

RECEIVED

12-17-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP2219-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD D. GREENWOOD,

Defendant-Appellant

On Appeal From the Denial of a Postconviction Motion for
Resentencing and the Judgment of Conviction
Entered in the Brown County Circuit Court,
the Honorable Tammy Jo Hock, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355
Office of the State Public Defender
735 N. Water St. Ste., 912
Milwaukee, WI 53202
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

| | Page |
|--|------|
| ISSUES PRESENTED | 1 |
| STATEMENT ON ORAL ARGUMENT AND PUBLICATION | 1 |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF THE FACTS RELEVANT TO THE ISSUE ON APPEAL | 2 |
| ARGUMENT | 5 |
| I. Mr. Greenwood Is Entitled to Resentencing Because The Court Relied on Inaccurate Information When Structuring His Sentence For Three Misdemeanor Charges. | 5 |
| A. Standard of Review | 5 |
| B. The belief that Mr. Greenwood could serve his sentences in jail with good time and Huber release constitutes inaccurate information | 6 |
| C. The circuit court relied on the inaccurate information in its sentencing decision. | 9 |
| CONCLUSION | 11 |
| CERTIFICATION AS TO FORM/LENGTH..... | 12 |
| CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) | 12 |
| CERTIFICATION AS TO APPENDIX | 13 |

| | |
|------------------------|-----|
| INDEX TO APPENDIX..... | 100 |
|------------------------|-----|

CASES CITED

| | |
|---------------------------------------|------------------|
| <i>State v. Tiepelman,</i> | |
| 2006 WI 66, | |
| 291 Wis. 2d 179, 717 N.W.2d 1 | 5, <i>passim</i> |
| <i>State v. Travis,</i> | |
| 2013 WI 38, | |
| 347 Wis. 2d 142, 832 N.W.2d 491 | 6, 7, 9, 10 |
| <i>Townsend v. Burke,</i> | |
| 334 U.S. 736 (1948) | 5 |
| <i>Welch v. Lane,</i> | |
| 738 F.2d 863 | 6 |

STATUTES CITED

| | |
|---------------------------|-------|
| <u>Wisconsin Statutes</u> | |
| § 302.11 | 7 |
| § 302.43 | 7, 10 |
| § 753.31(2) and (3) | 1 |
| § 809.23(4)(b) | 1 |
| § 939.621(1)(b)&(2) | 1 |
| § 940.19(1) | 1 |
| § 940.235(1) | 1 |
| § 943.01(1) | 1 |
| § 947.01(1) | 1 |

| | |
|-----------------------|---------|
| § 968.075(1)(a) | 1 |
| § 973.01(1) | 10 |
| § 973.03(2) | 6, 7, 8 |

ISSUES PRESENTED

Is Mr. Greenwood entitled to resentencing because the court sentenced him with the erroneous belief that he would serve his misdemeanor sentences in the county jail when in reality the sentences were required to be served in prison?

The circuit court determined that Mr. Greenwood was not entitled to resentencing because there was no inaccurate information, and that even if there was inaccurate information, the court did not actually rely on it.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Greenwood does not request oral argument if it would be helpful to the court. This is a one-judge appeal under Wis. Stat. §§ 753.31(2) and (3); therefore, Wis. Stat. § 809.23(4)(b) prohibits a request for publication.

STATEMENT OF THE CASE

The state charged Mr. Greenwood with the following four offenses: disorderly conduct, contrary to Wis. Stat. § 947.01(1); battery, contrary to Wis. Stats. § 940.19(1); strangulation and suffocation, contrary to Wis. Stats. §940.235(1); and criminal damage to property, contrary to Wis. Stat. § 943.01(1). (1:1-3). All of the counts were charged as constituting domestic abuse and subject to the domestic abuse repeater penalty enhancer, contrary to Wis. Stats. §§ 968.075(1)(a), and 939.621(1)(b)&(2). (1:1-3).

A jury found Mr. Greenwood guilty of disorderly conduct, battery, and criminal damage to property, and acquitted him of strangulation/suffocation. (62).

Prior to sentencing, Mr. Greenwood filed a motion to dismiss the domestic abuse penalty enhancer. (47). He also filed a brief and reply brief in support of his motion. (48, 52). The state opposed the motion. (51). The circuit court granted the motion and dismissed the domestic abuse penalty enhancer. (90:6). As a result of the circuit court's ruling, Mr. Greenwood stood convicted of three misdemeanors and faced the ordinary misdemeanor penalties. (90:6).

The court sentenced Mr. Greenwood to the maximum penalty for each conviction and ordered that the sentences be served consecutively in the county jail, with eligibility for good time and Huber. (90:19; App. 106). The court also ordered Mr. Greenwood to pay all costs. (90:20).

