

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 21, 2009

David R. Schanker
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. 2007AP2426

Cir. Ct. No. 2004CF249

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REX G. STONE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Rex Stone appeals an order denying his postconviction motion to withdraw his no contest pleas to one count of exposing a child to harmful material and one count of second-degree sexual assault of a child. The trial court concluded the motion was procedurally barred. By previous order

this court rejected the State's argument that it was procedurally barred and ordered briefing on the merits. Because we conclude the motion lacks merit, we affirm the order denying the motion without a hearing.

¶2 Stone argues his no contest pleas were not knowingly, voluntarily and intelligently entered because the court failed to adequately inform him of the direct consequences of his pleas. The record does not support Stone's argument. The court specifically informed Stone of the maximum terms of imprisonment and potential fines. The court was not required to inform Stone of the effect of Truth in Sentencing, or collateral consequences such as a possible future commitment under WIS. STAT. ch. 980,¹ the existence of The End of Confinement Review Board, or sex offender registration. See *State v. Sutton*, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146; *State v. Bollig*, 2000 WI 6, ¶27, 232 Wis. 2d 561, 605 N.W.2d 199.

¶3 The record also belies Stone's argument that the trial court failed to ascertain his education level. The court determined that Stone had not finished high school but could read and write. The court established Stone's ability to comprehend the elements of the offenses, the potential penalties and the constitutional rights he waived by pleading no contest. Therefore, Stone failed to meet his initial burden of making a prima facie showing that the court failed to comply with WIS. STAT. § 971.08. See *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

¶4 Stone next argues his trial counsel was ineffective in several respects. He contends counsel failed to investigate potentially exculpatory information found in discovery documents. Specifically, he cites a report from a social worker and police that indicates the mother of one of his victims was allowed to have contact with the victim after the allegations came to light and before police could question her. Stone apparently believes this contact would constitute grounds for suppressing the victim's testimony and he faults his trial counsel for failing to investigate the possibility of "tampering with witness statements." Stone's argument is based on pure speculation. The motion does not establish counsel's failure to discover any exculpatory or mitigating evidence and provides no basis for suppressing evidence.

¶5 Stone next argues his trial counsel was ineffective for failing to challenge defects in the criminal complaint. He argues that the sexual assault charge "between September of 2003 and December 2003" is "so vague that it violates both Due Process and Constitutional Right to Notice." The allegations were made approximately one year after the offenses. The complaint was based on the victim's statement that the sexual assault occurred before Christmas and during the school year. Because the victims were Stone's stepdaughters, he had access to the victims on numerous occasions. It would not be possible to make an alibi defense. Under these circumstances, the complaint is not defective, *see State v. Fawcett*, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988), and thus Stone's counsel was not ineffective for failing to challenge the complaint.

¶6 Stone next argues the complaint was defective because, as to one of the charges, it fails to say "Who says so? Or, how reliable is the informant?" *See State v. White*, 97 Wis. 2d 193, 203, 295 N.W.2d 346 (1980). This defect relates to personal jurisdiction and was waived by Stone's failure to challenge the

complaint before entering his no contest pleas. *See State v. Dietzen*, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991). To the extent Stone argues ineffective assistance of counsel for failing to preserve the issue, he has not established any prejudice. If counsel had objected to the complaint, undoubtedly an amended complaint would have been issued including the standard language attesting to the complainant's belief that the victim, as a citizen informant, has provided accurate information. Counsel's failure to object to the complaint does not undermine our confidence in the outcome. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶7 Stone argues his trial counsel spent minimal hours on the case as demonstrated by the time sheets submitted to the State Public Defender's Office. However, he does not identify exculpatory or mitigating facts that could have been discovered by spending more time on the case. Therefore, he has not established any prejudice from his counsel's performance. *Id.*

¶8 Stone contends the victim's statements in the PSI are inconsistent with the victim impact statements. The PSI says the victim "thinks he is mad at her mom and might hurt her." But the victim also stated "I still love him and I do not want him to go but I know he has to." The victim's statements are not, as Stone argues, a completely different story." Counsel was not ineffective and Stone established no prejudice from counsel's failure to highlight the victim's ambivalent feelings.

¶9 Stone next argues the PSI implies his probation was revoked on two offenses when it was actually only revoked on one offense. However, his motion does not allege the trial court relied on any inaccurate information when it sentenced him. To be entitled to relief, Stone must show that the information was

inaccurate and that the court relied on it. *See State v. Tiepelman*, 2006 WI 66, ¶¶2, 26, 291 Wis. 2d 179, 717 N.W.2d 1.

¶10 Finally, Stone faults his trial counsel for failing to move to strike a portion of the PSI in which his biological daughter accused Stone of sexually assaulting her. Stone’s attorney contested the allegation, but did not move to strike that portion of the PSI. There is no basis for striking the unproven allegations because it is appropriate for the court to consider them at sentencing. *See Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). “Unproven” is not synonymous with “false” allegations. In addition, Stone has not established the trial court’s reliance on the allegedly inaccurate information when it imposed sentence.

By the Court.—Order affirmed.

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

