STATE OF WISCONSIN

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

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

REPLY BRIEF OF THE 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

CASES CITED

STATUTES CITED

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.

In its response, the State opposes Mr. Coffee's appeal on two grounds. First, the State argues that Mr. Coffee forfeited his right to challenge the circuit court's consideration of inaccurate information at sentencing because he did not contemporaneously object to the State's assertions regarding the prior robbery. (State's Brief, 6). The State further argues that because trial counsel failed to object, the matter should have been brought as a claim of ineffective assistance of counsel. Second, the State argues that Mr. Coffee's motion fails on the merits, concluding that any reliance on the inaccurate assertions was harmless because the sentence imposed would have been the same. (State's Brief, 8). Woven into this argument is the State's assertion that the only inaccurate information that was presented was that the prior robbery did not involve a weapon. (State's Brief, 8-11). Mr. Coffee disagrees with the State's arguments on all grounds.

A. Mr. Coffee was not required to raise his claim that he was improperly sentenced based on inaccurate information as one of ineffective assistance of counsel.

Contrary to the State's position, Mr. Coffee need not raise his request for a new sentencing hearing under the rubric of ineffective assistance of counsel. The State alleges that Mr. Coffee forfeited his constitutional right to be sentenced upon

accurate information because neither he, nor trial counsel objected to the State's remarks. In support of his claim, the State cites a string of cases where courts have held that the forfeiture rule applies, including ***State v. Pinno***, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207; ***State v. Torkelson***, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511, and ***State v. Leitner***, 2001 WI App 172, ¶ 41, 247 Wis. 2d 195, 633 N.W.2d 207. (State's Brief, 6-7). The State ignores, however, that none of these cases, including ***Leitner***, involve requests for resentencing on the basis that the court considered inaccurate information at sentencing, and are therefore, not directly on point.

Moreover, the State broadly contends that "[t]he forfeiture rule applies to claims that the court considered improper matters at sentencing," implying that ***Leitner*** stands for the general principle that a resentencing request based on reliance on inaccurate information must be raised as ineffective assistance of counsel claims. (State's Brief, 7). This interpretation of ***Leitner*** is inappropriate.

Unlike the constitutional claim raised in this case, in ***Leitner***, this Court considered whether a sentencing court violated a legislatively-enacted statutory provision - the expunction statute, Wis. Stat. §973.015 - by relying on an improper factor when it considered expunged convictions and their underlying conduct at sentencing. ***Leitner***, 2001 WI App 172, ¶¶38-47. Thus, the issue in ***Leitner*** involved statutory interpretation, rather than the constitutionally-protected right to be sentenced based on accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

Additionally, not one of the cases setting forth the analysis for resentencing requests based upon reliance on

inaccurate information required that trial counsel object to the inaccurate information at sentencing or that the claim be raised as one of ineffective assistance of counsel. Specifically, in ***Tiepelman***, the Wisconsin Supreme Court concluded that the framework under which these constitutional sentencing claims should be assessed is *not the ineffective assistance of counsel rubric*, but rather the three-prong analysis it had created in ***State v. Lechner***, 217 Wis. 2d 392, 576 N.W.2d 912 (1998). ***Id*** at ¶¶ 21-23. The ***Tiepelman*** court held that the court of appeals applied the wrong standard when holding that Mr. Tiepelman had not established that he was *prejudiced* by the presentation of inaccurate information.

In explaining its holding, the Wisconsin Supreme Court cited a number of Wisconsin appellate decisions dealing with inaccurate information at sentencing hearings. One of those cases was ***State v. Anderson***, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998). ***Tiepelman*** at ¶¶ 22-23. Notably, when the Wisconsin Supreme Court referenced the court of appeal's decision in ***Anderson***, it opined that while the court of appeals had reached the correct decision's, its reasoning came "perilously close to conflating it analysis of the due process challenge with the claim of ineffective assistance of counsel." ***Id*** at ¶ 23. Therefore, the State's proposition that Mr. Coffee's claim is one that must be brought under the context of a claim of ineffective assistance of counsel or deemed forfeited is contradicted by the ***Tiepelman*** holding.

Moreover, ***Tiepelman*** similarly involved reliance upon inaccurate information regarding a defendant's criminal record, as the sentencing court believed that Mr. Tiepelman to have over twenty prior criminal convictions, when in fact, he had actually been charged with twenty criminal offenses, but

convicted of only five. ***Id*** at ¶ 6. It does not appear from the decision's background summary that there was a contemporaneous objection at the time of sentencing, nor was the claim raised on appeal as one of ineffective assistance of counsel. ***Id*** at ¶¶ 5-7. Instead, the postconviction claim and subsequent appeal alleged that the circuit court violated Mr. Tiepelman's constitutional due process right to a sentence based on accurate information regarding his criminal record. ***Id*** at ¶ 7-8.

