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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2292-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVINN D. COFFEE,

Defendant-Appellant-Petitioner.

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 DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. A defendant's right to be sentenced based only upon accurate information is rooted in the due process clause of the U.S. and Wisconsin Constitutions, and is not subject to forfeiture.

In its response brief, the State first asserted that Wisconsin sentencing procedure has built-in protections to ensure that the record can be corrected at the time of the sentencing hearing. Next, the State argued that the application of the forfeiture rule in other types of sentencing claims stands for the principle that all sentencing challenges are subject to forfeiture. Third, the State contends that the fact that none of the cases setting forth the rubric under which inaccurate information sentencing claims are decided hold that these claims are subject to forfeiture does not resolve the issue, and therefore, according to the State, forfeiture applies. Finally, the State concluded that the application of the forfeiture rule in these matters will not negatively impact judicial efficiency.[1]

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[1] Regarding the final two issues, Mr. Coffee addressed these issues at length in his opening brief and those arguments need not be restated here. As the State has not added any new arguments that were not already addressed in the opening brief on these two point, he stands by his earlier conclusions in support of his claim.

A. That defense counsel may correct the record at the time of sentencing says nothing of whether the forfeiture rule applies to inaccurate information sentencing claims.

The State argued that "[b]ecause defendants and their attorneys have…opportunities to address the court at sentencing, there is no reason not to expect them to challenge the presentation of inaccurate information at this time." (State's Response, 9). In support of this position, the State alleged the following:

- Wisconsin Stat. §972.14(2) requires circuit courts to ask defendants, before pronouncing sentence, "why sentence should not be pronounced" and requires courts to give the defendant and defense counsel "an opportunity to make a statement with respect to any matter relevant to the sentence."

- Courts tend to ask the parties early in a sentencing hearing whether they have reviewed a presentence investigation report and whether there are corrections to it.

- Defense counsel can object to an inaccurate information claim either during the sentencing proceeding or at the conclusion of the hearing.

(State's Response, 9).

The State asserts that because these procedural safeguards are in place, forfeiture should apply to any future challenge alleging the sentence was ordered based upon inaccurate information. (State's Response, 8-9).

Coffee disagrees. While the State is correct that the defense may be able to correct certain errors at the time of sentencing, that is not always the case, as evidenced by the facts in this case.

Here, the inaccurate information was not contained in a presentence report. The misrepresentations were presented by the State during its sentencing remarks in support of its request for substantial prison. Neither Coffee, nor defense counsel had notice that the 2011 arrest would be discussed. Notably, the arrest was not noted on Mr. Coffee's Criminal Information Bureau Arrest Report, and there was no CCAP entry. (27:10-38). Thus, preparing for the sentencing hearing in a typical fashion and reviewing his client's official arrest record would not have provided any hint that this matter would be an issue. To deny appellate review of a serious constitutional error like this on the merits because the statutory scheme recognizes the importance of a defendant's right to due process at sentencing

B. That Wisconsin courts have applied the forfeiture doctrine to non-inaccurate information sentencing challenges is irrelevant because those matters do not implicate the same basic constitutional right to be sentenced only upon accurate information.

The State asserts that case law supports the application of the forfeiture doctrine to inaccurate information claims. (State's Response, 10). In its response, the State goes through several cases[2] where the forfeiture doctrine was either implicitly or explicitly used by the reviewing court to dismiss a sentencing claim. Not one of these cases presents a challenge to a sentence on the grounds that materially inaccurate information was considered at sentencing.

The State first points to *Handel v. State*, 74 Wis.2d 699, 247 N.W.2d 711 (1976). *Handel* predated the Seventh Circuit decision in *U.S. ex rel. Welch v. Lane*, 738 F.2d 863, 864-865 (7th Cir. 1984), the case establishing the two-part test by which inaccurate information claims be measured. Thus, its relevance to this inquiry is limited.

