

**RECEIVED**

**02-21-2018**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

Case No. 2017AP2292-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVINN D. COFFEE,

Defendant-Appellant.

---

On Appeal from a Judgment of Conviction  
and an Order Denying Postconviction Relief,  
Entered in the Milwaukee County Circuit Court,  
the Honorable Frederick C. Rosa Presiding

---

BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT

---

Nicole M. Masnica  
Assistant State Public Defender  
State Bar No. 1079819

Office of the State Public Defender  
735 North Water Street, Suite 912  
Milwaukee, WI 53202-4116  
(414) 227-4805  
masnican@opd.wi.gov

Attorney for Defendant-Appellant

## TABLE OF CONTENTS

	Page
ISSUES PRESENTED .....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	1
STATEMENT OF FACTS.....	1
ARGUMENT .....	7
I.    Mr. Coffee is entitled to resentencing because the circuit court relied on the State’s inaccurate assertions regarding his prior criminal record and there is a reasonable probability that this reliance impacted the sentence imposed. ....	7
A.    Legal principles and standard of review. ...	8
B.    The circuit court erred in concluding that its reliance on the State’s inaccurate assertions regarding Mr. Coffee’s criminal history was harmless.....	9
CONCLUSION .....	13
CERTIFICATION AS TO FORM/LENGTH.....	14
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) .....	14
CERTIFICATION AS TO APPENDIX .....	15
APPENDIX .....	100

## CASES CITED

<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971) .....	11
<i>State v. Coolidge</i> , 173 Wis. 2d 783, 496 N.W.2d 701 .....	8
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 .....	11
<i>State v. Johnson</i> , 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990) .....	8
<i>State v. Payette</i> , 2008 WI App 106, 313 Wis. 2d 39, 756 N.W.2d 423 .....	8, 9
<i>State v. Tiepelman</i> , 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 .....	8, 9
<i>State v. Travis</i> , 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491 .....	8
<i>Townsend v. Burke</i> , 334 U.S. 736 (1948) .....	8
<i>Welch v. Lane</i> , 738 F.2d 863 (7 <sup>th</sup> Cir. 1984) .....	9, 10

## **ISSUES PRESENTED**

1. Did the circuit court err in concluding that its reliance upon inaccurate information, specifically the State's incorrect assertion that Mr. Coffee had been involved in another armed robbery prior to the offense in question, was harmless?

While the circuit court agreed with Mr. Coffee that the State presented inaccurate information at sentencing and that the court relied upon that information, it concluded that the sentence was supported by other facts in the record and that the error was therefore harmless. The circuit court denied the postconviction motion accordingly.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Mr. Coffee welcomes oral argument if the court would find it helpful to deciding the issue. Publication is not necessary, as the issue involves the application of well-settled case law.

## **STATEMENT OF FACTS**

### *Criminal Charges, Plea & Sentencing*

On Tuesday, November 10, 2015, police received a report of two armed robberies between North 25<sup>th</sup> and 28<sup>th</sup> Streets in the City of Milwaukee. Mr. Coffee and his co-defendant, Antonio Hazelwood, were immediately apprehended as suspects. (1). Mr. Coffee was very cooperative with police. He provided a complete confession to the crimes, and also gave a statement against Mr.

Hazelwood. (1). As a result of his behavior, Mr. Coffee was charged in Milwaukee County Case Number 15-CF-4965 with the following three counts:

- Count 1: Armed robbery, party to a crime, contrary to Wis. Stat. §§ 943.32(2) and 939.05;
- Count 2: Attempted armed robbery as party to a crime, contrary to Wis. Stat. §§ 943.32(2), 939.32 and 939.05;
- Count 3: First-degree recklessly endangering safety as party to a crime contrary to Wis. Stat. §§ 941.30(1) and 939.05.

(1).

On June 6, 2016, Mr. Coffee entered a guilty plea to all three counts in the criminal complaint. (6, 20). On June 23, 2016, the case proceeded to sentencing, the Honorable Frederick C. Rosa presiding. During the sentencing hearing, the State discussed Mr. Coffee's prior criminal record of two misdemeanor convictions. (42:9). The State also told the court that Mr. Coffee had been arrested for a similar armed robbery in December 2011, noting that it was never formally prosecuted. (42:9).

While pronouncing sentence, the court referenced the State's assertion about Mr. Coffee's prior arrest history and the armed robbery allegation. The court cited Mr. Coffee's "pattern" of criminal conduct when ordering sentence. (42:22-23). The court issued consecutive prison sentences on each of the three counts, as follows:

- Count 1: 4 years initial confinement, 3 years extended supervision;
- Count 2: 2 years initial confinement, 3 years extended supervision, consecutive to count one;
- Count 3: 5 years initial confinement, 3 years extended supervision, consecutive to counts one and two.