For these abovementioned reasons, there was no requirement that Mr. Coffee contemporaneously object to the State's inaccurate recitation of his record or that he raise this claim as one of ineffective assistance of counsel. Therefore, he has not forfeited his right to challenge the constitutionality of his sentence.

B. The circuit court's reliance on inaccurate information regarding Mr. Coffee's prior criminal record significantly impacted his sentence, and therefore, the error was not harmless and a new sentencing hearing is required.

In its response brief, that State contends that any reliance by the court on inaccurate information was harmless, concluding that the sentence would have been the same. (State's Brief, 9). In support of this conclusion, the State argues that the only inaccurate information presented by Mr. Coffee is that the prior arrest did not involve use of a weapon and therefore, was the only an allegation of simple robbery. (State's Brief, 9). It follows, according to the State, that the error was harmless because the mistake in the prior robbery being incorrectly deemed an armed robbery was only a "small

part of the court's overall explanation of its sentence." (State's Brief, 10).

1. The State's assertion that the only inaccurate information presented at sentencing was that the 2011 robbery involved a weapon when it, in fact, did not improperly distorts what the State represented at sentencing and the actual facts underlying the robbery report.

In its response, citing ***State v. Allen***, 2017 WI 7, ¶ 30, 373 Wis. 2d 98, 890 N.W.2d 245, the State argued that it was not error for the court to rely on the allegation of the robbery against Mr. Coffee because the court can consider as relevant any uncharged or unproven offenses. (State's Brief, 9, 11).

In making this assertion, the State is distorting the holding in ***Allen*** and ignoring the principle behind the decision. While the ***Allen*** court and others before it have concluded that a sentencing court can consider uncharged and unproven offense when ordering sentence, the purpose for permitting this exercise is so that the court can acquire the "full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Allen***, 2017 WI 7, ¶ 45. This means that all prior wrongs are relevant at sentencing, even if they were not be proven beyond a reasonable doubt – not that all prior allegations, including those of which a defendant was innocent, are aggravating factors at sentencing. A prior allegation of bad conduct is only material to sentencing if it is reliable, and here, it is definitively not.

In the instant case, the State alleged at sentencing that Mr. Coffee had been arrested for a prior armed robbery in 2011, but noted it was deemed a "no prosecution" by its office. (42). The State made this reference to support its position that Mr. Coffee had bad character and had likely engaged in similar serious criminal conduct in the past. Specifically, the State remarked:

> 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).

By leaving out key information about Mr. Coffee's arrest and subsequent release from custody, the State created an inaccurate picture of what occurred.[1] Per the police reports regarding the incident, the victim was approached by two young men who punched him in the face and took his wallet. (31:7). The victim's brother also witnessed the incident. After the theft, the victim reported the incident to police, with the call occurring at 1:31 p.m. (31:7). The victim gave a general description of the car associated with the robbers. (31:7). After taking the report, the officer canvased the area in his squad and spotted a car matching the description parked

[1] The State's version of the 2011 robbery complaint and Mr. Coffee's subsequent arrest is inaccurately summarized in the State's response brief. (State's Brief, 11). The State writes that the victim reported to police that he witnessed "the two men who robbed him go into a house" and that Mr. Coffee was found in that house. (State's Brief, 11). This is not how the report and arrest unfolded. (31:4-14).

nearby. (31:8). The victim was then picked up and taken out in a squad car to drive to the area of the vehicle. The victim stated that he could not be sure it was the same car. (31:8).

While driving back to the victim's home, he saw two black men entering a house from a distance, and the victim told the officer that these men looked like the ones who had robbed him. (31:8). The victim was dropped off and the police made contact at the home and arrested the two men inside. (31:8).

The following day, police returned to the victim's home to conduct a photoarray identification and the victim and his brother (an eyewitness to the robbery) informed police that Mr. Coffee and the other man arrested for the robbery were not the individuals who committed the crime. (31:9-10). The victim explained once he saw the men's faces as they were being escorted from the home, he knew that they were not the men who had robbed him. (31:9-10). In fact, the victim personally knew one of the two by name and said definitively that they did not commit the crime. Mr. Coffee and the other man were released from custody immediately. (31:9-10).

