

RECEIVED

05-12-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2015AP157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC L. LOOMIS,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION
RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE
LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE
SCOTT L. HORNE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUES PRESENTED1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....2

SUPPLEMENTAL STATEMENT OF FACTS.....2

ARGUMENT.....6

 I. The circuit court did not rely on inaccurate information when sentencing Loomis.....6

 A. Standard of review.....6

 B. Legal principles.6

 C. The COMPAS risk assessment tool provides the circuit court with relevant information.....6

 D. Loomis fails to prove that the court relied upon inaccurate information.8

 II. Loomis fails to meet his burden to prove that the circuit court relied on his gender at sentencing.....9

 III. The circuit court properly exercised its discretion in sentencing Loomis.10

 A. Standard of review.....10

 B. Legal principles.10

 C. The circuit court properly exercised its discretion at sentencing and did not rely on an improper factor.....11

 1. The circuit court properly considered COMPAS as one of many relevant factors at sentencing.....11

 2. The circuit court properly exercised its discretion when it concluded that Loomis drove a car

	Page
while his friend shot out of the car window.....	14
CONCLUSION	16

CASES CITED

McCleary v. State, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)	10
State v. Arredondo, 2004 WI App 7, 269 Wis. 2d 369, 674 N.W.2d 647	12
State v. Borrell, 167 Wis. 2d 749, 482 N.W.2d 883 (1992)	6
State v. Carter, 208 Wis. 2d 142, 560 N.W.2d 256 (1997)	11
State v. Frey, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436	14
State v. Gallion, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197	9, 10, 11, 13
State v. Harris, 119 Wis. 2d 612, 350 N.W.2d 633 (1984)	11
State v. Harris, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409	9, 10
State v. Hubert, 181 Wis. 2d 333, 510 N.W.2d 799 (Ct. App. 1993)	12

	Page
State v. Samsa, 2015 WI App 6, 359 Wis. 2d 580, 859 N.W.2d 149	passim
State v. Smalley, 2007 WI App 219, 305 Wis. 2d 709, 741 N.W.2d 286	12
State v. Stenzel, 2004 WI App 181, 276 Wis. 2d 224, 688 N.W.2d 20	11
State v. Straszkowski, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835	12
State v. Travis, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491	6
State v. Tiepelman, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1	6, 9

OTHER AUTHORITIES

<i>Evidence-Based Sentencing: The Application of Principles of Evidence Based Practice to State Sentencing Practice and Policy,</i> 43 U.S.F. L. Rev. 585 (Winter 2009)	6, 7
Karen Mann, et. al, <i>Broward County's Jail Population Management, American Jails,</i> Jan/Feb 2012, available at http://www.northpointeinc.com/files/ publications/Broward_County_Article.pdf	8, 12

Northpointe Inc., <i>Northpointe Software Suite</i> , (March 21, 2013), http://www.northpointeinc.com/products/northpointe-software-suite (accessed by searching for the above address in the Internet Archive index)	7-8
Northpointe Institute for Public Management, Inc., <i>COMPAS Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies</i> , (Jan. 14, 2010), available at http://www.northpointeinc.com/files/technical_documents/Selected_Compas_Questions_Posed_by_Inquiring_Agencies.pdf	10, 13
Wis. Dept. of Corrections, <i>COMPAS Assessment Tool</i> , http://doc.wi.gov/about/doc-overview/office-of-the-secretary/office-of-reentry/compas-assessment-tool (last visited May 4, 2015)	14
Wis. Dept. of Corrections, <i>Offender Lifecycle</i> , http://doc.wi.gov/Documents/WEB/ABOUT/OVERVIEW/Reentry%20Unit/offenderlifecycle.pdf (last visited May 4, 2015)	14

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2015AP157-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC L. LOOMIS,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION
RELIEF AND A JUDGMENT OF CONVICTION ENTERED IN THE
LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE
SCOTT L. HORNE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. A defendant has a constitutionally protected due process right to be sentenced based on accurate information. Here, the court considered, among other things, a COMPAS¹ report that contained relevant predictions of Eric L. Loomis's future dangerousness. Did the circuit court rely on inaccurate information at sentencing?