In total, Mr. Coffee was ordered to serve thirteen years initial confinement and nine years of extended supervision. (20). The court made Mr. Coffee eligible for the Challenge Incarceration Program (CIP) and for the Substance Abuse Program (SAP), but only after he has served the first eight years of the initial confinement portion of his sentence. (42:28).

#### *Postconviction Motion & Decision*

Following the filing of his notice of intent to seek postconviction relief, undersigned counsel was appointed to represent Mr. Coffee. A postconviction motion<sup>1</sup> was ultimately filed on behalf of Mr. Coffee. (27). The motion alleged that the State's assertions regarding a prior robbery

---

<sup>1</sup> In his postconviction motion, Mr. Coffee requested, in the alternative, that the circuit court modify his sentence to a total of eleven years initial confinement and eleven years extended. (27:8-9). The basis for this request was that while the court ordered Mr. Coffee service thirteen years confinement, the court also allowed entry into sentence-reducing prison programs after serving eight years. Due to DOC policy, Mr. Coffee is not eligible for the program until he is within three years of his release date. (27:8-9). As Mr. Coffee does not dispute that the court reasonably exercised its discretion in denying his request for a sentence modification, he is not appealing on this issue.

arrest were misleading and that he was deprived of his constitutional due process right to a fair sentencing hearing as a result. (27:6-7). In support of his motion, Mr. Coffee detailed the State's sentencing remarks:

What's alarming from the State's prospective because of the nature of this offense that's in front of the Court is that December 2011 there was an armed robbery case that was sent to my office. That was a no process.

So what the defendant has shown here with his past criminal conduct, not only is there a weapon's related offense, but there was something that triggered a law enforcement investigation and reviewed by my office for offenses by a title similar in nature to this.

(42:9).

Mr. Coffee's postconviction motion argued that this information was inaccurate and misleading, pointing to his Criminal Information Bureau (CIB) arrest history report which contained no entry from an alleged armed robbery arrest stemming from a December 2011 incident. (27:10-37). Mr. Coffee asserted that the State's claim that he was potentially responsible for another armed robbery prior to the incident before the court was incorrect. (27:6). Therefore, he argued, the first prong of the *Tiepelman* test had been satisfied.

Mr. Coffee then turned his attention to the second prong of the test, whether the sentencing court relied upon the information in question. (27:7). To support this proposition, Mr. Coffee pointed directly to the court's language and reference to the alleged armed robbery arrest in the State's sentencing remarks. (27:7). The court opined:

So you have got some misdemeanor cases; one successful probation, one unsuccessful probation. You have got a couple of police contacts; one significant concern because it sounds like it was an armed robbery which is what these offenses are.

So you basically are engaging in behavior that is kind of getting more serious. Domestic violence by itself is natured as assaultive behavior, meaning violence against another human being.

But these other things are violence and property crimes, and I don't know what else to call it. So that pattern or your behavior or undesirable behavior is escalating. I don't know what's going on in your head causing you to make these decisions?

(42:22-23). Mr. Coffee argued that these remarks established that the court considered the prior robbery allegation and that it impacted the way the court viewed the case. (27:7). It was then up to the State, to prove that there was “no reasonable probability” that the inaccurate information contributed to the outcome – essentially that it is clear beyond a reasonable doubt that the sentence would have been the same without the error. (27:7) (citing *Payette*, 2008 WI App at ¶ 46; See also *Travis* at ¶ 86)).

The court ordered briefing in the matter and the State ultimately disclosed, as an exhibit to its response, the police reports upon which its assertions were based. (31:4-11). Those reports established that the 2011 incident, regardless of Mr. Coffee's involvement, was not an “armed robbery.” The documents outlined a report of a “robbery with force” during which two African-American men approached a third young man outside of a residence, punched the man in the face and took his cellphone. (31:4-11). No weapon was brandished or



alleged to have been used in the robbery and no threat of a weapon was made. (31:4-11).

More importantly, the reports attached to the State's motion made it clear that the victim of the robbery, as well as a second witness, explained to police that the two men who were arrested for the offense were not the people responsible for the robbery. (31:4-11). Mr. Coffee was released immediately and never charged.

