STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP000130-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN RAY GADDIS,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and a Postconviction Order Denying Relief Entered in the Milwaukee County Circuit Court, the Honorable John Siefert, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court err by imposing the maximum penalty without identifying any sentencing goals or explaining why the maximum penalty was necessary?

2. Did the circuit court violate Mr. Gaddis' due process right when at sentencing it relied on the state's inaccurate portrayal of the underlying facts and its own inaccurate belief that Mr. Gaddis could have been charged with a felony?

The circuit court denied Mr. Gaddis' motion for postconviction relief without a hearing. It issued a written decision, finding that its original sentencing comported with standards set forth in ***McCleary*** and ***Gallion***; and therefore, it had not erroneously exercised its discretion. (30:3; App. 103). The circuit court also concluded that it did not rely on inaccurate information, and that any reliance on an incomplete version of event was harmless. (30:4; App. 104).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Gaddis does not request oral argument. 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

In a two-count criminal complaint filed on January 21, 2014, the state charged Mr. Gaddis with one count of misdemeanor retail theft, as a repeater, contrary to Wis. Stats. §§ 943.50(1m)(b) and (4)(a), and 939.62(1)(a), and one count of disorderly conduct, as a repeater, with use of a dangerous weapon, contrary to Wis. Stats. §§§ 947.01(1), 939.62(1) (a), and 939.63(1)(a). (2).

Pursuant to a plea agreement, Mr. Gaddis pled guilty to count one, misdemeanor retail theft, as a repeater. (12). Count two, disorderly conduct as a repeater and with the use of a dangerous weapon was dismissed and read-in.(12). After accepting his plea, the court sentenced Mr. Gaddis to the maximum penalty of two years imprisonment, divided into fifteen months of initial confinement, followed by nine months of extended supervision. (18). Mr. Gaddis received eighty-eight days of sentence credit. (18).

On September 22, 2014, Mr. Gaddis filed a postconviction motion for re-sentencing, arguing that the court failed to provide sufficient reasoning for imposing the sentence, and that the court relied on inaccurate information.[1] (21). The circuit court ordered briefing. (23). The state filed its response and Mr. Gaddis filed a reply. (26; 29).

Without a hearing, the circuit court issued a written decision and order denying the motion. (30). This appeal follows.

[1] Mr. Gaddis argued that alternatively, the court should modify his sentence. The circuit court denied that claim and Mr. Gaddis does not raise that issue in this appeal.

STATEMENT OF THE FACTS

The complaint alleged that Mr. Turner, who was employed as a loss prevention specialist at Walmart, identified Mr. Gaddis as the individual seen on camera concealing items in the cuff of his sleeve. (2:2). According to the complaint, Mr. Turner saw Mr. Gaddis pick up a package of Reese's peanut butter cups, remove the wrapper, conceal it in his coat, and than walk past the checkout. (2:2). The complaint states that Mr. Turner approached Mr. Gaddis, who began removing personal items from his pockets. (2:2). Mr. Gaddis then pulled out a red box cutter and held it in a "threatening manner." (2:2).

At sentencing, the state, which was recommending prison, with the length up to the court, described the nature of the offense. (38:6; App. 111). It represented that a loss prevention officer observed Mr. Gaddis attempt to leave the store without paying for candy. (38:7; App. 112) The loss prevention officer confronted Mr. Gaddis, who "then pulled out a box cutter from his pocket and slid the blade out of that box cutter and threaten (sic) that officer." (38:7; App. 112). Walmart was not requesting any restitution. (38:7; App. 112).

The state described Mr. Gaddis' record as well as his need for substance abuse treatment. (38:8; App. 113). The state indicated that if Mr. Gaddis would receive treatment in prison, it would help not only rehabilitate him, but protect the public. (38:8; App. 113).

The defense argued that Mr. Gaddis should be sentenced to a time-served disposition, as he had already spent eighty-eight days in custody. (38:9; App.114). At the time of sentencing, Mr. Gaddis was working as an apartment building manager and caring for his elderly grandparents and mentally ill mother. (38:9; App. 114).