¹COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions." *State v. Samsa*, 2015 WI App 6, ¶ 1 n.1, 359 Wis. 2d 580, 859 N.W.2d 149.

2. A defendant has a constitutionally protected due process right not to be sentenced because of his or her gender. Here, the court never mentioned Loomis's gender. Loomis relies on a scientific paper that states that COMPAS considers gender in its assessment without explaining how gender factors into the assessment. Did Loomis meet his burden to prove that the circuit court sentenced him because of his gender?

3. Did the circuit properly exercise its sentencing discretion when it considered relevant sentencing factors, including Loomis's character, the seriousness of the offense, and the need to protect the public?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS

Loomis faced charges of first degree recklessly endangering safety, attempting to flee a traffic officer, operating a motor vehicle without the owner's consent, possession of a firearm as a felon, and possession of a short-barreled shotgun or rifle (4:1-2). The State added the repeater enhancer to each charge and charged each crime as party to the crime except the attempting to flee (4:1-2).

Loomis and the State agreed to a negotiated plea where Loomis pled no contest to the charges of attempting to flee an officer and operating a motor vehicle without the owner's consent as repeat offenses (11). The rest of the charges would be dismissed and read-in for sentencing (11).

At the plea hearing, the court ensured that Loomis understood that the read-in charges could be considered at sentencing (40:3, A-Ap. 115). Loomis agreed and asked whether the court would consider the dismissed charges (40:4-5, A-Ap. 116-17). The court told him yes, it would consider the dismissed charges (40:5, A-Ap. 117). A lengthy discussion about the charges occurred.

Loomis planned to argue that the court should refuse to consider the dismissed charges (40:6, A-Ap. 118). The court explained that by pleading no contest, Loomis agreed that the court could find that he was party to the crime of first degree recklessly endangering safety (40:7-8, A-Ap. 119-20). The court wanted to make sure that Loomis knew the court could consider the dismissed charges (40:14, A-Ap. 126). Loomis understood that the court probably would consider the dismissed charges and asked for a few minutes to consider whether he would still plead no contest (40:16-17, A-Ap. 128-29). After the break, Loomis still wanted to go ahead with his plea (40:18-19, A-Ap. 130-31). Loomis pled no contest to operating a motor vehicle without the owner's consent and pled guilty to fleeing an officer (40:23-24).

The circuit court's sentencing comments largely addressed the standard sentencing factors. The court examined Loomis's individual characteristics. Loomis grew up in a chaotic environment that placed barriers and hurdles in Loomis's way (41:26, A-Ap. 158). The court concluded that Loomis had not made an honest effort to overcome those circumstances and become a law abiding member of the community (41:26, A-Ap. 158). The court believed Loomis's girlfriend saw potential in him and saw him as a good father to their child (41:27, A-Ap. 159). The court noted Loomis's "fairly continuous history of serious criminal offenses" (41:29, A-Ap. 161). Loomis had a sporadic job history and had treatment needs for drug addiction and for his past sex offender behavior (41:30, A-Ap. 162). The court concluded that Loomis had not taken full responsibility for his role in the crime (41:32-33, A-Ap. 164-65).

The court considered the nature and seriousness of the offense, and concluded that the crime is "extremely serious" (41:34, A-Ap. 166). The court concluded that Loomis drove the car when Michael Vang shot from the vehicle (41:33-34, A-Ap. 165-66). The shooting might have resulted in killing one or more people (41:34, A-Ap. 166).

The court felt it needed to protect the public. The court found that the community could not tolerate these crimes and that it had a strong interest in deterrence (41:35, A-Ap. 167). The court noted that the COMPAS evaluation concluded that Loomis was a high risk to

the community because of his high risk to re-offend (41:35, A-Ap. 167). The court concluded that the primary goal of the sentence was to protect the community and provide Loomis with treatment (41:35, A-Ap. 167). The circuit court rejected probation (41:35, A-Ap. 167). The court imposed consecutive sentences totaling 16 and a half years (41:37-38, A-Ap. 169-70).