Mr. Greenwood filed a postconviction motion on July 29, 2014. (93). He sought resentencing on the basis that the court sentenced him under the erroneous belief that he would serve the sentences the court imposed in the county jail, when in reality, by operation of law he had to serve the sentences in prison. (93). The circuit court denied the motion in a written decision and order. (74). This appeal follows.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUE ON APPEAL

After trial, the court granted the defense's motion to dismiss the repeater enhancers because Mr. Greenwood never stipulated that the offenses were acts that would qualify as domestic abuse, and the state never submitted the question to the jury. (90:6).

Because the repeater penalty enhancers no longer applied, the maximum penalties facing Mr. Greenwood decreased from bifurcated prison sentences, to county jail time. (90:6).

The state requested that the court impose the maximum sentence for each count and to run each sentence consecutive to one another. (90:6).

Defense counsel explained that as a result of this case, Mr. Greenwood's extended supervision in Marathon County Case Number 09-CF-110 was revoked and he was serving an eighteen month period of reconfinement. (90:11). Further, counsel told the court that Mr. Greenwood had been in custody while this case was pending for a total of 102 days. (90:11). Counsel also informed the court that once Mr. Greenwood was released, he would continue to be supervised by the Department of Corrections on extended supervision until the end of February 2018. (90:10).

Because the case involved misdemeanors, defense counsel requested the following sentence: sixty days on the disorderly conduct, six months for the battery, and three months on the criminal damage to property. (90:10). He further asked that the sentences be consecutive to one another, but concurrent to any other sentence. (90:10-11). Finally, he asked that any jail sentence imposed allow for Huber release privileges. (90:11).

The court considered the fact that Mr. Greenwood had been revoked from extended supervision and acknowledged that he was serving the period of reconfinement that resulted from the revocation. (90:18; App.105). The court reasoned that the maximum period of confinement was necessary on each count to account for the seriousness of the offense, his character and to protect the public. (90:18-19; App. 105-106). It imposed the following:

[O]n Count One, I sentence the Defendant to serve ninety days in jail. With respect to Count Two, I sentence the Defendant to serve nine months in jail. That's consecutive to the sentence he serves in Count One.....Count Four was the Criminal Damage to Property. I sentence the Defendant to serve nine months in jail consecutive to Count One and Count Two....those

sentences run consecutive to any other sentence that he is currently serving...With respect to that sentence then, Mr. Greenwood, you'll have the opportunity to earn good time. You will also be eligible to apply for huber privileges.

(90:19; App. 106).

Mr. Greenwood was also assessed costs and the domestic abuse surcharge. (90:19-20; App. 106). Finally, Mr. Greenwood's attorney informed the court that there was no sentencing credit because all of the credit was applied to the revocation. (90:20).

Mr. Greenwood filed a postconviction motion seeking resentencing because there was inaccurate information that the circuit court relied on at sentencing. (93:3-6). Specifically, the court relied on its mistaken belief that the misdemeanor sentences would be served in the county jail. (93:4-5).

The circuit court denied the motion without a hearing. The court first determined that there had been no inaccurate information before it at sentencing. (74:3; App. 103). It reasoned that other than the fact that defense counsel requested Huber privileges, "there was nothing at sentencing to suggest to the Court that Greenwood would absolutely serve his sentences in jail." (74:3; App. 103).

The court reasoned that "even if there was inaccurate information before [it] at sentencing, [it] did not actually rely on it when structuring Greenwood's sentences." (74:3; App. 103). The court said there was no reliance on that information because the "[c]ourt was well aware that Greenwood was serving a revocation sentence and the implications of 973.03(2)." (74:3; App. 103). Furthermore, the court said that it intended to give Mr. Greenwood the maximum amount of time available for each count, regardless of where the time would be served. (74:4; App. 104). Finally, regarding the court's statements at sentencing that Mr. Greenwood was allowed Huber release privilege and was also eligible for

good time, the court explained that this was merely a statement made in the event “somehow Greenwood were to serve those sentences in the jail.” (74:3; App. 103).

ARGUMENT

I. Mr. Greenwood Is Entitled to Resentencing Because The Court Relied on Inaccurate Information When Structuring His Sentence For Three Misdemeanor Charges.

A. Standard of Review

Mr. Greenwood has the right-protected by the due process clause of both the federal and state constitutions-to be sentenced on accurate information. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *State v. Tiepelman*, 2006 WI 66 ¶ 9, 291 Wis.2d 2 179, 717 N.W.2d 1. When a circuit court imposes a sentence in reliance on inaccurate information, that sentence is “founded at least in part upon misinformation of a constitutional magnitude.” *Id.*

In order to establish that the court sentenced him on the basis of inaccurate information, a defendant must satisfy a two-prong test. *Tiepelman*, 291 Wis.2d 179, ¶ 2. The first prong is to establish that the information before the court was inaccurate. *Id.* The second prong is to establish that the court actually relied on the inaccurate information. *Id.* Once a defendant satisfies this test, the burden shifts to the state to show that the error was harmless. *Id.* ¶ 3.

