

RECEIVED

12-09-2016

STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Appeal Case No. 2016AP000683-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

THOMAS G. ST. PETER,

Defendant-Appellant.

ON APPEAL FROM THE ORDER DENYING MOTION
FOR MODIFICATION OF SENTENCE ENTERED ON
MARCH 10, 2016, AND THE JUDGEMENT OF
CONVICTION AND SENTENCE ENTERED ON
DECEMBER 30, 2015, IN THE CIRCUIT COURT OF
MILWAUKEE COUNTY,
THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

John Chisholm
District Attorney
Milwaukee County

Kelly O'Neill
Assistant District Attorney
State Bar No. 1091246
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND
PUBLICATION2

STATEMENT OF THE CASE2

STANDARD OF REVIEW5

ARGUMENT5

 I. THE CIRCUIT COURT SENTENCED ST. PETER
 BASED ON ACCURATE FACTS5

 II. A REVIEW OF THE RECORD SHOWS THAT THE
 SENTENCE IMPOSED WAS A PROPER EXERCISE
 OF DISCRETION BY THE COURT6

CONCLUSION9

TABLE OF AUTHORITIES

CASES CITED

	Page
<i>McCleary, v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971).....	5, 7
<i>Ocanas v. State</i> , 70 Wis. 2d 179, 233 N.W.2d 457 (1975).....	7
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197	5, 7
<i>State v. Harris</i> , 119 Wis. 2d 612, 350 N.W.2d 633 (1984).....	7
<i>State v. Harris</i> , 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409	7
<i>State v. Lechner</i> , 217 Wis. 2d 392, 576 N.W.2d 912 (1998).....	5
<i>State v. Odom</i> , 2006 WI App 145, 294 Wis. 2d 844, 720 N.W.2d 695	7
<i>State v. Tiepelman</i> , 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1	5, 6

WISCONSIN STATUTES CITED

§ 939.50(3)(c).....	8
§ 939.51(3)(a).....	2
§ 943.20(1)(a).....	8
§943.20(3)(a)-(c)	8
§ 943.32(2)	8
§ 946.41(1)	2

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2016AP000683-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

THOMAS G. ST. PETER,

Defendant-Appellant.

ON APPEAL FROM THE ORDER DENYING MOTION
FOR MODIFICATION OF SENTENCE ENTERED ON
MARCH 10, 2016, AND THE JUDGEMENT OF
CONVICTION AND SENTENCE ENTERED ON
DECEMBER 30, 2015, IN THE CIRCUIT COURT OF
MILWAUKEE COUNTY,
THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

- 1) Did the circuit court rely on inaccurate information when sentencing St. Peter?

Trial Court Answered: No.

- 2) Did the circuit court exercise proper discretion when sentencing St. Peter?

Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. The issues presented can be resolved by applying well-established legal principles to the facts of the case. Pursuant to Wis. Stat. § 752.31(2)(f) and (3) this is a one-judge appeal and pursuant to Wis. Stat. § 809.23 (4) (b) publication is not an option.

STATEMENT OF THE CASE

On October 11, 2015, Thomas St. Peter was charged in Milwaukee County Circuit Court Case number 15CM3569 with one count of Obstructing an Officer, contrary to Wis. Stats. §§ 946.41(1) and 939.51(3)(a). (R2:1-2). The complaint alleged that on September 25, 2015, St. Peter lied to police when he told the police that his car was taken in an armed robbery. (R2:1). St. Peter told officers that his car was taken by a black male who got into the car through an unlocked passenger door. (R2:1). St. Peter said that the male then pointed a revolver at him and told him to start driving. (R2:1.) St. Peter said that the male told him to pull into a gas station where he was told to get out of the car and then the male drove away. (R2:1). City of Milwaukee police officers conducted follow up that included recovering video from the gas station, recovering St. Peter's car, processing the car for fingerprints, and identifying a suspect from those fingerprints. (R2:1-2). An officer interviewed the suspect identified by the fingerprints. (R2:2). During that interview the suspect, C.W., said that he never robbed St. Peter. (R2:2). C.W. told the officer that St. Peter owed him money for drugs and that he took St. Peter's vehicle after a drug transaction. (R2:2). C.W. said that he asked St. Peter to purchase a cigar for him and when St. Peter left the vehicle C.W. got into the driver's seat and drove away with St. Peter's vehicle. (R2:2). St. Peter was then interviewed and he admitted the story about the armed robbery was a fabrication. (R2:2).