Loomis filed a postconviction motion for resentencing based in part on his claim that the circuit court erroneously exercised its sentence discretion and on his claim that the circuit court considered inaccurate information in the COMPAS assessment (26:1-2).²

As is pertinent to this appeal, Loomis argued that the circuit court should not have concluded that he drove the car at the time of the drive by shooting (42:10-11, A-Ap. 185-86). The court believed the State's explanation was more consistent with the facts, and gave that version greater weight at sentencing (42:16, A-Ap. 191). The court concluded that it was entitled to consider the read-in offense if the court concluded that the evidence supported it (42:21, A-Ap. 196). The circuit court denied Loomis's motion on that ground.

Dr. David Thompson testified at the postconviction hearing (43:4-45, A-Ap. 217-58). He told the court that COMPAS was originally designed to help corrections allocate resources and to identify individual needs in the community (43:10, A-Ap. 223). He believed that COMPAS should not be used as a factor in deciding whether to incarcerate someone (43:10-11, A-Ap. 223-24). He based this conclusion on the fact that COMPAS was not designed to be a factor at sentencing (43:12, A-Ap. 225), and that it is risky to use a tool for a purpose different than its original purpose (43:21-22, A-Ap. 234-35). He felt that courts could overestimate the value of the

²The circuit court granted the motion in part and amended Loomis's sentence to three years of incarceration. At sentencing the court considered it aggravating that a person died after Loomis provided that person with pills (41:35-36, A-Ap. 167-68). Later, the parties agreed that the court relied on inaccurate information and that there was no nexus between the death and Loomis's actions (42:3-4, A-Ap. 178-79).

COMPAS risk predictions and assign too much weight to the conclusions (43:12-13, A-Ap. 225-26). But he agreed that courts could consider it at sentencing when identifying treatment needs (43:26, A-Ap. 239).

Dr. Thompson told the court that the risk assessment considers only the individual's age at the time of the first offense, the current age, and the criminal history (43:13, A-Ap. 226). He did not know how much each factor was weighed because Northpointe does not release its trade secrets (43:17, A-Ap. 230).³ The COMPAS evaluation considered many factors within the category of criminal history including arrest history, placement, and types of crimes (43:29, A-Ap. 242). He believed that the COMPAS tool needed to be cross-validated in Wisconsin in order to conclude that its predictions were valid using a Wisconsin population (43:16, A-Ap. 229). He also believed that COMPAS assessment ignored individual characteristics in favor of group characteristics (43:23-24, A-Ap. 236-37). He did not know how COMPAS considered gender, but believed that it did consider it (43:24, A-Ap. 237).

Dr. Thompson felt that actuarial assessment and professional judgment led to the best sentencing decisions, but courts should not consider COMPAS (43:30-31, A-Ap. 243-44). Instead, Dr. Thompson wanted courts to consider other instruments, but did not name those other instruments (43:30-31, A-Ap. 243-44). COMPAS is the most widely used risk assessment tool nationwide (43:41, A-Ap. 254). Dr. Thompson agreed that all the information measured in COMPAS is relevant to sentencing (43:35-37, A-Ap. 248-49).

The circuit court denied Loomis's motion (43:52, A-Ap. 265). The court concluded that professional judgment and actuarial science together provides the best sentencing outcomes (43:53, A-Ap. 266). The court found that even if COMPAS had not been attached, Loomis's sentence would have been exactly the same (43:55, A-Ap. 268).

³Northpointe, a consulting and research firm, created the COMPAS assessment software. See <http://www.northpointeinc.com/>.

ARGUMENT

I. The circuit court did not rely on inaccurate information when sentencing Loomis.

A. Standard of review.

Whether a defendant has been denied this due process right is a constitutional issue that a reviewing court decides independently from the circuit court. *State v. Travis*, 2013 WI 38, ¶ 20, 347 Wis. 2d 142, 832 N.W.2d 491.

B. Legal principles.

“A defendant has three due process rights at sentencing: (1) to be present at the hearing and to be afforded the right to allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information.” *State v. Borrell*, 167 Wis. 2d 749, 772, 482 N.W.2d 883 (1992).

