STATE OF WISCONSIN

C O U R T 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

---

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. The Court Relied on Inaccurate Information When it Contemplated that Both Good Time and Huber Privileges Applied to Mr. Greenwood's Misdemeanor Sentences Being Served Consecutive to a Prison Sentence.

The parties agree that both the federal and state constitutions entitle Mr. Greenwood to be sentenced on the basis of accurate information. (State's Br. at 10). Likewise, the parties agree that a defendant claiming that inaccurate information formed a basis of his sentence must satisfy the two-prong test under ***State v. Tiepelman***, 2006 WI 66 ¶ 2, 291 Wis. 2d 179, 717 N.W.2d 1. (State's Br. at 10). The first prong requires a defendant to establish that the information before the court was inaccurate, while the second prong requires that a defendant establish that the court actually relied on it. ***Id***. The burden then shifts to the state to show that the error was harmless. ***Id***. at ¶ 3.

A. The court's misunderstanding about where Mr. Greenwood would serve his misdemeanor sentences constituted inaccurate information.

At sentencing, the court explicitly stated,

> [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).

The record, therefore, is clear that the court believed that Mr. Greenwood's sentences would be served in the Brown County jail. However, as the state agrees, Wis. Stat. § 973.03(2) required, without exception, that Mr. Greenwood serve this sentence in prison because at the time the court sentenced him he was in prison on a revoked case.

The state seems to argue that there was no inaccurate information at sentencing because the circuit court ruled as such in its written decision on the postconviction motion. (State's Br. at 11). This is not the test. "Proving that information is inaccurate is a threshold question. A defendant cannot show actual reliance on inaccurate information if the information is accurate.'" ***State v. Travis*** 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491. (quoting ***State v. Harris***, 2010 WI 79, ¶ 33, n. 10, 326 Wis. 2d 685, 786 N.W. 2d 409. Information is not inaccurate simply because the court says that it is not.

The state also seems to misconstrue Mr. Greenwood's argument by stating that there was "nothing to guarantee that Mr. Greenwood would absolutely spend his sentence in jail." (State's Br. at 11). Mr. Greenwood has not, and is not, arguing that the inaccurate information is that the court guaranteed him that he would serve his sentence in jail. Rather, he argues that the court mistakenly believed that the sentences would be served in the county jail and that its sentencing remarks about jail, good time, and Huber privileges reflect that belief. Moreover, this mistaken belief

formed at least part of the court's consideration in imposing the sentence.

The state initially agrees that the source of the inaccurate information is inconsequential to the analysis. (State's Br. at 12-13). (citing ***Tiepelman***, 291 Wis. 2d 179, ¶ 6). However, it attempts to distinguish that case from the instant one because in ***Tiepelman***, the court, despite having the correct information before it, mistakenly believed that the defendant had twenty prior convictions, when in actuality, he had five. ***Id***. ¶ 6. The state goes on to point out that the court in this case did not have any inaccurate information about Mr. Greenwood's record. (State's Br. at 13). However, despite differences in the type of information that was inaccurate, the underlying principle applies. Whether the court relied on defense counsel's request for Huber, or on its own mistake of law, is irrelevant to an inaccurate information at sentencing analysis. *See* ***Id***.

A jail sentence, with good time and eligibility for release privileges to work, constitutes a different type of sentence than prison, where there are no release privileges, and after release there will be seven additional months of supervision. The difference between a jail and a prison sentence is clear from the statutes, as the latter is reserved only for more serious offenses or repeat offenders. Wis. Stat. § 973.01(2)(b). The court's words at sentencing regarding jail, huber and good time make it clear it mistakenly believed that Mr. Greenwood's sentence would be in the county jail. This belief constitutes that there was inaccurate information.

B. The circuit court relied on its mistaken belief that Mr. Greenwood's sentence would be in the county jail with good time and work release.

The state is correct that there are no "magic words" that a circuit court must use to show that it paid "explicit attention" to the inaccurate information. ***Travis***, 347 Wis. 2d ¶ 30. However, the state claims, that a "mere reference" to the inaccurate information is insufficient to show reliance. (State's Br. at 14). Contrary to the state's assertion, however, the number of times makes a "mere reference" is not determinative of whether the court gave consideration to the inaccurate information in its sentencing decision. For example, in ***Tiepelman***, the circuit court referenced twenty prior convictions, when the actual number of prior convictions was five. 291 Wis. 2d 179, ¶ 29. Without reference to the number of times the court stated the inaccurate information, the Wisconsin Supreme Court agreed with the parties that the record showed specific consideration. ***Id***. It is not the number of references a court makes to the inaccurate information, but instead, the reviewing court must determine whether consideration was given to the inaccurate information so that it formed part of the basis for the sentence. ***Travis***, 347 Wis. 2d ¶ 30.