On December 30, 2015, a plea and sentencing hearing was heard by Circuit Court Judge John Siefert. (R18:1). St. Peter entered a plea of guilty to one count of obstructing an officer. (R18:1). The State recommended time served and a fine. (R18:3). During its sentencing argument, the State laid out the facts of the case, starting with when police were dispatched to an armed robbery complaint. (R18:8). The State said that when police responded to that complaint St. Peter indicated that he had been robbed at gunpoint and that his car had been taken without consent. (R18:8). The State pointed out that St. Peter's story was somewhat correct, in that someone had taken his vehicle without his consent. (R18:8).

The State explained that a suspect was taken into custody for taking St. Peter's vehicle and that that person gave a mirandized statement. (R18:8). In that statement, the suspect relayed that he was a drug dealer and that St. Peter was his client. (R18:8). The suspect stated that St. Peter was a regular customer and that this was a situation where St. Peter owed the suspect money. (R18:8). The suspect admitted to moving into the driver's seat and driving away with St. Peter's car, but denied having a gun at the time he took the car. (R18:9). The State argued that St. Peter had used the criminal justice system because he was upset, and that he used it in a way that was convenient for him, and that this was a very serious offense because of the police resources that were tied up in investigating St. Peter's allegations. (R18:9). The State stressed the value of police resources and police man or woman hours, and the importance of their work in a city that has a lot of very serious violent crimes occurring. (R18:9). The State explained that the time officers had dedicated to St. Peter's case where the victim and the suspect knew each other was time that they could have spent serving a legitimate victim. (R18:10). The State concluded by again stressing the serious nature of the offense and noted for the court that St. Peter had a 2013 manufacturing and delivering heroin case for which he received probation with prison time imposed and stayed. (R18:10).

The defense began its argument by clarifying both St. Peter's and C.W's role in the offense. (R18:10-11). Defense counsel stated that his client admitted to lying to the police. (R18:11). Defense counsel argued that St. Peter lied to the officer because he did not want to disclose to the officer that he

was there to meet C.W. to purchase drugs or that he was on probation at the time. (R18:11-12). After this comment, the court asked the defense if St. Peter was currently on probation and if he was being revoked. (R18:12). Defense counsel responded that St. Peter was still on probation and that he had received four days credit and an alternative to revocation. (R18:12). Defense counsel went on to explain that St. Peter was an addict, that he had lost his job, and that he was going through a divorce. (R18:13). Defense counsel closed by saying that this was a case that could have been resolved on the spot but wasn't, due to St. Peter's actions. (R18:14).

The court did not find the parties' sentencing recommendations appropriate and instead sentenced St. Peter to forty-five days in the House of Correction. (R18:15). The court explained that he was not sympathetic with the idea of people being essentially framed. (R18:14). He said that in the case at hand the suspect was not an outstanding citizen, but also was not the armed robber he had been portrayed as by St. Peter. (R18:14). The court stated that he did not think that St. Peter's actions could be excused with a time-served disposition. (R18:14-15). The court stated that, "we do not mis-use the criminal justice system to settle personal scores, even when the personal score arises from somebody having victimized you." (R18:17). The court went on to describe similar situations to St. Peter's. (R18:17-18). The court described situations where changing a fact in a case would change the case from a misdemeanor into a felony. (R18:17-18). The court asked St. Peter if he took care of his children and what their ages were when setting the terms of the sentence. (R18:15). The court did not allow release privileges for childcare, due to the ages of St. Peter's children. (R18:15).

On March 3, 2016 St. Peter filed a Motion for Modification of Sentence. (R14:1). In the motion St. Peter argued that the sentencing judge may not have clearly understood the facts of the case. (R14:3). St. Peter further argued that the court was not presented with several factors at the time of sentencing. (R14:5).

