STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP1066-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. GRAVELLE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reframes the issues as follows:

1. Is Richard Gravelle entitled to resentencing based on his claim that the sentencing court relied on inaccurate information?

The circuit court said, "No."

This Court should affirm.

2. Did the circuit court fail to soundly apply the *McCleary* and *Gallion* sentencing factors when it sentenced Gravelle for his OWI—6th conviction?

The circuit court did not address this issue because Gravelle did not raise it in his postconviction motion.

If this Court overlooks Gravelle's forfeiture of this claim, it should reject it on the merits.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. This case is appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

INTRODUCTION

Gravelle seeks resentencing based on his claim that the court relied on inaccurate information at sentencing, namely, information regarding the nature of Gravelle's past alcohol treatment. The circuit court soundly exercised its discretion in denying him relief on this claim. Gravelle also seeks, for the first time on appeal, relief from his sentence based on what he believes was the court's erroneous exercise of discretion by misapplying the *McCleary* and *Gallion* sentencing factors. Because Gravelle did not preserve this claim in his postconviction motion, he has forfeited it. In any event, the circuit court soundly applied the sentencing factors here. This Court should affirm.

STATEMENT OF THE CASE

On an afternoon in February 2017, a West Bend police officer pulled Gravelle over for driving 46 mph in a 25-mph zone. (R. 1:1–2.) Gravelle smelled strongly of alcohol and was visibly drunk; a preliminary breath test indicated that his blood alcohol level was .298 percent. (R. 1:1–2.) During the encounter, Gravelle told police that "he was probably around a .27 alcohol level and normally operates around a .40 alcohol level." (R. 1:2.) After he was arrested, Gravelle refused to submit a blood sample. (R. 1:2.) Police obtained a warrant for one, the result of which showed a .257 blood alcohol concentration. (R. 47:5.) DMV records indicated that Gravelle had previously been convicted of OWI on five prior occasions since 1997. (R. 1:2.)

Gravelle pleaded guilty to a count of OWI, 6th offense. (R. 23:1; 46:6.) The circuit court sentenced Gravelle to four years' initial confinement and four years' extended supervision and imposed a fine. (R. 23:1.) It also determined that he was ineligible for the earned release/substance abuse program (SAP). (R. 23:2.)

Gravelle, through counsel, filed a motion for postconviction relief, seeking resentencing based on his claim that the court relied on inaccurate information. (R. 36:1–10.) Alternatively, he sought sentence modification based on a new factor. (R. 36:11–12.) In both claims, Gravelle essentially argued that the circuit court did not factor in his alcohol treatment needs and asked for either eligibility for the SAP or a shorter period of initial confinement. (R. 36:12.) The circuit court denied the motion in a written decision and order. (R. 39.)

Gravelle, proceeding pro se, timely filed a notice of appeal from his judgment of conviction and the order denying postconviction relief. (R. 40.)

ARGUMENT

I. Gravelle is not entitled to resentencing because he cannot show that the court relied on inaccurate information regarding his treatment history.

On appeal, Gravelle renews only his inaccurate information claim; he does not appear to renew his new-factor sentence modification claim. (Gravelle's Br. 14–16.) For the reasons below, Gravelle is not entitled to resentencing.[1]

A. A defendant seeking resentencing based on inaccurate information must prove that the information was inaccurate and that the court actually relied on it.

Whether a court has denied a defendant his due process right to be sentenced based on accurate information is a constitutional question that this Court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

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[1] Gravelle cites one new-factor case, *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, in his brief (Gravelle's Br. 14), but he nevertheless does not appear to develop a new-factor argument. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (this Court will not develop unsupported arguments for a defendant). In any event, the record and Gravelle's brief are devoid of facts that would satisfy the new-factor test. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (stating that a new factor is "a fact or set of facts highly relevant to the imposition of the sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties").

A defendant who requests resentencing based on the sentencing court's use of inaccurate information must demonstrate that (1) the information was inaccurate and (2) the sentencing court actually relied on that inaccurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 20 (citing *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998)). Information is inaccurate when it is "extensively and materially false." *Id.* ¶ 10 (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)); *see also State v. Travis*, 2013 WI 38, ¶ 84, 347 Wis. 2d 142, 832 N.W.2d 491 (stating that courts "must consider whether the sentence is based on a foundation of such materially inaccurate information that the proceedings are lacking in due process").

In considering a sentencing challenge based on allegedly inaccurate information, this Court reviews the entire sentencing transcript to determine whether the court gave explicit attention to inaccurate information and whether the information "formed part of the basis for the sentence." *State v. Alexander*, 2015 WI 6, ¶ 30, 360 Wis. 2d 292, 858 N.W.2d 662 (citations omitted). This Court also may consider the postconviction court's remarks in response to the motion for resentencing. *Id.* (citation omitted).

If a defendant shows actual reliance on inaccurate information, the burden shifts to the State to prove harmless error. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 2, 26.

B. Gravelle cannot shoulder his burden of showing that the court had inaccurate information before it, let alone actually relied on it.

