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STATE OF WISCONSIN

COURT OF APPEALS

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 OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. This is a one-judge appeal pursuant to Wis. Stat §§ 753.31(2) and (3) and publication is not an option pursuant to Wis. Stat. §809.23(4)(b).

ISSUES PRESENTED

Is Mr. Greenwood entitled to resentencing because the court sentenced him to county jail when according to State statute he would be required to serve his sentence in prison?

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

STATEMENT OF THE CASE

The State charged Mr. Greenwood with four offenses: disorderly conduct, contrary to Wis. Stat. § 940.01(1); battery, contrary to Wis. Stats. § 940.19(1); strangulation and suffocation, contrary to Wis. Stat. § 940.235(1); and criminal damage to property, contrary to Wis. Stat.. § 943.01(1). (R. 1: p. 1-3). All of the counts were charged as constituting domestic abuse and subject to the domestic abuse repeater enhancer, contrary to Wis. Stats. §§ 968.075(1)(a), and 939.621(1)(b)&(2). (R. 1: p.

1-3).

A jury found Mr. Greenwood guilty of disorderly conduct, battery, and criminal damage to property, and acquitted him of strangulation and suffocation. (R. 74: p. 1).

Prior to sentencing, the court dismissed the domestic abuse penalty enhancer because the State did not present this issue to the jury. (R. 74: p. 11). As a result of the circuit court's ruling, Mr. Greenwood stood convicted of three misdemeanors and faced the ordinary misdemeanor penalties.

The court sentenced Mr. Greenwood to the maximum penalty for each conviction and ordered the sentences be served consecutively in the county jail, with the possibility of good time and Huber. (R. 74: p. 2).

Mr. Greenwood filed a post-conviction motion on July 29, 2014. (R. 93, p. 1). He sought resentencing on his belief the court sentenced him under an erroneous belief 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. (R. 74: p. 2). The circuit court denied the motion in a written decision and order. (R. 74: p. 1).

Mr. Greenwood then filed an appeal. This response 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 the offenses were acts that would qualify as domestic abuse, and the State never submitted the question to the jury. (R. 90: p. 6).

Because the repeater penalty enhancers no longer applied, the maximum penalties facing Mr. Greenwood decreased from bifurcated prison sentences to jail terms. The State requested the court impose the maximum sentence for each count and to run each sentence consecutive to one another. (R. 90: p. 6).

Defense counsel explained 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 re-confinement. (R. 90: p. 11). Further, counsel told the court Mr. Greenwood had been in custody while this case was pending for a total of 102 days. (R. 90: p. 11). Counsel also informed the court 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. (R. 90: p. 10).

The court considered the fact Mr. Greenwood had been revoked from

extended supervision and acknowledged he was serving the period of re-confinement as a result of the revocation. (R. 74: p. 3). The court reasoned 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. (R. 90: p. 18-19).

Mr. Greenwood was also assessed costs and the domestic abuse surcharge. (R. 90: 19-20). Additionally, Mr. Greenwood's attorney informed the court Mr. Greenwood would not be eligible for sentence credit because all of the credit was applied to Mr. Greenwood's revocation. (R. 90: p. 20).

Mr. Greenwood filed a post-conviction motion seeking resentencing because he believes there was inaccurate information the circuit court relied on at sentencing. (R. 93: p. 3-6). Specifically, Mr. Greenwood believes the court mistakenly believed the misdemeanor sentences would be served in the county jail. (R. 93: p. 4-5).

The circuit court denied the motion. (R. 74: p. 3). The court first determined there had been no inaccurate information at sentencing. (R. 74: p. 3). The court reasoned that other than defense counsel's request for Huber privileges, there was nothing in the record to indicate the court

intended to guarantee Mr. Greenwood an absolute right to serve his sentence in jail. (R. 74: p. 3).