Whether or not a defendant has been denied his constitutional due process right to be sentenced on the basis of inaccurate information is an issue that this court reviews de novo. *Tiepelman*, 291 Wis. 2 179, ¶ 9.

- B. The belief that Mr. Greenwood could serve his sentences in jail with good time and Huber release constitutes inaccurate information

The circuit court sentenced Mr. Greenwood with the erroneous belief that his misdemeanor sentences would be served in jail and that he would receive the benefit of good time as well as the Huber privileges that the court authorized. That belief was inaccurate, however, because at the time of sentencing Mr. Greenwood was serving a revoked prison sentence and Wis. Stat. §973.03(2) required him to serve the sentences in prison.

To prevail on a due process claim that he was sentenced on the basis of inaccurate information, a defendant has the burden to first establish that the information was, in fact, inaccurate. *Tiepelman*, 291 Wis.2d 179, ¶ 2. Here, the circuit court determined that Mr. Greenwood did not establish that any information before the court at sentencing was inaccurate. (74:3; App. 103). It found that there was nothing at sentencing, other than defense counsel's request for Huber release to "suggest to the Court that Greenwood would absolutely serve his sentences in jail." (74:3).

A defendant does not have a constitutional right to a particular sentence. However, he does "have a right to a fair sentencing *process*—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *Tiepelman*, 291 Wis.2d 179, ¶ 26; quoting *Welch v. Lane*, 738 F.2d 863, 864-65 (emphasis in original).

The range of penalties that is available to the court is a relevant and important consideration for a court when determining the appropriate sentence. See *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. In that case the court erroneously believed that the defendant was subject to a mandatory minimum five year sentence, and that mistake pervaded the file. *Id.* ¶ 26. The Court agreed, as did this

court, and the parties, that the erroneous belief that the conviction had a mandatory minimum penalty was inaccurate information. *Travis*, 347 Wis. 2d 142, ¶27. The Court stated that the circuit court's erroneous belief about the mandatory minimum "unnecessarily limited the sentencing court's discretion." *Id.* ¶ 78. Moreover, when a court sentences one with a misunderstanding of the minimum period of confinement, the framework of the sentencing is thrown off and the circuit court cannot properly sentence on the basis of accurate facts and law. *Id.* ¶ 80.

This case is similar to *Travis* in that the circuit court's mistaken belief about where Mr. Greenwood would serve his sentence affected the length of his sentence and the framework for sentencing. Because Mr. Greenwood was serving a prison sentence at the time of sentencing in this case, he was required to serve his misdemeanor sentences in prison.¹ Wis. Stat. § 302.11 governs misdemeanor sentences served in prison. Under that statute, Mr. Greenwood can be paroled. If he is released on parole, he will be in the legal custody of the Department of Corrections for the remainder of his sentence. The same would not be true if his sentences were served in jail. If the sentences were served in jail, Mr. Greenwood would receive good time under Wis. Stat. § 302.43. Applying that provision to the total 21-month sentence he received means that Mr. Greenwood would have received 5.25 months off of his sentence. Therefore, had the sentence been in jail, he would have been out of custody after serving 15.75 months and once out of custody, he would no longer be under the supervision and custody of the county sheriff or any other agency.

The circuit court found that no one presented inaccurate information, except perhaps defense counsel when

¹ Wis. Stat. § 973.03(2) provides: "A defendant sentenced to the Wisconsin state prison and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in state prisons."

he asked the court to grant Huber. (74:3; App. 103). It is irrelevant, however, whether the inaccuracy came from one of the parties, an outside source, or was a result of the judge's own error. See, *State v. Tiepelman*, 2006 WI 66, ¶¶6, 29, 291 Wis. 2d 179, 717 N.W.2d 1. In that case, the pre-sentence investigation report accurately stated that the defendant had been arrested twenty times, but convicted only five times. *Id.* ¶ 6. However, the court mistakenly believed that the defendant had been convicted twenty times. *Id.* The Court found a due process violation despite the fact that the inaccurate information originated in the judge's mind. *Id.* ¶¶ 27, 49.

Here, even if the circuit court did not characterize defense counsel's request for Huber release as presenting inaccurate information, its pronouncement of sentence demonstrates that it mistakenly believed that it was sentencing Mr. Greenwood to the county jail. Contrary to the circuit court's assertion in its decision that it was well-aware that Mr. Greenwood was serving a prison sentence at the time of sentencing, and the implications of Wis. Stat. § 973.03(2) it explicitly told Mr. Greenwood that he would be going to jail. (74:3; App. 103; 90:18-19; App. 105-106). It also explicitly told him that he would receive good time as well as Huber release. (90:18-19; App. 105-106).