A sentence based “upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand.” *Travis*, 347 Wis. 2d 142, ¶ 17. A defendant who moves for resentencing based on the circuit court’s use of inaccurate information at the sentencing hearing must show both that: (1) the information was inaccurate and (2) the court actually relied on the inaccurate information in the sentencing. *Id.* ¶ 21 (citing *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis. 2d 179, 717 N.W.2d 1). If a defendant can meet both requirements, then the burden shifts to the State to prove that the error was harmless. *Id.* ¶ 23.

C. The COMPAS risk assessment tool provides the circuit court with relevant information.

COMPAS is a risk assessment tool available to circuit courts at sentencing. *State v. Samsa*, 2015 WI App 6, ¶ 13, 359 Wis. 2d 580, 859 N.W.2d 149. Actuarial tools, like COMPAS, are proven by the most rigorous research to work to significantly reduce offender recidivism. Warren, Roger K., *Evidence-Based Sentencing: The*

Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy, 43 U.S.F. L. Rev. 585, 586 (Winter 2009). This type of research came in response to a change in sentencing policies in the 1970s from “offender-based” sentencing to “offense-based” sentencing. *Id.* at 588-89. The new sentencing policies led to longer sentences and unprecedented rates of recidivism. *Id.* at 589-91. The research looked to solve the problem of recidivism. *Id.* at 596.

The research showed that effective treatment programs are ones that are “specifically targeted to address the identified needs of a certain group of offenders in certain ways.” Warren, 43 U.S.F. L. Rev. at 598. The first task in applying the principles of evidence based practice to a sentencing decision is to determine “whether the defendant is a suitable candidate for a rehabilitation or treatment program.” *Id.* at 599. For example, high-risk offenders need to be separated from “extremely high-risk or highest-risk offenders who are deeply enmeshed in a criminal subculture” because these offenders are not responsive to traditional correctional programming. *Id.* at 600.

Actuarial tools are far better predictors of risk than professional judgment, but the most accurate assessment is using an actuarial tool and professional judgment. Warren, 43 U.S.F. L. Rev. at 603. COMPAS is a tool to help circuit courts make bail, sentencing, and postconviction decisions based on what research shows to be the most effective in reducing recidivism.

COMPAS is a computerized tool designed to assess offenders’ needs and risk of recidivism and is used by criminal justice agencies across the nation to inform decisions regarding the placement, supervision and case management of offenders. Developed and focused on predictors known to affect recidivism, this tool includes dynamic risk factors in its prediction of recidivism and provides information on a variety of well-validated risks and need factors designed to aid in correctional treatment to decrease the likelihood that offenders will re-offend.

See Northpointe Inc., *Northpointe Software Suite*, (March 21, 2013), <http://www.northpointeinc.com/products/northpointe-software->

suite (accessed by searching for the above address in the Internet Archive index).

COMPAS is composed of 22 different scales that empirical research has identified as predictive of future behavior. The 22 scales are grouped into five main categories: criminal involvement, relationships/lifestyles, personality/attitudes, family, and social exclusion. COMPAS assesses three categories of risk: recidivism, violence, and failure to appear at a court hearing.

Karen Mann, et. al, *Broward County's Jail Population Management*, American Jails, Jan/Feb 2012 at 17.⁴

D. Loomis fails to prove that the court relied upon inaccurate information.

Loomis fails to identify what information he believes that the circuit court relied upon in sentencing him. He says COMPAS is an “inaccurate and inappropriate” factor at sentencing. Loomis’s brief at 17. Those words are not interchangeable. The State will address the appropriateness of COMPAS in section III of this brief.

Loomis does not point to any particular part of the COMPAS evaluation that is inaccurate. Instead, he argues that because it is not an individualized assessment but rather a comparison to a class of offenders, it may overestimate his risk to re-offend. Loomis’s brief at 18. He believes that “it assumes that a specific defendant is a high risk based on comparison with others in the group as determined by COMPAS.” Loomis’s brief at 20.

