. But I think it's important that the court at least acknowledge that this was a sexual touching. That this was not just a playground scuffle or a wrestling match or a battery of some kind. It was a sexual

touching. It was a sexual assault, even though the defendant may have been eight years of age.

Staples claims that, like the presentence-investigation-report writer at his first sentencing, the prosecutor at his second sentencing again mischaracterized the playground incident as an inappropriate sexual touching. Staples contends that his lawyer's failure to object allowed the prosecutor to introduce at his second sentencing hearing information that we found inaccurate and misleading on Staples's first appeal. We disagree.

¶15 First, the main focus of Staples's first appeal was whether the trial court relied on inaccurate information concerning the revocation of Staples's probation. We pointed out, however, that, in fact, Staples's probation was revoked for reasons other than the sexual-assault allegation by Staples's nephew. Staples does not assert that the second sentencing court did not know this.

¶16 Moreover, although we briefly mentioned the playground incident in the original appeal, we did not determine that it was improper for the original sentencing court to consider that incident in the reasoned exercise of its discretion. We wrote:

The [presentence investigation report] also referred to an element of sexually inappropriate and deviant behavior in three prior incidents, including the one involving his nephew. The report concluded that there was a "notable element" in three of Staples' arrests that was "strikingly similar to the foremost aspect in the present offense, inappropriate sexual behavior."

Staples, No. 02-1330-CR, unpublished slip op. at 2. In a footnote, we noted that: "One of the two other incidents occurred when he was eight years old and he and three other children held two girls down on a playground and kissed and touched them." *Id.*, No. 02-1330-CR, unpublished slip op. at 2 n.2.

¶17 Second, at Staples's resentencing, the trial court explicitly disclaimed reliance on the earlier incidents, including the playground incident:

I'm not even looking at whether or not, as the court of appeals has told Judge Konkol, he incorrectly relied on incorrect information viewing that somehow some juvenile contacts that may have been sexual in nature sort of have escalated to this. I'm putting that completely aside. That's not what I see escalate.

What I see escalating is untreated alcohol use, denial and a refusal to get help when it was offered to you. That's what I see. And then to come into court and in some small way be disingenuous and say to the court, you know, even this thing it probably happened. I don't remember. I don't have the details to it because I was drunk. And then the details that you want to remember a[re] details that are absolutely consistent with your belief of what happened. I'm not going to allow you to play that game.

Staples has not shown that the trial court relied on inaccurate information.

C.

¶18 Staples also contends that his trial lawyer should have objected when at the second sentencing hearing the prosecutor "argued at great length numerous facts that related to the crimes Mr. Staples' [*sic*] was found not guilty of committing." As an example, Staples points to the following comments related to the kidnapping charge and claims that the State "argued [these] facts to the court as though the jury found [Staples] guilty":

- "Hurcel Staples ... dragged Jamie S[.] into [his sister]'s bedroom, threw her down on the bed."
- Jamie S. "testified she was able to break free and she ran from the bedroom. ... Mr. Staples caught--ran after her, caught her and pulled her back into the bedroom."

- “The defendant did get off of her and allowed her to use the bathroom. At some point while she was in the bathroom, he yelled something to the effect that time’s up, and then dragged her from the bathroom.”

Staples has shown neither deficient performance nor prejudice.

¶19 “It is well established that a sentencing judge may take into account facts introduced at trial relating to other charges, *even ones of which the defendant has been acquitted.*” *State v. Arredondo*, 2004 WI App 7, ¶54, 269 Wis. 2d 369, 404, 674 N.W.2d 647, 663 (Ct. App. 2003) (internal quotation marks omitted; emphasis in *Arredondo*). Moreover, the trial court clearly stated in response to Staples’s lawyer’s concern that the trial court was going to sentence Staples as if he was guilty of all four counts that it was only going to sentence Staples for the crime he committed:

To the extent that [the prosecutor] made any reference to me considering--that this is serious because of the other charges, even those that the jury didn’t come back with guilty verdicts on, I just--I simply didn’t take his argument that way. I want the record to reflect that. And the courts just simply would not do that, because I, like the defense has pointed out, have an obligation to sentence the defendant on what he has been convicted for, and that’s one count of second-degree sexual assault of a child.