The defense argued that the "facts need[ed] to be reviewed to put this case in some perspective." (38:9; App. 114). It told the court that the object of the theft was candy. (38:9; App. 114). Counsel explained that the incident with the box cutter the state described occurred in the lobby, and that the loss prevention officer that confronted Mr. Gaddis asked him to empty his pockets. (3:10; App. 115). Defense counsel told the court that the police reports did not describe any physical threats. (38:10; App. 115). Additionally, defense counsel told the court that Mr. Gaddis did not use any threatening words or use the knife to get out of the store. (38:10; App. 115). Despite Mr. Gaddis's extensive record, counsel argued that since 1997 he had only had one felony conviction and that his other cases were related to substance abuse issues. (38:10; App. 115).

In it sentencing remarks, the circuit court stated that it must consider Mr. Gaddis' character, the protection of the public, and seriousness of the offense. (38:12; App. 117). It stated that Mr. Gaddis' record put his character in doubt. (38:12; App. 117). In addition to his record, the court stated, "I don't accept the defense's explanation of the knife - - box cutter weapon and how it was displayed as being more accurate than the district attorney's description of it. And that's the aggravating circumstance." (38:12; App. 117). It concluded that it would follow the state's recommendation for a prison sentence because it was appropriate and found that the state "could have charged this rather - -directly as a - - felony instead of a different kind of felony instead of retail theft as a habitual criminal." (38:12; App. 117).

Immediately after those remarks, the circuit court imposed the maximum sentence of two years, dividing it into fifteen months of initial confinement and nine months on extended supervision. (38:12-13; App.117-118). In relation

to programming, the court said that Mr. Gaddis was not likely to get into boot camp because the length of his sentence, with credit, made him a "short-termer." (38:14; App. 119). However, the court made Mr. Gaddis eligible for the Earned Release Program so that Mr. Gaddis, if given the program, could earn his way out sooner by participating in treatment. (38: 14-15; App. 119-120).[2]

Mr. Gaddis filed a postconviction motion and a reply that asserted that the circuit court failed to adequately explain its reasoning for sentencing Mr. Gaddis to the maximum penalty, and that the court had relied inaccurate information in reaching its decision at sentencing. (21, 29). Mr. Gaddis also claimed he was entitled to re-sentencing because relied on inaccurate information. (21, 26). Mr. Gaddis asserted that interviews with the loss prevention officers present, revealed that his description of the offense, which the court rejected, was actually accurate. (21).

In his motion, Mr. Gaddis informed the circuit court that Mr. Turner, one of the loss prevention specialists present, verified that he requested that Mr. Gaddis empty his pockets twice. (21:7-8). Mr. Turner further confirmed that Mr. Gaddis complied, which is how the box cutter came out. (21:7-8) Mr. Addir, the other loss prevention officer present, indicated that Mr. Gaddis extended, and then retracted the box cutter after emptying his pockets a second time. (21:8). Finally, Mr. Turner confirmed what Mr. Gaddis told the court at sentencing – that there were no verbal or physical threats. (21:8). In his reply, Mr. Gaddis also argued that contrary to

[2] On April 18, 2014 the court placed on the record a corrected judgment of conviction. The court made Mr. Gaddis eligible for the "Substance Abuse Program" as the Earned Release Program no longer exists. (38: 2; App.).

the circuit court's belief, the facts of his case did not give rise to probable cause to be charged with a felony. (29).

The circuit court denied Mr. Gaddis a re-sentencing. (30). In its decision, the circuit court agreed that it could have been more extensive in its remarks, but that it was unnecessary to do so because Mr. Gaddis was obviously a "career criminal," unable to change his behavior, and probation was "obviously off the table given [his] history." (30:3; App. 103).

The circuit court also disagreed that it relied on inaccurate information. (30:4; App. 104). It reasoned that the version of events Mr. Gaddis presented in his postconviction motion did not make the circumstances less aggravating. (30:4-5; App. 104-105). The court also found that even if Mr. Gaddis did not directly threaten the officers, they took it as an implied threat, which prompted them to end their detention of him. (30:5; App. 105).

Mr. Gaddis appeals from the circuit court's decision and order denying him postconviction relief.