The court reasoned even if there was inaccurate information at sentencing, the inaccurate information was not what the court relied on when structuring Mr. Greenwood's sentences for the three convictions. (R. 74: p. 3). The court said there was no reliance on the information because the "[c]ourt was well aware Greenwood was serving a revocation sentence and the implications of 973.03(2)." (R. 74: p. 3). Furthermore, the court Stated it intended to give Mr. Greenwood the maximum amount of time regardless of where the time would be served. (R. 74: p. 4). Finally, regarding the court's Statements at sentencing that Mr. Greenwood was permitted to apply for Huber release privilege and was also eligible for good time, the court explained this was merely a Statement made in case Greenwood would be able to serve his sentence in jail. (R. 74: p. 3).

ARGUMENT

- I. Mr. Greenwood Is Not Entitled to Resentencing Because The Court Relied on the Accurate Information it Had to Consider When Structuring Mr. Greenwood's Sentence and Not on Mr. Greenwood's Request for Privileges.

A. Standard of Review

Mr. Greenwood has the right to be sentenced on accurate information, which is based on the due process clause of the federal and the State constitutions. *Townsend v. Burke*, 334 U.S. 736, 742 (1948); *State v. Tiepelman*, 2006 WI 66 ¶ 9, 291 Wis.2d 179, 717 N.W.2d 1.

There is a two prong test required to show the court sentenced based on inaccurate information. *Tiepelman*, 291 Wis. 179 ¶ 2. First, the defendant has to show there was inaccurate information. *Id.* Second, the defendant has to show the circuit court actually relied on the inaccurate information when structuring the sentence. *Id.* Only if the defendant is able to satisfy this test does the burden shift to the State to establish the error was harmless. *Id.* at ¶ 3.

Whether the defendant has been denied his constitutional right to be sentenced on accurate information is an issue of law for the court to review *de novo*. *Tiepelman*, 291 Wis. 179 ¶ 9.

B. Accommodating Mr. Greenwood and allowing him the potential of serving his sentences in jail with good time and Huber release does not constitute inaccurate information.

The circuit court sentenced Mr. Greenwood to the maximum

sentence available because the court believed Mr. Greenwood needed to be sentenced to the maximum period of confinement for each of the misdemeanors based on the nature of the crimes and to protect the public especially the victim of the crime. (R. 90: p. 18-19). Although the court sentenced him to jail, Wis. Stat. §973.03(2) required him to serve the sentence in prison as he was already serving his revoked extended supervision sentence in prison.

In order to prevail on a claim the defendant was sentenced based on inaccurate information, the defendant has to first prove the information was actually inaccurate. *Tiepelman*, 291 Wis. 179 ¶ 2. Here, the circuit court identified there was no inaccurate information before the court when structuring the sentence. (R. 74: p. 1). It found there was nothing to guarantee that Mr. Greenwood would absolutely spend his sentence in jail.

A defendant does not have the constitutional right to a particular sentence. First, Mr. Greenwood argues the circuit court saying his sentence would be served in jail was an absolute guarantee he would not have to spend his sentence in prison. Second, Mr. Greenwood took being sentenced to jail as a guarantee that the length of his sentenced

would be affected. Mr. Greenwood further argues the ability to have his sentenced reduced was considered when the court structured his sentence, and therefore was reliance on inaccurate information.

Mr. Greenwood believes this case is similar to *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. In that case, the court was found to have relied on inaccurate information when structuring the sentence when it believed the defendant was subject to a minimum five year sentence. *Id.* at ¶ 26. The framework of sentencing is defective when there is a misunderstanding about the minimum period of confinement. *Id.* at ¶ 80. That is not the case here, as the court was unconcerned with the minimum period of confinement because it intended to sentence Mr. Greenwood to the maximum period of confinement. The court satisfied this objective by sentencing Mr. Greenwood to a twenty-one month jail term which happened to be required to be spent in prison because of Mr. Greenwood's revocation and Wis. Stat. §973.03(2).

Here, the circuit court found the only person to potentially present inaccurate information was the defense counsel when Huber was requested. Where the misrepresented information comes from is

irrelevant. *See Tiepelman* at ¶ 6. In that case, the court mistakenly believed the defendant was convicted twenty times prior, when in actuality, he had been arrested twenty times, but convicted only five. *Id.* The court found although the inaccurate information was not actually presented, the court still relied upon it when structuring the defendant's sentence and therefore there was a finding of inaccurate information relied upon at sentencing. *Id.* at ¶ 29.