The defendant has the opportunity to challenge its accuracy at the outset of a sentencing hearing. Loomis did not dispute the

⁴Available at http://www.northpointeinc.com/files/publications/Broward_County_Article.pdf.

accuracy of the PSI or the COMPAS assessment except to tell the court he had a job at sentencing (41:5, A-Ap. 137).⁵

He does not assert he is a low-risk to re-offend or argue against any specific conclusion in his COMPAS assessment. At best, Loomis's argument is that the COMPAS was potentially inaccurate. The court can reach its own reasonable inferences based on the information presented at sentencing. *State v. Gallion*, 2004 WI 42, ¶ 19, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court got relevant information from the COMPAS report about Loomis's future dangerousness. The circuit court drew its own conclusions based on that information.

Since Loomis does not point to specific inaccurate information, he cannot meet his burden to prove that the circuit court actually relied upon inaccurate information at sentencing. See *Tiepelman*, 291 Wis. 2d 179, ¶ 26. The circuit court did not rely on inaccurate information when sentencing Loomis.

II. Loomis fails to meet his burden to prove that the circuit court relied on his gender at sentencing.

A defendant has a due process right not to be sentenced on the basis of gender. *State v. Harris*, 2010 WI 79, ¶ 33, 326 Wis. 2d 685, 786 N.W.2d 409. The burden to prove that the circuit court actually relied upon gender falls on the defendant. *Id.*

Loomis asserts that the court violated his due process rights by sentencing him based on his gender. Loomis's brief at 21. Loomis fails to point to anything in the sentencing transcript that relates to his gender. He instead places his argument completely on the fact that the developers of COMPAS have gender-specific risk assessments. *Id.* He asserts without support that because he's a man his risk is higher. *Id.* He fails to meet his burden.

⁵Neither the PSI report nor the COMPAS evaluation is contained in the appellate record. Record number 14 is labeled as the PSI, but only contains the alternative PSI (14).

The circuit court never considered the fact that Loomis was a man in its sentencing decision. COMPAS does not ask for the gender of the offender. Instead, COMPAS has a different automated risk and needs assessment specifically for women offenders. See Northpointe Institute for Public Management, Inc., *COMPAS Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies*, 3 (Jan. 14, 2010).⁶

Simply having two different risk scales does not mean that the COMPAS assessment improperly considers gender. Loomis does not explain how the two different assessments work. The circuit court did not rely solely on the COMPAS assessment at sentencing. The circuit court did not violate Loomis's due process rights at sentencing. Loomis fails to meet his burden.

III. The circuit court properly exercised its discretion in sentencing Loomis.

A. Standard of review.

A circuit court properly exercises its discretion if, by reference to the relevant facts and factors, it explains how the sentence's component parts promote the sentencing objectives. *Gallion*, 270 Wis. 2d 535, ¶ 46. There is a strong public policy against interference with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *Id.* ¶ 18; *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

A court erroneously exercises its discretion when it "imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." *Harris*, 326 Wis. 2d 685, ¶ 30.

B. Legal principles.

The objectives of the sentence, including, but not limited to, the protection of the public, punishment, rehabilitation, and

⁶*Available at* http://www.northpointeinc.com/files/technical_documents/Selected_Compas_Questions_Posed_by_Inquiring_Agencies.pdf.

deterrence should be articulated on the record. *Gallion*, 270 Wis. 2d 535, ¶ 40. Which objectives should be given greatest weight is up to the circuit court to identify in each case. *Id.* ¶ 41. Courts must also describe, on the record, the facts relevant to the objectives. *Id.* ¶ 42.

The circuit court shall impose the minimum sentence consistent with the gravity of the offense, the rehabilitative needs of the offender, and the need for protection of the public. *Id.* ¶ 44. The factors that a circuit court can consider in sentencing include: past record of criminal offenses; history of undesirable behavior patterns; the defendant's personality, character and social traits; results of presentence investigation; vicious or aggravated nature of the crime; degree of defendant's culpability; defendant's demeanor at trial; defendant's age, educational background and employment record; defendant's remorse, repentance and cooperativeness; defendant's need for close rehabilitative control; the rights of the public; and the length of pretrial detention. *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984); *see also Gallion*, 270 Wis. 2d 535, ¶ 43 n.11. "An improper sentencing factor is a factor that is totally irrelevant or immaterial to the type of decision to be made." *Samsa*, 359 Wis. 2d 580, ¶ 8.