Following receipt of all of the briefs, the circuit court issued a written decision in this matter denying Mr. Coffee's request for a new sentencing hearing. (35). The court concluded that while Mr. Coffee had successfully established both that the State presented inaccurate information and that the court relied upon this information during the sentencing hearing, "this error was harmless because it did not materially affect the court's sentencing decision." (35:4). The court stated:

Even without information about the December 2011 police contact, the fact that the defendant *used* a weapon in the commission of the offenses in this case *and that he shot one of his victims* would have led the court to the same conclusion that he was "engaging in behavior that is getting more serious" and that his "pattern...of undesirable behavior is escalating.

(35:4).

Mr. Coffee now appeals.

## **ARGUMENT**

- I. Mr. Coffee is entitled to resentencing because the circuit court relied on the State's inaccurate assertions regarding his prior criminal record and there is a reasonable probability that this reliance impacted the sentence imposed.

At Mr. Coffee's original sentencing hearing, the State argued that his behavior in the instant case (allegations surrounding two armed robberies) was more concerning and aggravated because Mr. Coffee had previously been involved in an armed robbery in 2011 that was never charged. (42:9). The sentencing court referenced its belief that Mr. Coffee had been involved in the prior armed robbery when ordering sentence, finding that the repeated similar conduct showed a pattern and that his criminal behavior was escalating. (42:22-23).

The State's assertion that Mr. Coffee had been involved in a prior armed robbery was misleading and inaccurate. In 2011, Mr. Coffee and another man were arrested as suspects in a strong-arm robbery they did not commit, and there was no allegation that a weapon involved in any event. (31:4-11). Shortly after Mr. Coffee and his friend were arrested for the offense, police met with the victim and a second witness. (31:4-11). They explained to police that the two men who had been arrested did not commit the crime and that one of the men was actually an acquaintance of theirs. (31:4-11). Mr. Coffee was immediately released from police custody.

On review of Mr. Coffee's postconviction motion, the circuit court agreed the information presented by the State regarding the 2011 armed robbery was inaccurate and had been relied upon by the court at the sentencing hearing. (35:3-

4). Even still, the circuit court argued, the error was harmless because there were other facts in the record supporting the sentence ordered in this case. (35:4).

Mr. Coffee contends that the circuit court's conclusion regarding harmlessness runs contrary to the law, as the question is not whether there are other facts that could support the sentence ordered, but rather whether there is any reasonable probability that the outcome would have been different had the inaccurate information not been presented. *See State v. Travis*, 2013 WI 38, ¶ 86, 347 Wis. 2d 142, 832 N.W.2d 491; *See also State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423).

Based on the record and the circuit court's remarks at sentencing, Mr. Coffee argues that one cannot conclude beyond a reasonable doubt that the sentence and outcome of the case would have been the same absent the presentation of the inaccurate information regarding Mr. Coffee's involvement in a prior uncharged armed robbery.

A. Legal principles and standard of review.

An individual subject to a criminal penalty following conviction has a constitutionally protected due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1, citing *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (citation omitted), *Townsend v. Burke*, 334 U.S. 736 (1948). Whether an individual has been denied this due process right by the sentencing court is a constitutional question the appellate court reviews de novo. *Tiepelman*, 2006 WI 66 at ¶ 9 (citing *State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993)).

When a defendant alleges that the court relied on inaccurate information at the time of sentencing when deciding on the appropriate penalty, the defendant must sufficiently establish that (1) the information was in fact inaccurate and (2) that the circuit court relied on the inaccurate information. *Tiepelman*, 2006 WI 66 at ¶¶ 9. If the defendant meets that standard, the burden shifts to the State to establish that the error was harmless. *Id.* If there is no reasonable probability that the inaccurate information contributed to the outcome,” then the error was harmless and a new sentencing hearing is not required. *See State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423). However, if the reliance on the inaccurate information did in fact affect the ultimate sentence, then the court must vacate the original sentence and order a new sentencing hearing.

The right to a new sentencing hearing is based on a defendant’s constitutional due process right to a fair sentencing in which “the court goes through a rational process of selecting a sentence based on relevant considerations and accurate information.” *Tiepelman*, 291 Wis. 2d 179, ¶ 26 (quoting *Welch v. Lane*, 738 F.2d 863, 864-865 (7<sup>th</sup> Cir. 1984)).

- B. The circuit court erred in concluding that its reliance on the State’s inaccurate assertions regarding Mr. Coffee’s criminal history was harmless.

In denying Mr. Coffee’s postconviction motion seeking resentencing, the circuit concluded that even though Mr. Coffee had proven that the State’s presentation of his criminal history was inaccurate and that the court did rely on the misrepresentations at the sentencing hearing, that the reliance was harmless. (35:4). In its decision, the circuit court

referenced the passage from the sentencing hearing in which it had made reference to the prior armed robbery allegation. (35:4). Picking choice words from that passage, the circuit court found that it could have made all of the same conclusions regarding Mr. Coffee's character and the danger he posed to the community without any knowledge of the prior armed robbery allegation. (35:4).