[2] One of the cases cited by the State is *State v. Benson*, 2012 WI App 101, ¶17, 344 Wis.2d 126, 822 N.W.2d 484. Mr. Coffee's opening brief discussed the application of *Benson* in this case at length, and the argument need not be restated here. Mr. Coffee relies upon his arguments in the opening brief.

Additionally, *Handel* is not an inaccurate information challenge. There, the defense argued it was improper for the court to consider pending criminal charges when ordering sentence. The defendant did not assert the pending charges inaccurately presented his prior behavior. *Handel*, 74 Wis.2d 699, 701. This court held that the law permitted a sentencing court to consider pending charges, and thus, there was no due process violation. *Id.* at 703-04.

The State next points to *State v. Johnson*, 158 Wis.2d 458, 463 N.W.2d 352 (Ct. App. 1990). The State contends that the court dismissed Johnson's position because he had not objected at the time of sentencing. (State's Response, 12). This is an incorrect reading of the decision. While the court does mention *Handel* and counsel's failure to object, the court does not use this as grounds to deny Johnson's claim and thus, the statement is dicta. *Id.* at 470. The *Johnson* court opined:

> Johnson's attorney reviewed the presentence report prior to sentencing and did not note any objection to it or point the court to any purported inaccuracies. In a similar situation, the supreme court held that where the facts stated in a presentence report "were not challenged or disputed by the defendant at the time of sentencing, we find no abuse of discretion by the sentencing judge [in considering them].

Id. at 470, citing *Handel*, 74 Wis.2d 699, 704.

The reference to *Handel* specifically talks about reviewing the claim under the "abuse of discretion" rubric, as *Handel* was not an inaccurate information challenge. Moreover, the *Johnson* court ultimately applies the *Welch/Tiepelman* analysis in its holding, and concludes that the defendant failed to prove that the recitation of his record in the presentence report "was inaccurate or that the trial court relied on inaccurate information in sentencing him." *Id.* at 470-71.

Pointing to *State v. Mosley*, 201 Wis.2d 36, 45, 547 N.W.2d 806 (Ct. App. 1996), the State's response next asserts that the holding was effectively a decision based on forfeiture even though court did not use that language. The plain language of the holding, however, demonstrates otherwise. In *Mosley*, the defendant challenged assertions of a witness who told the presentence writer that Mosley "was a significant distributor of cocaine base, selling approximately five to ten ounces per week." *Id.* at 44. On appeal, Mosley complained that those statements were "unproven, unsubstantiated and inherently unreliable hearsay." *Id.*

The *Mosley* court concluded that the information at issue was not inaccurate, as Mosley had "on the record…explicitly stated that he was not saying the statements were untrue; he was merely challenging the strength of the evidence to support them." *Id.* at 45. Therefore, because this court has "expressly held that uncharged and unproven offenses may be considered by a sentencing court,"

the sentencing court's consideration of alleged other acts of drug dealing by Mosley was not improper. *Id.* at 45-46.

The State's response also discusses *State v. Samuel*, 2001 WI App 25, 240 Wis.2d 756, 623 N.W.2d 565 (Ct. App. 2000) and *State v. Leitner*, 2001 WI App 172, 247 Wis.2d 195, 633 N.W.2d 207, aff'd, 2002 WI 77, 253 Wis.2d 449, 646 N.W.2d 341. Again, neither *Samuel*, nor *Leitner* involve inaccurate information due process challenges.

In *Samuel*, the defendant asserts procedural error because at sentencing, the court considered private health information presented by the State that the defense was unable to access ahead of the hearing. *Samuel*, 2001 WI App 25, ¶¶41-42. Samuel was not contending that the discussions of the health records were inaccurate, but rather that he should have been allowed access to the records prior to sentencing. *Id.*

In *Leitner*, the defendant challenged the court's consideration of expunged convictions at sentencing. *Leitner*, 2001 WI App 172. There was no claim that evidence of the prior convictions was inaccurate. *Id.* at ¶¶38-41. Therefore, the relevance of the *Samuel* and *Leitner* cases to this matter is minimal, as neither case involved inaccurate information at sentencing claim, and thus, the rights implicated by the errors in those matters were far different than in this case. *See Tiepelman*, 2006 WI 66, ¶¶9-10; *Welch,* 738 F.2d 863, 864-865. For these reasons, the State's

claim that "case law supports the…conclusion…that the forfeiture doctrine applies to Coffee's inaccurate-information claim" is incorrect. (State's Response, 14).