C. The circuit court properly exercised its discretion at sentencing and did not rely on an improper factor.

Loomis asks for resentencing. Loomis's brief at 27. But Loomis actually seeks a modification of a sentence imposed by an erroneous exercise of discretion; resentencing is only available if the initial sentence is vacated because it was illegally imposed. *See State v. Stenzel*, 2004 WI App 181, ¶ 5 n.2, 276 Wis. 2d 224, 688 N.W.2d 20 (citing *State v. Carter*, 208 Wis. 2d 142, 146-47, 560 N.W.2d 256 (1997)). The State addresses his claim as a challenge to the circuit court's sentencing discretion.

1. The circuit court properly considered COMPAS as one of many relevant factors at sentencing.

Loomis argues that the circuit court should not have relied on the COMPAS assessment at sentencing. Loomis's brief at 16-24. The

circuit court did not erroneously exercise its discretion. It considered relevant sentencing factors and sentenced Loomis within the maximum allowable penalties. The information from COMPAS is one such relevant sentencing factor. Accordingly, this court should affirm Loomis's sentence.

Courts can use the COMPAS assessment in sentencing. *Samsa*, 359 Wis. 2d 580, ¶ 13. For courts to exclude the use of the COMPAS assessment at sentencing would be to treat it different than other relevant evidence.

The COMPAS evaluation places the defendant in a category of offenders, but is still individualized to each defendant. The COMPAS assessment asks many questions. It then creates a risk assessment assessing overall risk in three areas and criminogenic needs in 22 areas. Mann, *supra*, at 17. It is possible that two offenders might answer all questions the same, but it is unlikely.

It is an actuarial scale that uses other offenders' behavior to assess the specific offender's risk. Actuarial scales are admissible at trial when rules of evidence apply. See *State v. Smalley*, 2007 WI App 219, ¶ 20, 305 Wis. 2d 709, 741 N.W.2d 286; *State v. Straszkowski*, 2008 WI 65, ¶ 52, 310 Wis. 2d 259, 750 N.W.2d 835. At sentencing, there is no need for information to be established beyond a reasonable doubt. See *State v. Arredondo*, 2004 WI App 7, ¶ 54, 269 Wis. 2d 369, 674 N.W.2d 647. And there is no burden of proof. *State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). Even though COMPAS is an actuarial tool, it can be considered as a factor at sentencing.

Loomis states that the COMPAS assessment warns courts not to use it to decide a sentence. Loomis's brief at 18. Loomis's COMPAS evaluation states, "risk scores are not intended to determine the severity of the sentence or whether the defendant is incarcerated" (43:25, A-App. 238). This is the same disclaimer in all COMPAS evaluations. See *Samsa*, 359 Wis. 2d 580, ¶ 12. Loomis reads this statement broadly and argues that the entire COMPAS assessment cannot be considered by the court at sentencing. Loomis's brief at 18. The statement should not be interpreted that broadly.

The statement explicitly addresses only the risk scores, and does not apply to any of the other parts of the COMPAS assessment. The COMPAS assessment discusses a variety of factors that are relevant to the court's sentencing decision. The assessment discusses areas where the defendant will need to improve to lessen his risk for re-offense. That discussion is important information that the court can and should consider at sentencing. Much of this information is already available to the court in the rest of the PSI. The qualifying sentence does not apply to any part of the COMPAS except the risk scores.

The risk score should not determine the severity of the sentence or whether an offender is incarcerated. But it does not mean that his risk score cannot be considered at all by the court at sentencing. Instead, the score alone cannot be used to make those decisions. It also means that a high score should not automatically mean that an offender must be sentenced to incarceration. The statement does not preclude using the score as a factor among the many others a sentencing court considers at sentencing.