On March 8, 2016 the court denied St. Peter's motion for sentence modification. (R15:1). In the decision, the court clarified that he did not rely on inaccurate information when

sentencing St. Peter. (R15:2). The court also found that St. Peter did not set forth a sufficient claim for relief. (R15:1).

This appeal follows.

STANDARD OF REVIEW

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 184, 717 N.W.2d 1, 3. Whether a defendant has been denied the due process right to be sentenced based on accurate information is a constitutional issue presenting a question of law which an appellate court reviews de novo. *Id.* In order to establish a due process violation based upon inaccurate sentencing information, a defendant must establish by clear and convincing evidence both that information before the court was inaccurate and that the court relied upon the misinformation in reaching its determination. *Id.* at ¶¶ 9, 26.

Sentencing lies within the sound discretion of the circuit court, and appellate review is limited to considering whether discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. The policy is against interfering with trial courts in passing sentences. *McCleary, v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512, 521-522 (1971). A sentence should be affirmed if it can be sustained as a proper discretionary act upon reviewing the facts of the record. *Id.* at 282. When reviewing an imposed sentence the starting presumption is that the lower court acted reasonably. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998).

ARGUMENT

I. THE CIRCUIT COURT SENTENCED ST. PETER BASED ON ACCURATE FACTS.

In *State v. Tiepelman* the court held that a defendant must establish both that there was inaccurate information before the sentencing court and that the court actually relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 2, 291 Wis. 2d 179, 184, 717 N.W.2d 1, 3. If the defendant

proves both of those things then the burden shifts to the State to establish that the error was harmless. *Id.* at ¶ 3.

In *Tiepelman* the sentencing court misread a presentencing report that listed the defendant's criminal record. The report properly noted that the defendant had twenty charged offenses but that only five of the offenses had resulted in convictions. *Tiepelman* at ¶ 6. The court after reading the report stated on the record that the defendant had twenty prior convictions. *Id.*

St. Peter's case is much different than the *Tiepelman* case. St. Peter must first show that there was inaccurate information before the sentencing court at the time of sentencing. St. Peter alleges that the judge sentenced him based on inaccurate information, that information being that the judge believed C.W. was an innocent victim of St. Peter's false report to law enforcement. The judge at the time of sentencing made clear that he understood that C.W. was not a completely innocent uninvolved party. In this case, St. Peter has at most shown that some of the information presented at sentencing may have been confusing. The court clearly understood the facts of the case at the time of sentencing and even placed that understanding explicitly on the record by identifying similar situations to the facts of the case. (R18:17-18).

The court never believed that St. Peter framed a totally innocent man as St. Peter alleges. In fact the record makes abundantly clear that the court understood that the person who took St. Peter's car was not totally innocent. (R18:14). The court made clear that St. Peter's car had not been taken from him at gunpoint by an unknown individual. (R18:14) The court walked through the offense and gave two similar ways the justice system could be abused by people to get the outcome that they desired. (R18:17-18). When assessing St. Peter's case using the test from *Tiepelman*, St. Peter fails to show any inaccurate information presented to the court at the time of sentencing or any reliance by the sentencing court on inaccurate information at the sentencing hearing.

II. A REVIEW OF THE RECORD SHOWS THAT THE SENTENCE IMPOSED WAS A PROPER EXERCISE OF DISCRETION BY THE COURT.

The three primary factors a court could consider at sentencing are, “the gravity of the offense, the character of the offender, and the need for protection of the public.” *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). There are several other factors the court may consider including past criminal record, the aggravated nature of the crime, and the rights of the public. *State v. Harris*, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 698-99, 786 N.W.2d 409, 415. Considerable discretion is given to the sentencing court to decide which factors are relevant and what weight the factors are assigned. *Id.* at ¶¶ 28-29. Sentences imposed, “should call for 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.” *State v. Gallion*, 2004 WI 42, ¶ 22, 270 Wis. 2d 535, 678 N.W.2d 197. A probationary sentence should be considered first unless it is necessary to protect the public, the defendant needs correctional treatment, or if it would unduly depreciate the seriousness of the offense. *Id.* at ¶ 25. A court need not explicitly identify the factors but should discuss them. *State v. Odom*, 2006 WI App 145, ¶25, 294 Wis.2d 844, 857, 720 N.W.2d 695.