ARGUMENT

I. Mr. Gaddis Is Entitled to Re-sentencing Because the Circuit Court Failed to Adequately Explain Its Reasons For Sentencing Mr. Gaddis to the Maximum Penalty Permitted

In this case, the circuit court failed to provide an adequate explanation for its sentence. The court told Mr. Gaddis that it had to consider his character, the protection of the public, and the seriousness of the offense. (38:12). However, the court failed to do more than identify the three factors and recite a couple of facts. It provided no explanation

or analysis of how it weighed the facts against the sentencing factors. Nor did it identify any sentence objectives. Rather, it said the state's recommendation for prison was appropriate and that it would follow it. The Wisconsin Supreme Court has concluded that "[s]uch an approach confuses the exercise of discretion with decision-making." ***State v. Gallion***, 2004 WI 42, ¶ 2, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, the circuit court erroneously exercised its discretion at sentencing and Mr. Gaddis is entitled to a new hearing.

On appeal, this Court reviews sentencing to determine whether the circuit court erroneously exercised its discretion. ***Id***. ¶ 17. This Court "will find an erroneous exercise of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard." ***State v. Black***, 2001 WI 31, ¶ 9, 242 Wis.2d 126, 624 N.W.2d 363.

Here, the circuit court's erroneous exercise of discretion stems from its failure to exercise its discretion at sentencing, which requires the court to provide a "rational and explainable basis" for the particular sentence it imposed. ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

A. The circuit court is required to explain the reasons for its sentence, and the objectives of the sentence on the record.

Mr. Gaddis, like all defendants, has "a constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court." ***State v. Hall***, 2002 WI App 108, ¶ 21, 255 Wis.2d 662, 648 N.W.2d 13. As part of that rational and explainable basis that must be put forth on the record, the court must consider the

gravity of the offense, the rehabilitative needs of the defendant, and the need to protect the public. Wis. Stat. § 973.017(2); ***State v. Taylor,*** 2006 WI 22, ¶ 20, 289 Wis. 2d 34, 710 N.W.2d 466. 3

"Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning." ***McCleary***, 49 Wis. 2d 263, 277. Circuit courts may not dispense with discretion by citing facts, "magic words," or limiting sentences to the statutory maximum. ***Gallion***, 270 Wis. 2d 535, ¶ 37. Instead, they "are required to specify the objective of the sentence on the record." ***Id***. at ¶ 40; Wis. Stat. § 973.017(10m). Accordingly, a court must tailor the sentence to the individual case "by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives" ***State v. Harris***, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409.

Furthermore, in each case, the court should impose the "minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶ 23, (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

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[3] A court may also consider several other factors such, "(1) Past record of criminal offenses;(2) history of undesirable behavioral pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational and employment record; (9) defendant's remorse and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention." ***State v. Harris***, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 786 N.W.2d 409.

B. The court failed to identify the sentencing objectives or provide a rational and explainable basis for imposing the maximum sentence.

Here, the circuit court confused discretion with decision-making. Instead of specifying the objective of the sentence and providing a reasoned explanation of how it viewed and weighed the facts with the sentencing factors, the court simply recited "magic words" and a couple of facts before imposing the maximum penalty. This approach directly contradicts the mandate of ***McCleary*** and ***Gallion***. The court's only remarks were that Mr. Gaddis had a "horrible record" and that it did not believe his explanation of the box cutter, which it found to be an aggravating circumstance. (38:12; App. 117). Immediately after stating that the state's prison recommendation was appropriate, the circuit court said that Mr. Gaddis could have been charged with a felony. (38:12; App. 117).

Recitation of those three "facts" fails to explain whether the court was imposing the maximum sentence for punishment, deterrence, or another reason altogether. Mere recitation of facts, imposing the maximum penalty, and reciting magic words is not sufficient to support a finding that a court properly exercised its discretion. ***Id***.

Moreover, there was no discussion of other relevant facts such as the object of the theft being candy, the absence of restitution being sought, Mr. Gaddis being a caretaker for his mentally ill mother and elderly grandparents and his acceptance of responsibility. Likewise, there was no discussion about why probation was "obviously off the table," or why the maximum term of imprisonment was necessary. (30:3; App. 103). The court's sentencing explanation is deficient and deprives Mr. Gaddis of his constitutional right

to have an explanation of the relevant and material facts and factors that influenced the court's decision. *See* ***Hall***, 255 Wis.2d 662, ¶¶ 20, n. 10 and 21.