The state argues that the circuit court did not give specific consideration to granting Huber release because it was an "afterthought," and "not part of the court's consideration when structuring the sentence."(State's Br. at 13). Whether or not a defendant is granted Huber release privileges lies within the discretion of the circuit court. *See* Wis. Stat. § 303.08(1). Huber release is not an "afterthought" at sentencing; rather it is an exercise of discretion made in consideration of the circumstances of the individual case. ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574. The

state's assertion here, that Huber release was an "afterthought," is contrary to the presumption that a circuit court properly exercises its discretion at sentencing. ***State v. Stenzel***, 2004 WI App 181, ¶ 7, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court identified protection of the public as well as specific deterrence as its primary sentencing goals. (90:17-18). It then took all of the factors that it had previously discussed in the hearing, and determined that the maximum penalty on each count was necessary to further its objectives. (90:18). However, by granting eligibility for Huber, as opposed to straight time, the circuit court believed that time out of custody and working in the community would not undermine its sentencing objectives. Moreover, the court's reference to the good time provision demonstrates that it would have believed Mr. Greenwood would serve three-fourths of the actual time imposed. *See* Wis. Stat. § 302.43

The circuit court gave "explicit attention" to the provisions for both good time and Huber. It considered how those provisions would affect Mr. Greenwood's sentence and determined that the Huber privileges would not undermine it's sentencing objectives. The record demonstrates that the circuit court actually relied on its mistaken belief that Mr. Greenwood would be sentenced to the county jail and that those provisions would apply to his sentence.

C. The state has not met its burden to show harmlessness beyond a reasonable doubt.

Because there was inaccurate information, and actual reliance, the burden shifts to the state to show that the error was harmless beyond a reasonable doubt. ***Tiepelman***, 291 Wis. 2d 179, ¶ 31. To meet this burden, the state must prove that the sentencing court would have imposed the same sentence absent the error. ***Travis***, 347 Wis. 2d 142, ¶ 74.

The error in this case is not harmless beyond a reasonable doubt as the state asserts. It first argues that "nothing new would occur based on the requirement that Mr. Greenwood spend his sentence in prison rather than jail." (State's Br. at 16). This assertion is inaccurate. How the sentence would actually play out is considerably different based upon where it is served. Good time applied to the jail sentence would have meant Mr. Greenwood would have been released after serving 15.75 months with no further supervision. *See* Wis. Stat. § 302.43. In prison, however, Mr. Greenwood is prohibited from earning good time. *See* ***State v. Harris***, 2011 App 130, ¶ 10, 337 Wis. 2d 2220. 805 N.W.2d 386. Moreover, the sentence essentially becomes bifurcated, and a portion of the 21 months will be spent under the supervision of the Department of Corrections, pursuant to Wis. Stat. § 302.43. Likewise, Mr. Greenwood would not have Huber release, which the court determined was appropriate under the facts of the case. In other words, a prison sentence is more severe than a county jail sentence.

If the court did not consider the statutes that controlled this case, and how that changed the conditions of confinement as well as the length and structure of the overall sentence, then it was arguably committing error. *See* ***Travis***, 347 Wis. 2d 142, ¶ 79. (where it would have arguably an error of law if the court did not consider the mandatory minimum penalty at all). Courts must account for certain statutory provisions when structuring a sentence that furthers their objectives. For example, a court may order "straight-time" and deny Huber release because it believes it undermines the seriousness of an offense. Similarly, it may make a defendant eligible for programs that will enable him or her to be released early because rehabilitation is a goal of sentencing and early release will not pose undue risk to the public. These are all considerations a court must account for when structuring a

sentence. And, in order to make these considerations, the court must know which statutes apply to a particular case. Here, because the court had a mistaken belief about which statutes applied to Mr. Greenwood's sentence, it could not properly account for these considerations. Accordingly, because of the court's mistake of law affected proper sentencing considerations, and thereby the framework of the sentence, the error cannot be harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth in this brief, and his brief-in-chief, Mr. Greenwood respectfully requests this court reverse the order of the circuit court denying his postconviction motion for resentencing.

Dated this 26th day of February, 2015.

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
Milwaukee, WI 53202
(414) 227-4300
Email: 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 1,827 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 26th day of February, 2015

Signed:

MICHELLE L.VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355
Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
Email: velasquezm@opd.wi.gov
Attorney for Defendant-Appellant