So I just wanted to interject that ... only because I did not want you to feel that somehow dependant on what you viewed mister--how you viewed [the prosecutor’s] arguments, that somehow the court was going to sort of mistakenly go down a path that I know I’m forbidden from going down. I want to offer you assurances that that’s not the case.

D.

¶20 Staples also argues that his lawyer should have objected at the second sentencing hearing when the prosecutor summarized for the trial court what Deandre Staples, Staples's nephew, told the police:

Finally, there was an eye witness to this offense. Not to the sexual assault but to the circumstances surrounding it. The state was unable to secure his appearance at trial. ... I would note that it is the defendant's nephew that I was unable to secure at trial. And we made diligent, bordering on extraordinary, efforts to try to serve Yolanda Staples so she would bring her son Deandre Staples to court.

....

But I think it's important that I put before the court what Deandre told the police. Deandre stated that ... after [a] card game, Hurcel [Staples] put [Jamie S.] up in a corner, meaning that he put her into a wall. Said that Jamie was trying to push him off and saying to get off. That while she was against the wall, that Hurcel [Staples] pulled his pants down but was wearing boxer shorts. And that he pulled his pants down just below his buttocks area.

He then said that Hurcel [Staples] took Jamie over his shoulder and took her--took her into his mom's bedroom and closed the door. And that after a while, she came out and Hurcel [Staples] came after her, grabbed her and took her back into the same bedroom. He said at this time Hurcel [Staples] was only wearing boxer underwear. And after a longer period of time, they came out of the bedroom and put him and his brother, who was sleeping on the couch, to bed and turned out the lights.

Deandre stated that while they were in the bedroom, he heard Jamie screaming. He said he couldn't tell what she was screaming but that she was screaming. He said that the stereo on the apartment was turned up loud. He said he tried to wake up his brother to go to the phone booth on 92nd and Lincoln to call 9-1-1 but his brother would not get up.

Deandre then told his mother, Yolanda, when she came home that, quote, "my uncle was being nasty and Jamie was screaming," unquote.

Staples claims that these facts were inadmissible hearsay. We disagree. The rule against hearsay does not apply to sentencing proceedings. WIS. STAT. RULE 911.01(4)(c); *State v. Mosley*, 201 Wis. 2d 36, 45, 547 N.W.2d 806, 810 (Ct. App. 1996).¹

E.

¶21 Staples also claims that his lawyer did not sufficiently argue mitigating factors at the second sentencing, including: (1) his alleged remorse and acceptance of responsibility; (2) his lack of education and his alleged learning disability; and (3) his alcohol problem. Staples’s lawyer at the resentencing did, however, seek leniency for these reasons.

¶22 At the second sentencing hearing, Staples’s lawyer told the sentencing court that Staples’s “current posture in regard to his responsibility for the offense is far different than how he presented himself before the court at the time of his original sentencing,” pointing out that Staples now acknowledged that

¹ WISCONSIN STAT. RULE 911.01(4)(c) provides:

RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:

....

(c) *Miscellaneous proceedings.* Proceedings for extradition or rendition; sentencing, granting or revoking probation, modification of a bifurcated sentence under s. 302.113 (9g), adjustment of a bifurcated sentence under s. 973.195 (1r), issuance of arrest warrants, criminal summonses and search warrants; hearings under s. 980.09 (2); proceedings under s. 971.14 (1) (c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969.

“whatever the context would have been ... it was still his responsibility being the adult in the equation ... to refrain.” Staples’s lawyer also told that court that: “I think that it is important for the court to consider that [Staples] does now exhibit a great deal of shame and remorse for his involvement in this offense”; pointed out that Staples was attempting to get his general equivalency diploma; and discussed extensively Staples’s alcohol problem and need for treatment. Beyond mere rhetoric, Staples has not shown what more could have been said or how that would have affected the sentence imposed following our remand.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