In its written decision denying the postconviction motion, the circuit court conceded that its comments at sentencing could have been more extensive. (30:3; App. 103). Despite this concession, the circuit court found that it had not had any reason to go into further explanation. It concluded that it did not need to:

> state the obvious: that the defendant was a career criminal with serious rehabilitative needs who was unwilling or unable to curb his criminal behavior. Probation was obviously off the table given the defendant's history. And while there were some mitigating factors in the defendant's favor, the court did not assign any significant weight to them and was not required to do so.
>
> (30:3; 103).

Despite the circuit court's conclusion that going into further or more detailed explanation was unnecessary, giving a detailed and reasoned explanation is precisely what it is obligated to do. ***Gallion***, 270 Wis. 2d 535, ¶¶ 41-43. It needed to explain why probation was "obviously" not an option, what mitigating factors existed, and why those mitigating factors did not receive any weight from the court. ***Id***. It also should have discussed rehabilitative needs, how important those needs factored into the court's sentence, and how the sentence imposed addressed those needs.

When a defendant brings a postconviction motion challenging a court's sentence, the court has an opportunity to clarify its sentencing decision and rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App.

1994) (emphasis added); ***State v. Stenzel***, 2004 WI App 181, ¶ 9, 276 Wis. 2d 224, 688 N.W.2d 20. Here, however, the court's decision on the postconviction motion is insufficient because instead of clarifying its remarks, the circuit court is providing objectives for the first time. (30:2; App. 102). Additionally, the decision does not explain what the court considered mitigating or why it gave no weight to any mitigating facts. Nor does the decision explain why the maximum period of imprisonment was necessary.

Mr. Gaddis was entitled to have the trial court explain and discuss all of the relevant and material factors the court considered *at the time of sentencing*; thereby assuring him that the result was that of a deliberate process. ***State v. Hall***, 255 Wis. 2d 662, ¶ 21; ***Gallion***, 270 Wis. 2d 535, ¶ 8; ***McCleary***, 49 Wis. 2d at 278. Because the circuit court failed to do that, Mr. Gaddis is entitled to re-sentencing.

II. Mr. Gaddis Is Entitled to Re-sentencing Because the Court Relied on Inaccurate Information When Structuring His Sentence.

A. Standard of Review

Mr. Gaddis 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. Inaccurate information was presented at sentencing.

Mr. Gaddis maintains that the circuit court's sentencing explanation was inadequate under ***Gallion*** and ***McCleary***. However, to the extent that this Court believes that the circuit court's sentencing explanation comported with those requirements, Mr. Gaddis argues that the circuit court had inaccurate information before it, and that it relied on that inaccurate information when determining the sentence.

1. The state's representation of how the offense occurred constituted inaccurate information.

Here, one piece of inaccurate information before the sentencing court was the state's representation of how the box cutter was displayed. The state described the encounter between Mr. Gaddis and Walmart security in its sentencing argument. It told the court that a loss prevention officer saw Mr. Gaddis take some candy and attempt to leave without paying. (38:7; App. 112). The state told the court that the loss prevention officer confronted Mr. Gaddis, who "*then* pulled out a box cutter from his pocket and slid the blade out of that box cutter and threaten[ed]that officer." (38:7; App. 112).

(emphasis added). The state's description implies that Mr. Gaddis pulled out and displayed the box cutter in direct response to being confronted. It also explicitly told the court that Mr. Gaddis threatened the guard. (38:7; App. 112).

In contrast, Mr. Gaddis told the court that the box cutter was originally displayed when he was asked to empty his pockets. (38:11; App. 116). He denied threatening anyone and told the court that the police reports did not contain any indication of either verbal or physical threats. (38:11; App. 116). The circuit court, presented with two different descriptions of the offense, explicitly rejected Mr. Gaddis' version of how the box cutter had been displayed and his assertion that no threats were made. (38:12; App. 117). In its decision on the postconviction motion, the court indicated that it was persuaded by the state's arguments that it did not rely on inaccurate information, and that any reliance was harmless. (30:4; App. 104).