Gravelle alleges that the court relied on three pieces of inaccurate information. First, he claims that the court relied on information that his past treatment efforts were involuntary, when in reality he voluntarily submitted to some of his treatment. (Gravelle's Br. 14–15.) Second, he

claims that the court relied on a belief that his prior treatment efforts were in vain. (Gravelle's Br. 16.) Third, he claims that the court misunderstood his prior record of other crimes, including bail jumping and probation violations, to conclude that he was a danger to the public. "The premise that Gravelle is somehow a danger to the public based on this record of events is just not realistic," he writes. (Gravelle's Br. 16.)

To start, Gravelle's second and third claims do not allege inaccurate information. That Gravelle has had prior treatment yet still committed a sixth OWI and that he had a lengthy prior record were facts in the PSI (R. 17), which Gravelle reviewed and, absent two minor corrections, indicated was accurate (R. 47:2–3, 18). Gravelle simply disagrees with the court's weighing of those facts. But the court was entitled to view his prior treatment as ineffective, given that Gravelle had just committed his sixth OWI.

And the court was entitled to weigh Gravelle's past crimes in assessing Gravelle's character and the need to protect the public. When discussing the danger to the public, the court focused on the danger Gravelle posed based on his OWI in this case and his previous five OWIs. (R. 47:24–25.) Later, in the context of discussing Gravelle's character, the court explained that his committing other crimes, on top of the OWIs, was "very troubling." (R. 47:27.) None of that was inaccurate information; the court was entitled to view his current crimes as dangerous and to express concern that Gravelle had committed multiple other crimes. Gravelle points to nothing in the sentencing transcript to suggest that the court actually relied on any inaccurate information regarding his past criminal record.

As for Gravelle's first claim, he cannot demonstrate that there was inaccurate information before the court regarding his willingness to take part in treatment in the past. To start, the PSI writer indicated that Gravelle had

received alcohol treatment "during past periods of supervision." (R. 17:26.) It listed several programs that Gravelle claimed to have attended, including an inpatient treatment program that Gravelle claimed "was voluntary and he checked himself in." (R. 17:26.) DOC also confirmed that Gravelle enrolled in a three-month residential treatment while he was incarcerated in 2012. (R. 17:26.)

Moreover, during sentencing, both counsel noted that Gravelle had treatment while he was on supervision. (R. 47:7, 13.) Both counsel also opined that his treatment during supervision was likely mandated by his supervising agent. The prosecutor, while arguing that Gravelle's crimes made him a danger to the community, noted that Gravelle reoffended despite having treatment "while he's been on supervision and probably as a direct result of his supervision." (R. 47:7.) Similarly, Gravelle's counsel discussed Gravelle's past treatment and how it shaped her sentencing recommendation. She noted that Gravelle appeared to have participated in treatment during supervision and—while she did not know the extent to which that treatment was voluntary—she assumed, "based on his activity and offenses, his agent mandated him to do those programs." (R. 47:13.)

The overarching point from both counsel was that Gravelle was before the court having committed his sixth OWI after he had engaged in significant treatment. In other words, both counsel discussed their understanding of the nature of his treatment in the context of his risk of reoffending and posing a danger to the public, not as a comment on Gravelle's character or his apparent willingness to go to treatment. In all, that Gravelle participated in past alcohol treatment while incarcerated or on supervision was accurate. Both counsel were entitled to surmise that that treatment was likely a condition of his supervision. None of that was inaccurate information.

But even so, the court did not rely on an assumption that Gravelle's treatment was involuntary in sentencing him. Rather, the court was concerned with the gravity of the offense, as a sixth OWI, and Gravelle's demonstrated risk to the public. On that latter point, it emphasized that Gravelle's legal limit was .02, and he was at .257 when he was stopped. (R. 47:22.) It pointed out that Gravelle told the arresting officer and his lawyer that "he normally operates around a .40," which suggested that Gravelle did not recognize the seriousness of the offense and the danger he posed to the public in drinking and driving. (R. 47:22, 24, 28.)

The court mentioned Gravelle's past treatment only when it was discussing SAP eligibility. The court denied Gravelle eligibility, stating, "I look at the programs you have been in and I look at the fact that you are here, and I don't think it's appropriate to let you out early" through the program. (R. 47:29–30.) Referencing back to its remarks that Gravelle had maintained some sobriety "for a while" since his last offense in 2010 (R. 47:24–25), the court said that "the program you have had so far, maybe it's helped a little bit, but it hasn't really helped in the long run because here you are" (R. 47:30). Indeed, in its postconviction decision, the court confirmed as much: "What mattered to the court was not whether the treatment was voluntary or involuntary, but the fact that the treatment had been unsuccessful in preventing Gravelle from committing his sixth OWI offense." (R. 39:3.)

In all, nothing in the court's discussion of Gravelle's treatment indicates that it assumed Gravelle was an unwilling participant in his past treatment, let alone that that assumption weighed against him. Gravelle is not entitled to relief on this claim.