The State contends that while "[t]he victim and his brother later said that Coffee and the other man were not the people who had performed the robbery…, [i]t is certainly possible to believe the victim's initial report that Coffee robbed him over his later retraction." (State's Brief, 11). Therefore, according to the State, this information is not inaccurate.

Not only does the State's conclusion imply that the victim lied in its report that Mr. Coffee did not rob him, it does so with absolutely no support for this accusation. Moreover, the summary of the arrest that was provided to the

court at the sentencing hearing did not include information that the victim and another eyewitness stated that Mr. Coffee was not the individual who committed the robbery or how it came to be that he was accused of the crime. Instead, the court was left with the impression that police believed Mr. Coffee to be involved in an armed robbery in 2011, sent it to the prosecutors office for charging, but that there was not enough evidence to support charges against him.

Tiepelman and its progeny stand for the principle that all criminal defendant's found guilty of an offense have a constitutional due process right to be sentenced upon accurate information. ***Tiepelman***, 2006 WI 66, ¶ 9; *See also* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990); ***United States v. Tucker***, 404 U.S. 443, 447 (1972); ***Townsend v. Burke***, 334 U.S. 736 (1948); ***United States ex rel. Welch v. Lane*** 738 F.2d 863, 866 (7th Cir. 1984). Here, the State's representations at sentencing created an inaccurate picture of Mr. Coffee's prior arrest record. This is evidenced not only by its sentencing remarks, but also by the court's statements at sentencing and in its written decision ruling on the postconviction motion. Even though it ultimately denied Mr. Coffee's motion, the circuit court wrote that the police report outlining the 2011 shows that not only was Mr. Coffee not arrested for a robbery involving a weapon, "more significantly, he apparently was not involved in the offense." (35:3-4). That is the reasonable conclusion any unbias factfinder would reach upon reviewing those reports, and therefore, the entirety of the State's references to the 2011 arrest was inaccurate as a matter of law.

2. The court's reliance on the inaccurate summary of Mr. Coffee's 2011 arrest was not harmless, and the State fails to prove otherwise.

As discussed in the previous section, the State takes the position that the only inaccurate information provided about the 2011 arrest by the State was that the arrest did not actually involve a weapon. While this court reviews the question of harmlessness *de novo*, it is important to consider how the circuit court viewed the allegedly inaccurate information at the time of sentencing and how it interprets the correction of the inaccurate claim because the analysis calls for an inspection of whether the court would have ordered the same sentence had they received the correct information at the outset. *See* ***Tiepelman***, 2006 WI 66 at ¶ 9; ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

Here, the circuit court made it clear in both its remarks at sentencing and in the decision that it believed at the time of sentencing that Mr. Coffee was likely involved in past conduct alleged to have been an armed robbery. Upon reviewing the associated police reports in the postconviction stage, the circuit court opined that the State's attempt to rely on those reports to show that the information provided at sentencing was not inaccurate was "problematic, because the report shows that the defendant was arrested for a *strong arm* robbery – no weapon was involved – and more significantly, he apparently was not involved in the offense." (35:3-4). The court then acknowledged that it did in fact "consider[] the December 2011 incident during its sentencing decision," but ultimately it wasn't the primary focus when ordering sentence. (35:4).

For the State to satisfy the harmless error burden, it must demonstrate "that the error did not affect the circuit court's selection of sentence; that there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." ***State v. Travis***, 2013 WI 38, ¶ 86, 347 Wis. 2d 142, 832 N.W.2d 491. The State's fails to meet this burden.

In support of its claim that the error was harmless, the State writes, "It is unlikely that the Court would have given Coffee a different sentence had it know his previous arrest did not involve a weapon." (State's Brief, 9). The State then goes on and picks snippets of the court's sentencing remarks in an effort to minimize the effect the prior arrest had on the sentence. (State's Brief, 9-10). The State, however, fails to address the circuit court's acknowledgement at sentencing that it found the 2011 robbery important. The court opined:

> 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.

(42:22-23). The court specifically says that the it considered it "significant" that Mr. Coffee had previously been involved in an armed robbery, the same crime for which he was being sentenced for the instant case.

Like in ***Travis***, there is nothing in the record here to establish beyond a reasonable doubt that the sentence would have been the same had the court heard an accurate summary of Mr. Coffee's 2011 arrest and subsequent release. "[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 (7th Cir. 1984); *See also* ***Tiepelman*** at ¶ 14). 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 5th day of June, 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 2,841 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 5th of June, 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