The state's portrayal of events is inaccurate, or at the least, incomplete. In its reply, the state argued that its characterization of the offense was not inaccurate and that it did not contradict Gaddis' version. (23:7). However, bringing out a box cutter and extending the blade upon being confronted, which is how the state characterized the offense, is far more aggravating and confrontational than taking the box cutter out of one's pocket when requested to do so. Moreover, Mr. Gaddis extended and then retracted the blade after he took it out of his pocket the second time. This implies he was showing the security officers, who were accusing him of theft, exactly what was in his pockets. Furthermore, contrary to what the state told the circuit court, Mr. Gaddis did not threaten the officers. Mr. Turner verified Mr. Gaddis did not make any verbal threats or movements toward him and that they allowed Mr. Gaddis to leave per store policy.

(21:7-9; 22:3-4). The officers' statements corroborate the version of events that the defense presented to the court at the time of sentencing.

2. The court's assertion that Mr. Gaddis could have been charged with a felony constituted inaccurate information.

Although fact-finding at sentencing is not conducted with the same evidentiary formality as a trial, it nonetheless a critical function of the court in to ensure defendants' due process right to be sentenced on accurate information is protected. ***State v. Anderson***, 222 Wis. 2d 403, 411-12, 588 N.W.2d 75 (Ct. App. 1998). Due process is violated when a defendant's sentenced is based in part on inaccurate information, regardless of the source of that inaccurate information. *See,* ***State v. Tiepelman***, 291 Wis. 2d 179, ¶¶6, 29. (where the PSI contained accurate information, but the court misread read it, believing the defendant had 20 convictions).

Here, the circuit court apparently believed that the state could have charged Mr. Gaddis with a felony instead of retail theft as a repeat offender. (38:12; App. 117). This presumption seems to have come from the court itself. However, in its argument, the state noted that Mr. Gaddis had "obviously demonstrated an ability to possess weapons and to commit armed robberies." (38:7; App. 112). It is unclear whether the state was arguing that this offense was an armed robbery or whether it was referring to a 2009 conviction for robbery with threat of force. The source of the inaccurate information, however, is inconsequential. ***Id***.

Whether it was based on its own belief, or argument of the state, the facts of the case would not support an armed robbery or any other felony charge. Mr. Gaddis did not use

the box cutter to commit the offense. He made no verbal or physical threats to take and conceal items.[4] Moreover, while he possessed a box cutter, he only removed it from his pocket at the request of the security officers. Pursuant to Wis. Stat. § 943.32(2), armed robbery requires that the actor takes the property of another by use or threat of use of a dangerous weapon. Mr. Gaddis did not display the box cutter in an attempt to exit the store. He did not threaten to use the box cutter against anyone in order to leave the store with items. Any belief that the facts would support a felony was inaccurate.

The court did not provide any specifics about which felony Mr. Gaddis could have been charged with or make factual findings, other than it believed the state's portrayal of events, which suggested Mr. Gaddis immediately displayed the box cutter in response to being confronted and that he threatened the security officers. The state, which wanted a prison sentence, and was aware of Mr. Gaddis' significant criminal record, did not charge the case as a felony. Furthermore, it did not argue that Mr. Gaddis received a benefit of a reduction in charges. Because the facts do not support a felony charge, a belief that they did was inaccurate.

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. ***State v. Travis***, 2013 WI 38, ¶ 28, 347 Wis. 2d 142, 832 N.W.2d 491. 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

[4] Robbery, pursuant to Wis. Stat. § 943.32, is a class E felony requires force, or threat of force to take the property.

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***, 347 Wis. 2d 142, ¶ 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 [inaccuarate 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.

"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. "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 record is clear that the circuit court explicitly relied on the inaccurate information.

1. The circuit court relied on the state's inaccurate portrayal of the offense.

When there is a guilty plea, such as in this case, "the sentencing undoubtedly is the most critical phase of the proceeding." ***Anderson***, 222 Wis. 2d at 411. Accordingly, "the trial court has an important fact-finding role to perform if facts relevant to the sentencing are in dispute. In that setting, the sentencing court must resolve such disputes." ***Id***.