II. Gravelle forfeited his sentencing-discretion claim; alternatively, it is meritless.

In his postconviction motion, Gravelle sought resentencing based on inaccurate information and, alternatively, sentence modification based on a new factor. (R. 36.) Gravelle never claimed, as he does in his brief to this Court (Gravelle's Br. 5–13), that the circuit court misapplied the *McCleary* and *Gallion* factors in sentencing him. As a result, he has forfeited review of this claim. *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (distinguishing between forfeiture and waiver). Accordingly, this Court may decline to address it. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443–44, 287 N.W.2d 140 (1980) (appellate courts generally decline to address arguments first raised on appeal).

In any event, the circuit court soundly exercised its discretion in sentencing Gravelle. It identified and considered the three primary sentencing factors from *McCleary* and *Gallion*:[2] "Number one, the gravity of the offense. Number two, the need to protect the public. Number three, the character and rehabilitative needs of Mr. Gravelle himself." (R. 47:22.)

As for the gravity of the offense, the court noted that "all OWI cases are grave and serious." (R. 47:23.) It explained that while Gravelle's case was "[n]ot the worst one I have ever seen," it was aggravated because (1) it was a sixth offense, (2) Gravelle's blood test result showed a very

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[2] *See State v. Gallion*, 2004 WI 42, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197 ("In each case, the sentence imposed shall '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.'" (quoting *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W. 2d 512 (1971)).

high alcohol concentration, (3) Gravelle refused to submit to a blood test, and (4) Gravelle stated that he normally "operate[d] at around a .40." (R. 47:24.)

As for the need to protect the public, the court noted that generally, that need was present in any OWI case, and that that need was pressing in Gravelle's case since this was his sixth OWI and Gravelle's alcohol concentration was extremely high. (R. 47:24–25.)

As for Gravelle's character and rehabilitative needs, the court weighed the positives and negatives. On the positive side, Gravelle was 47, well-educated, he could hold down jobs when he was sober, and he accepted responsibility early on in the case and did not delay its resolution. (R. 47:25–26.) On the negative side, Gravelle demonstrated that despite the positives in his life and his responsibilities to his 13-year-old son, he continued to drink and drive. (R. 47:26.) The court also noted that it was troubled that, in addition to the OWIs, Gravelle also had committed bail jumping, had a marijuana violation, and "a couple of batteries and some other things," as well as probation revocations. (R. 47:27.)

In all, the court explained, the need to protect the public from Gravelle potentially reoffending was its foremost concern. (R. 47:28.) Gravelle faced a maximum penalty of ten years' imprisonment and a $25,000 fine. *See* Wis. Stat. §§ 346.63(1)(a), 939.50(3)(g). The court imposed a sentence of eight years' imprisonment (four years' initial confinement and four years' extended supervision) and imposed fines and costs totaling $8672. (R. 47:28.) It also addressed SAP, but it declined to find Gravelle eligible, because it found this case to be "too serious" and it did not want Gravelle to be released early. (R. 47:29–30.)

Nothing in the court's sentencing remarks reflected an erroneous exercise of discretion, and nothing in Gravelle's

brief compels a different conclusion. Gravelle primarily argues that the court weighed the aggravating factors too heavily and his mitigating characteristics too lightly. (Gravelle's Br. 6–7.) But the court was entitled to weigh those factors as it did. As it explained, the bad outweighed the good in this case and created a need to protect the public, justifying Gravelle's sentence.

Gravelle complains that the court placed too much emphasis on his remarks to police that he could normally function with a .40 BAC and misinterpreted it as boasting, when Gravelle's intention was to simply tell police that he did not need medical treatment. (Gravelle's Br. 8–10.) But the court did not take Gravelle's statement as a boast. Rather, it reflected Gravelle's cluelessness: Gravelle was legally barred from driving over .02. That Gravelle drove while at .257 BAC and expressed to police that he "normally operates" around a .40 demonstrated that Gravelle was well aware he was driving while significantly intoxicated and that he did not appreciate that, with five prior OWIs, he could not drink and drive, period.

Finally, Gravelle accuses the sentencing court of enhancing his punishment—through the length of his sentence, the fine, and the denied eligibility for SAP—because he is an alcoholic. (Gravelle's Br. 10–13.) This claim is wholly baseless. As explained above, the court addressed the sentencing factors and set forth its reasoning why it was imposing the eight-year sentence, the fine, and why it was denying SAP eligibility. In a nutshell, it imposed its sentence to drive the point home to Gravelle that his crime was serious and he could not drink and drive. The court imposed the fine and denied SAP eligibility for the same reason. Contrary to Gravelle's claims (Gravelle's Br. 11–13), the court did not express that Gravelle was an incurable alcoholic. To the contrary, it recognized that Gravelle had periods where he remained sober and did well. (R. 47:25–26.)

It also expressed hope that Gravelle would get counseling and treatment while on supervision. (R. 47:30.)

In all, Gravelle is not entitled to relief on his sentencing claims.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 3rd day of October, 2018.

Respectfully submitted,

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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 2,848 words.

_____
SARAH L. BURGUNDY
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I hereby certify that:

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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 3rd day of October, 2018.

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