Moreover, in its decision, the circuit court explained that its statements about jail, good time and Huber were merely a way of making Mr. Greenwood eligible if somehow he were able to serve his sentence in jail. (74:3; App. 103). However, Wis. Stat. § 973.03(2), without exception, requires that a defendant in prison must serve a consecutive misdemeanor sentence in prison. The court's explanation that its sentence provided for good time and Huber in case Mr. Greenwood would "somehow" serve his time in jail instead of prison is no explanation at all.

C. The circuit court relied on the inaccurate information in its sentencing decision.

The second prong of the analysis is to determine whether the circuit court actually relied on the inaccurate information. *Travis*, 2013 WI 38, ¶ 28. A defendant need not show prejudicial reliance. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 26-27. “Whether the circuit court actually relied on the incorrect information at sentencing . . . turns on whether the circuit court gave explicit attention or specific consideration to the inaccurate information, so that the inaccurate information formed part of the basis of the sentence.” *Travis*, ¶ 28. (internal quotations omitted).

To make this determination, the reviewing court considers the record as there are no magic words a court must use to show actual reliance. *Id.* ¶¶ 30-31. There need not be a statement such as “Because of the existence of this [inaccurate information], you are sentenced to X number of years imprisonment,” to show actual reliance. *Id.* ¶ 30. Rather, a reference to the inaccurate information can suffice. For example, in *Tiepelman*, the Court found that the circuit court’s explicit references to the pre-sentence report and the number of convictions established actual reliance. 291 Wis. 2d 179, ¶ 29.

The circuit court, in its decision denying Mr. Greenwood’s postconviction motion, explained that it intended for Mr. Greenwood to serve the maximum sentence regardless of where that would be. (74:4; App. 104). However, “[a] circuit court’s after-the-fact assertion of non-reliance on allegedly information is not dispositive of the issue of actual reliance.” *Id.* Here, the circuit court gave specific consideration to the erroneous belief that Mr. Greenwood would serve his sentence in jail. This is evidenced by the circuit court telling Mr. Greenwood that he was going to jail and ultimately granting him Huber release.

(90:18-19; App. 105-106). The court gave Mr. Greenwood the maximum amount of time on each count, but recognized that in jail, he would be eligible for good time. (90:18; App. 105). This observation is significant to a sentence because with good time, the length of Mr. Greenwood's sentence would be reduced by one-fourth. Wis. Stat. § 302.43.

Furthermore, non-penalty enhanced misdemeanor sentences are not bifurcated, so when the period of incarceration is over, the sentence is complete. Wis. Stat. § 973.01(1). Accordingly, the total 21-month sentence served in jail meant that Mr. Greenwood would actually serve 15.75 months. If in prison, he would serve the entire length of the sentence because even if he was paroled, he would still be under the legal custody of the Department of Corrections and required to comply with rules of supervision or face reconfinement. The circuit court's explicit attention to good time demonstrates that it believed that Mr. Greenwood would actually serve three-fourths of his sentence get out of custody, and not under any form of supervision after that time.

Another consideration the court made showing actual reliance on inaccurate information is that it permitted Mr. Greenwood to have Huber privileges. (90:19; App. 106). Allowing Mr. Greenwood to participate in Huber release signifies that the court found it appropriate for him to be in the community for periods of time and to work for the duration of his sentence. It also signifies that the court believed that allowing Huber release would not undermine the court's sentencing goal of protecting the public.

"A reviewing court must independently review the record of the sentencing hearing to determine the existence of any actual reliance on inaccurate information." *Travis*, 347 Wis. 2d 142, ¶ 48. Here, the record is clear that the circuit court explicitly thought Mr. Greenwood would serve the misdemeanor sentences in jail. (90:19; App. 106). The court's explicit attention to good time and Huber release further illustrates that inaccurate information formed a part of the

sentence.(90:19; App. 106). Because the court relied on this mistaken belief about where Mr. Greenwood would serve his sentence, the burden shifts to the state to prove that this was harmless error. *Tiepelman*, 291 Wis. 2d 179 ¶ 3.

CONCLUSION

For all of the reasons stated above, Mr. Greenwood respectfully requests that this court reverse the decision of the circuit court and find that he has met his burden, and shown that there was inaccurate information before the circuit court and that the circuit court actually relied on that information.

Dated this 17th day of December, 2014.

Respectfully submitted,

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 N. Water St., Ste. 912
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,987 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of December, 2014.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355
Office of the State Public Defender
735 N. Water St., Ste. 912
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of December, 2014.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 N. Water St., Ste. 912
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X T O A P P E N D I X

| | Page |
|--|---------|
| Decision and Order dated September 8 th , 2014..... | 101-104 |
| Excerpt from Sentencing Transcript | 105-106 |