Here, the parties presented different characterizations of the underlying facts of the offense. The court made few remarks at sentencing (as argued above), however, it resolved the discrepancies in the facts presented by accepting the state's presentation and rejecting Mr. Gaddis'. In accepting that Mr. Gaddis pulled out the box cutter upon being confronted and that he threatened the security officers, the circuit court determined that the circumstances were aggravating. (38:12; App. 117). Because of these "aggravated circumstances," the circuit court concluded that the state's recommendation for prison was appropriate and that it would follow it, ultimately sentencing Mr. Gaddis to the maximum term of imprisonment. (38:12; App. 117).

In its written decision denying postconviction relief, the circuit court stated that it did not rely on inaccurate information because it would not have found the supplemental information provided to it to make the nature of the offense less aggravating. (30:4-5; App. 104-105). The court also found that even if Mr. Gaddis did not directly threaten the officers, they took it as an implied threat and that prompted them to end their detention of Mr. Gaddis. (30:5; App. 105).

However, the circuit court's assertion that the new information provided would not have made its characterization of the offense as aggravated does not dispose of the question as to whether the court relied on inaccurate information. ***Travis***, 347 Wis. 2d 142, ¶ 48. Furthermore, "the fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as part of the basis of the sentence." ***Id***. ¶ 47. (quoting ***Welch v. Lane***, 738 F.2d, 863, 867 (7th Cir. 1984), cited with approval in ***Tiepelman***, 291 Wis.2d 179, ¶14).

The state's portrayal of the events is more aggravating, and more importantly, the circuit court explicitly rejected Mr. Gaddis' explanation of the offense. However, as evidenced in the interviews with the guards present, Mr. Gaddis was truthful in indicating he made no threats as well as in how the box cutter was displayed – the guards asked him to empty his pocket.[5] The court's after – the – fact assertion that these additional details do not make the nature of the offense less aggravating is contrary to what it said at the sentencing. The court explicitly relied on the state's representation of the facts, which are inaccurate, or in the lease incomplete, and found that these (inaccurate) facts made the offense more aggravated. (38:12; App. 117).

2. The court relied on the inaccurate belief that Mr. Gaddis could have been charged with a felony.

In its remarks, the circuit court connected the appropriateness of a prison sentence to its (inaccurate) belief that Mr. Gaddis was receiving a benefit by not having been charged with a felony. (38:12; App. 117). The court gave explicit attention to this assumption and attributed it to further demonstrate the aggravated nature of the offense. Again, this explicit attention and consideration to this belief demonstrates reliance on the belief that Mr. Gaddis could have been charged with a felony. ***Travis***, 347 Wis. 2d 142, ¶ 28.

D. Reliance on the inaccurate information was not harmless error.

Because there was inaccurate information, and actual reliance, the burden shifts to the state to show that the error

[5] In the interviews, Mr. Turner recalled that Mr. Gaddis made no threats, while Mr. Addir could not recall. (22:3-6).

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 circuit court adopted from the state's argument in its decision. The sentencing court had very little to say before imposing the maximum sentence. From what the court did say, if any meaningful reasoning can be discerned, one would know that the court considered the offense very aggravated based on the state's recitation of the facts, and that the court believed Mr. Gaddis could have been charged with a felony. It was these "aggravating facts" which outweighed any mitigating factors and persuaded the court that a prison sentence was appropriate.

The circuit court's of an appropriate sentence would have to be different if two facts it considered aggravating were inaccurate. To say otherwise would mean that the court did not base any part of its sentence on what it said it did, and that there was another, unknown, justification for the sentence.

CONCLUSION

Mr. Gaddis respectfully requests that for the reasons stated above that the court reverse the decision of the circuit court denying him postconviction relief, vacate the judgment of conviction and order a re-sentencing hearing.

Dated this 30th day of March, 2015.

Respectfully submitted,

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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 5,073 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 30th day of March, 2015.

Signed:

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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; and (3) 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 30th day of March, 2015

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