II. Mr. Coffee's due process right to a fair sentencing was violated by the circuit court's reliance on materially inaccurate information at sentencing.

A. If this court finds that Mr. Coffee did not forfeit his right to direct review of his inaccurate information claim, he maintains that under a proper application of the *Tiepelman* test, he would prevail.

A reading of the State's Response would have one believe that the inaccuracy at issue here was that in December 2011, Coffee committed a robbery "by punching the victim in the face rather than using a weapon." (State's Response, 30-31). The State asserts that this difference is meaningless in terms of the sentence ultimately ordered by the court. (State's Response, 30-31). The State wrote:

> …whether Coffee's 2011 arrest was for armed robbery or robbery was not important to the court's overarching point when it discussed the arrest – that Coffee was engaging in escalating criminal behavior. And while the court described the crime of the prior arrest as similar to Coffee's current offense, that remains true even if the previous arrest was for mere robbery.

(State's Response, 30).

We know, however, that while this is part of the problem, the misleading representations were even more troubling because the State implied that Coffee had committed a robbery in 2011 when in fact he did no such thing. Thus, his arrest for a robbery, armed or otherwise, was plainly irrelevant to his character. Instead, evidence of the prior arrest spoke only to the fact that as a young black man with long dreadlocks, Coffee once resembled someone who committed a robbery in December 2011.

While the State ignores this fact in its discussion of the merits of Coffee's claim, the circuit court did not. The court wrote:

> The State's reliance on the December 27, 2011 incident report to diffuse the defendant's inaccurate information claim is problematic, because the report shows that the defendant was arrested for *strong arm* robbery – no weapon was involved – and more significantly, he apparently was not involved in the offense.

(35:3-4) (emphasis in original).

The court went on to acknowledge that it "considered the December 2011 incident during its sentencing decision." (35:4). Thus, Coffee has satisfied the first two prongs of the *Tiepelman* test, and we turn to the question of whether the error was harmless.

The State asserts that the consideration of inaccurate information was harmless because the only inaccuracy was the difference between the 2011 incident being a strong arm robbery rather than an armed robbery. (State's Response, 31-33). It follows, per the State, that because "the court could, of course, properly consider Coffee's arrest when sentencing him," the sentence would have been the same. (State's Response, 30-31). The State points to nothing specific to support its position the sentence would have been identical absent its belief the offense here was not Coffee's first armed robbery.

Instead, the State argues that the court focused primarily on "the defendant's conduct in *this* case, his contribution to the prevalence of gun violence that is threatening the fabric of our community, the impact of his crimes upon the victims and the greater community, his background and rehabilitative needs, and the need to protect the public." (State's Response, 32, citing 35:4). Accepting this position for the sake of argument, each of the considerations listed by the State cannot be excised from the inaccurate information about the prior arrest.

That Mr. Coffee had, per the State's inaccurate representation, previously committed an armed robbery is directly relevant to these factors – specifically, Coffee's contribution to gun violence in the community, to his background, to his rehabilitative needs, and to the need to protect the community. (35:4). It is the State's duty to show, *beyond a reasonable doubt*, that the inaccurate

information regarding the 2011 arrest did not impact Coffee's sentence. *See Travis*, 2013 WI 38, ¶¶73. They cannot do so.

The sentencing proceeding was permeated with references to the arrest. During Mr. Coffee's allocution, the court interjected:

> So Mr. Wesson there says you had a couple of police contacts. No charges but one of them was an armed robbery. Then you had these domestic violence situations. So then you were kind of becoming acquainted with the criminal justice system.
>
> Any reason why those contacts were not enough to get you to kind of think about your associations and your choices that you were making out there?