COMPAS is a decision support tool intended to help guide the decision maker in case supervision, treatment, and placement decisions. Northpointe Inst. for Public Management, Inc., *COMPAS Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies*, 7 (Jan. 14, 2010).⁷ The court can consider the risk scores in relation to the many other considerations at sentencing. The court decides which factors should be given the greatest weight. *Gallion*, 270 Wis. 2d 535, ¶ 40. It cannot decide to place a defendant in prison solely because of his score on COMPAS, but also does not need to ignore the COMPAS score completely.

COMPAS has a role at sentencing. Dr. Thompson testified that COMPAS is only for people in the community and should not be used at sentencing to decide about incarceration (43:10-11, A-Ap. 223-24). This is contrary to the DOC's statement that COMPAS is used "to determine their risk and needs and inform dynamic case

⁷Available at http://www.northpointeinc.com/files/technical_documents/Selected_Compas_Questions_Posed_by_Inquiring_Agencies.pdf.

plans that will guide the offender throughout his or her lifecycle in the criminal justice system.” Wis. Dept. of Corrections, *COMPAS Assessment Tool*, <http://doc.wi.gov/about/doc-overview/office-of-the-secretary/office-of-reentry/compas-assessment-tool> (last visited May 4, 2015). The lifecycle flow chart indicates that DOC intends to use the COMPAS assessment from arrest to discharge. Wis. Dept. of Corrections, *Offender Lifecycle*, <http://doc.wi.gov/Documents/WEB/ABOUT/OVERVIEW/Reentry%20Unit/offenderlifecycle.pdf> (last visited May 4, 2015).

COMPAS provides individualized relevant information. The COMPAS assessment is one of many factors a court can consider at sentencing. The circuit court considered all the relevant sentencing factors and drew a reasonable conclusion based on those factors.

2. The circuit court properly exercised its discretion when it concluded that Loomis drove a car while his friend shot out of the car window.

The circuit court can consider uncharged and unproven offenses regardless of whether the defendant consented to having the charge read-in or dismissed outright. *State v. Frey*, 2012 WI 99, ¶ 47, 343 Wis. 2d 358, 817 N.W.2d 436. Loomis knew that the court could consider his dismissed charges. At sentencing, the court believed the State’s version of the events, and found Loomis’s role to be an aggravating factor. The circuit court properly exercised its discretion

Loomis argues that the circuit court did not exercise its discretion and instead simply concluded that Loomis committed the crime of recklessly endangering safety because that charge was read-in at sentencing. Loomis’s brief 24-25. Loomis specifically asserts that the court stated the right standard at the plea hearing, but failed to correct confusing statements made earlier in the plea hearing. Loomis’s brief at 26.

At the plea hearing, Loomis did not admit to driving the car during the shooting and the court wanted to ensure that Loomis understood that it could disagree and then consider the crime. At the

end of the hearing, Loomis understood that the court probably would consider the dismissed charges and asked for a few minutes to consider whether he would still plead no contest (40:16-17, A-Ap. 128-29). Loomis wanted to go ahead with his plea (40:18-19, A-Ap. 130-31).

At sentencing, the court concluded that Loomis drove the car when Michael Vang shot from the vehicle (41:33-34, A-Ap. 165-66). The shooting might have resulted in killing one or more people (41:34, A-Ap. 166). The court believed the State's explanation was more consistent with the facts, and therefore gave that version greater weight at sentencing (42:16, A-Ap. 191). The court concluded that it was entitled to consider the read-in offense if the court concluded that the evidence supported it (42:21, A-Ap. 196). The circuit court properly exercised its discretion.

The circuit court imposed the sentence that it felt was necessary given the priority the court placed on protecting the public and treatment. The court sentenced Loomis within the statutory limits and weighed the proper sentencing factors when fashioning a sentence. The court properly exercised its discretion at sentencing. This court should affirm that exercise of discretion.

CONCLUSION

The State requests this court affirm the circuit court's order denying postconviction relief and the judgment of conviction.

Dated this 12th day of May, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 266-9594 (Fax)
remingtonca@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,248 words.

Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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. § (Rule) 809.19(12). I further certify that 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.

Dated this 12th day of May, 2015.

Christine A. Remington
Assistant Attorney General