This case is distinct from *Tiepelman*. In that case the court relied on the defendant having prior convictions when structuring his sentence whereas in this case, the court did not have any inaccurate information regarding Mr. Greenwood's prior convictions. The court here was concerned with his past behavior and protecting the public, and for those reasons Mr. Greenwood received the sentence structured to impose the maximum confinement. The court granting Mr. Greenwood's request for Huber was an afterthought not part of the court's consideration when structuring the sentence. The court was not relying upon Mr. Greenwood being able to obtain the privilege of Huber or his ability to earn good time to reduce his sentence.

C. The court did not rely on Mr. Greenwood obtaining

additional privileges when making its sentencing decision.

Mr. Greenwood asserts next the court actually relied on inaccurate information when structuring his sentence. Mr. Greenwood makes this assertion to move forward with his claim to be resentenced. In order to satisfy this prong, there needs to be attention given to the alleged inaccurate information during sentencing in order to show there could be reliance. *Travis* at ¶ 28.

While there do not have to be specific words Stated to show reliance, there needs to be more than a mere reference to the inaccurate information at some point in the transcript. *Travis* at ¶ 30. This means the inaccurate information needs to be considered when the court is making its sentencing decision.

In this case, the circuit court structured Mr. Greenwood's sentence and then, at the request of the defense the court gave Mr. Greenwood the opportunity to apply for Huber privilege. Mr. Greenwood was not guaranteed these privileges, they were merely rights he could apply for in the future. Ultimately, the court or the sheriff could take these rights away at any time without notice under Wis. Stat. § 303.08(2).

Additionally, regarding Mr. Greenwood's claim that his sentence is longer in prison than it would be in jail is immaterial. Ultimately the court sentenced him to a twenty-one month sentence and that is what he will receive. While Mr. Greenwood claims it will be longer in prison than in jail is inaccurate as he will still serve no more than twenty-one months regardless of the physical location of his sentence.

D. Even if the information is found to be inaccurate and the Court did rely on it, the error was harmless and it was the Court's intent Mr. Greenwood receive the maximum sentence allowable.

The test for harmless error was set by the Supreme Court in *Chapman v. California*. 386 U.S. 18, 18 (1967). The court must find the error is harmless beyond a reasonable doubt. *Id.*

There are several factors for the court to consider when evaluating a defense of harmless error. These factors revolve around the type of error, the importance of the error, corroborating evidence, and nature of the cases. *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637. It is necessary to look at all of the factors around the potentially inaccurate information to determine if the error was

harmless.

The present case is similar to *Hale*. In that case the defendant argued his constitutional right to confront was violated when a sworn statement was admitted into evidence for the jury to hear without a proper excuse as to why the individual could not be in court. *Hale*. at ¶ 29. There was enough corroborative evidence the statement, although admitted in violation of the defendant's confrontation right, the violation was harmless error because looking to the totality of the circumstances it did nothing to advance the State's case against the defendant. *Id.* at ¶ 78. In this case nothing new would occur based on the requirement that Mr. Greenwood spend his sentence in prison rather than jail.

The court wanted to sentence Mr. Greenwood to the maximum sentence due to the nature of the crime and to protect the public. The court was not concerned with lightening his sentence nor was there a concern for where it was. The court did not consider him being able to obtain privileges when structuring his sentence. This is clear from the court stating it was going to be following the recommendation of the State. The court's intent in sentencing was achieved; there is no issue

about where the sentence is served.

CONCLUSION

For all of the reasons Stated above, the State respectfully requests this court affirm the decision of the circuit court and find Mr. Greenwood has failed to meet his burden. The circuit court was not presented with inaccurate information and even if it was, the court did not rely on the inaccurate information. Additionally, even if there was inaccurate information the court relied on, the error was harmless because the court intended to give Mr. Greenwood the maximum sentence available and this objective was achieved.

Dated this 11th day of February, 2015.

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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 2,487 words, including footnotes.

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 Wis. Stat. § 809.19(12).

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on February 11, 2015. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 11th day of February , 2015.

Signed:

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