(42:18).

The circuit court later 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.*
>
> 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 – emphasis added).

The State's misrepresentations the arrest and its relevance to his sentence carried on throughout this sentencing proceeding, and the State has failed to prove that the sentence would have been the same absent the inaccurate information. Therefore, Coffee is entitled to a new sentencing hearing, and he asks this court to remand this case back to the circuit court accordingly. *See Tiepelman* 2006 WI 66, ¶31.

B. If this court finds that Mr. Coffee forfeited his right to direct review and declines to overlook the forfeiture to decide the claim on the merits, he asks this court to find the sentencing court's consideration of inaccurate information plain error under Wis. Stat. §901.03(4).

As the State pointed out in its response brief, if this court concludes Coffee forfeited his right to review of his sentencing claim on the merits, the court may review this claim under the plain error doctrine, codified in Wis. Stat. §901.03(4), which permits "appellate courts to review errors that were otherwise [forfeited] by a party's failure to object." *State v. Jorgensen,* 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77 (citation omitted).

A "plain error" is "a clear or obvious error, one that likely deprived the defendant of a basic constitutional right." *State v. Lammers,* 2009 WI App 136, ¶12, 321 Wis.2d 376, 773 N.W.2d 463, citing *State v. Frank*, 2002 WI App 31, ¶25, 250 Wis.2d 95, 640 N.W.2d 198 (Ct. App. 2001). "[W]here a basic constitutional right has not been extended to an accused," the reviewing court should invoke the plain error doctrine to grant relief. *Id.,* citing *Virgil v. State*, 84 Wis.2d 166, 190-95, 267 N.W.2d 852 (1978); *see also State v. King*, 205 Wis.2d 81, 91, 555 N.W.2d 189 (Ct. App. 1996).

The sentencing court's consideration of materially inaccurate information about Mr. Coffee's arrest record and the significance of the 2011 robbery arrest rise denied him his constitutionally-protected right to a sentence based only upon accurate information. An individual subject to a criminal penalty has a constitutionally-protected due process right to be sentenced based only upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9. A fair sentencing process that conforms to the due process clause of the U.S. Constitution is "one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *Id.* at ¶26 (quoting *U.S. ex rel. Welch v. Lane*, 738 F.2d 863, 864-865 (7th Cir. 1984)). This court has held that if a sentencing proceeding is tainted with false or misleading information as it was in this case, causing an individual to be sentenced based on assumptions that are "materially untrue…[, it] is inconsistent with due

process of law, and such a conviction cannot stand." *Tiepelman*, 2006 WI 66, ¶10 (quoting *Townsend*, 334 U.S. 736, 741).

Here, the error is clear and obvious. As evidenced by the record and acknowledged by the circuit court in its decision on the postconviction motion, while Coffee was arrested in December 2011, it was for a robbery and not an armed robbery, and "more significantly," he was definitively innocent of that offense. Thus, the State's implications that the robbery arrest spoke to Coffee's character and the risk he posed to the community were misleading and materially inaccurate.

This error also deprived Coffee of a basic constitutional right – his right to be sentenced based only upon accurate information – and therefore his sentence is "inconsistent with due process of law." *Tiepelman*, 2006 WI 66, ¶¶9-10. Therefore, this court should invoke the plain error doctrine to grant relief and remand this matter for a new sentencing hearing. *See Lammers,* 2009 WI App 136, ¶12; *Virgil*, 84 Wis.2d 166, 190-95; *King*, 205 Wis.2d 81, 91.

CONCLUSION

For these reasons, Coffee respectfully requests that this Court reverse the decision of the court of appeals and hold that these claims are not subject to forfeiture. He also asks that this court address the merits of his claim and find that he is entitled to resentencing.

Dated this 14th day of August, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 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 14th day of August, 2019.

Signed:

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