When reviewing a sentence for an exercise of discretion there is a presumption that the trial court acted reasonably. *Ocanas v. State*, 70 Wis. 2d 179, 184, 233 N.W.2d 457, 460 (1975). The complainant must show that the sentence for some reason was unreasonable or unjustifiable given the record. *Id.* On appeal a court will, “search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.” *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522 (1971). A sentence should ordinarily be affirmed, “if the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors.” *Id.* at 281.

The court acknowledged that C.W. was not an “outstanding citizen” at the beginning of the sentencing. (R18:16). The court went on to address the seriousness of the offense St. Peter had committed. The court discussed the fact that people cannot choose to up charges against other individuals. (R18:16). The court noted that the criminal justice

system could not be used as a method of personal vengeance. (R16:16).

The forty-five day sentence does reflect the serious nature of the offense and the sentencing court's serious concern expressed over the facts of the case. During the sentencing the court illustrated other situations where a victim of a crime could change a fact and seriously change the penalties a defendant would be facing. (R18:17-18). Looking at the facts of St. Peter's case he accused the person who stole his car, C.W., of robbing him of his car at gunpoint. With those facts C.W. could have been charged with Robbery, contrary to Wis. Stats. §§ 943.32(2) and 939.50(3)(c). C.W. could have faced maximum penalties of a fine of \$100,000 or imprisonment of 40 years, or both. Those are very serious penalties. The true facts of the theft that occurred supported at most a charge of Theft, contrary to Wis. Stats. §§ 943.20(1)(a) and 943.20(3)(a)-(c). Depending on the value of St. Peter's car the possible charge could have ranged from a class A misdemeanor to at most a class G felony. Looking at the maximum penalty C.W. could have faced with the true story, and St. Peter's car being valued at over \$10,000, it would have been a fine of \$25,000 or imprisonment of not more than 10 years, or both. That is a difference of at least 30 years of imprisonment. The sentencing court spent quite a bit of time trying to illustrate this serious difference in charges with similar fact patterns.

The sentence of forty-five days imposed by the court is well below the maximum sentence that could have been imposed. At the time of this offense St. Peter was already on probation. The court did explicitly ask about St. Peter's probationary status during the sentencing arguments. (R18:12). The court asked defense counsel if St. Peter had been revoked because of the current case and defense counsel informed the court that St. Peter had not been revoked. (R18:12).

A review of the record shows that the sentencing court took into consideration St. Peter's probationary status at the time of the offense, knew of St. Peter's criminal history, and was fully informed by defense counsel of St. Peter's character. The court spoke at length about the gravity of the offense and stated that he did not think that St. Peter's behavior could be "excused with a time-served disposition." (R18:15). This

statement illustrates the sentencing court's belief that the sentence recommendation from both the State and defense counsel would unduly depreciate the seriousness of the offense. Given the serious nature of the offense and the fact that St. Peter was already on probation at the time of the offense probation was not the appropriate sentence in this case.

When sentencing St. Peter the court took into consideration the necessary factors and listened intently to arguments given by both parties. After listening to arguments from both parties the court delivered a sentence that was different than that recommended by both parties but one that was well within the court's discretion. The court discussed the seriousness of the offense and the need for punishment. The court also engaged when both the State and defense counsel presented other relevant factors. Looking at the facts of the record the court acted reasonably when sentencing St. Peter.

CONCLUSION

For all of the above reasons, the State respectfully requests that this Court uphold the decision of the circuit court denying St. Peter's post-conviction motion and uphold the judgment of conviction and sentence.

Dated this _____ day of December, 2016.

Respectfully submitted,

JOHN CHISHOLM
District Attorney
Milwaukee County

Kelly O'Neill
Assistant District Attorney
State Bar No. 1091246

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 word count of this brief is 2,853.

Date

Kelly O’Neill
Assistant District Attorney
State Bar No. 1091246

**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 s. 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.

Date

Kelly O’Neill
Assistant District Attorney
State Bar No. 1091246

P.O. Address:

Milwaukee County District Attorney’s Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.