The circuit court's conclusion misapplies the law, as the issue of harmless error in the context of a claim of inaccurate information at sentencing is not simply whether there are other facts in the record that support the sentence. If that were the law, it would be hard to imagine any scenario in which the court could not point to underlying facts in the record to support the sentence ordered unless the misunderstanding of the sentence was structural in nature. "[T]he 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." *U.S. ex rel. Welch v. Lane*, 739 F.2d 863 (7<sup>th</sup> Cir. 1984); *See also Tiepelman* at ¶ 14).

Instead, the State must establish and the court must conclude that there is "no reasonable probability that [the inaccurate information] contributed to the outcome." *Payette*, 2008 WI App 106 at ¶ 46. In other words, the court must conclude that it is clear beyond a reasonable doubt that the sentence would have been the same at the time of sentencing without the reliance on inaccurate information. *Payette*, 2008 WI App 106 at ¶ 49. This is very different than simply pointing to other facts in the record that tend to support a similar sentence.

Further, Wisconsin courts have long emphasized the importance of the link between the facts relevant to a particular defendant and case and the ultimate sentence imposed. Circuit courts are charged with the duty of imposing a sentence which “call[s] 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, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197, citing *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). In doing so, the court must identify the objectives of the sentence on the record and describe how the facts at issue are relevant to these objectives. *Id.*, 2004 WI 42 at ¶ 40. “Courts must explain, in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives.” *Id.* at ¶ 42.

The Supreme Court of Wisconsin’s holding in *Gallion* mandates that a sentencing court fashion a sentence that is appropriate under the circumstances and supported by the facts in the record at the time of sentencing. *Id.* In this case, the sentencing court did just that – it fashioned a sentence that was supported by facts in the record and one of those key “facts” was that it inaccurately believed Mr. Coffee had been involved in a similar crime, an armed robbery, a few years earlier.

The sentencing court ordered that Mr. Coffee serve thirteen years initial confinement and nine years extended supervision, and supported that conclusion by pointing to the seriousness of the offense compounded with Mr. Coffee’s purported criminal history, which the court at that time believed included another allegation of armed robbery. When ordering sentence, the court specifically noted:

You have got a couple of police contacts; one significant concern because it sounds like it was an armed robbery which is what these offenses are.

(42:22). The sentencing court continued its assessment of Mr. Coffee's character and the danger he poses to the community, concluding that Mr. Coffee had established a "pattern" of violence and property crimes. (42:22-23).

Simply pointing to other facts in the record that could support a similar outcome ignores that all of those same aggravating facts were present and considered by the court at the time the initial sentence was ordered. Now, however, one major aggravating factor has been removed from consideration. For these reasons, it is impossible for one to reasonably conclude that the sentence would have been identical had the State not misrepresented Mr. Coffee's prior criminal record. Therefore, Mr. Coffee is entitled to a new sentencing hearing.

## **CONCLUSION**

For the foregoing reasons, Mr. Coffee respectfully requests that this court reverse the judgment and order of the circuit court and remand this matter to the circuit court for a new sentencing hearing.

Dated this 20<sup>th</sup> day of February, 2018.

Respectfully submitted,

NICOLE M. MASNICA  
Assistant State Public Defender  
State Bar No. 1079819

Office of the State Public Defender  
735 North Water Street, Suite 912  
Milwaukee, WI 53202-4116  
(414) 227-4805  
masnican@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 2,861 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 20<sup>th</sup> day of February, 2018.

Signed:

---

Nicole M. Masnica  
Assistant State Public Defender  
State Bar No. 1079819

Office of the State Public Defender  
735 North Water Street, Suite 912  
Milwaukee, WI 53202-4116  
(414) 227-4805  
masnican@opd.wi.gov

Attorney for Defendant-Appellant

## **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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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 20<sup>th</sup> day of February, 2018.

Signed:

---

Nicole M. Masnica  
Assistant State Public Defender  
State Bar No. 1079819

Office of the State Public Defender  
735 North Water Street, Suite 912  
Milwaukee, WI 53202-4116  
(414) 227-4805  
masnican@opd.wi.gov

Attorney for Defendant-Appellant

# **A P P E N D I X**

**I N D E X  
T O  
A P P E N D I X**

	Page
Order Denying Motion for Postconviction Relief, Dated October 30, 2017.....	101-105