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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP001694-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VAYLAN G. MORRIS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and from an Order Denying Postconviction Motion, Entered in the Milwaukee County Circuit Court, the Honorable Janet Protasiewicz Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Was Mr. Morris deprived of his constitutionally-protected due process right to a fair sentencing hearing when the State presented inaccurate information related to the death of the infant child, O.M., at sentencing?

The circuit court held that Mr. Morris failed to establish by clear and convincing evidence that the information presented by the State at sentencing constituted inaccurate information, but that even if it had, the error was harmless because the court did not consider that information in sentencing Mr. Morris.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Morris welcomes oral argument on this issue if the court would find it helpful to deciding the question posed by this appeal. This matter involves the application of well-established legal principles, and therefore, publication is not necessary.

STATEMENT OF FACTS

The Death of O.M.

On November 25, 2015, emergency personnel responded to a call reporting that an infant, O.M., DOB: 10/1/2015, was not breathing. (1). Her parents, Monica Gonzalez and Vaylan Morris, were present at

the home and admitted to police that they had smoked "K2" (synthetic marijuana) that day prior to falling asleep next to their daughter in bed. (1). When they awoke, they discovered O.M. laying between them and non-responsive. (1). The nearly three-month old baby was unable to be revived and was pronounced dead at the scene. (1).

An autopsy was performed by Dr. Brian Linert of the Milwaukee Medical Examiner's Office. Following the receipt of the results of the toxicology tests of O.M., Dr. Linert concluded that the cause of death was "undetermined." (30). The autopsy and extensive toxicological testing revealed that there was a detectable level of a chemical compound known on the street as a type of K2 in O.M.'s stomach contents. The chemical compound, however, was not found anywhere in O.M.'s blood or nervous system. (30). Therefore, Dr. Linert was able to conclude within a reasonable degree of medical certainty that O.M.'s possible ingestion of the chemical "did not play a role" in her death. (30).

In addition, Dr. Linert determined that, while it was reported that Mr. Morris and Ms. Gonzalez were sleeping in the same bed with the child at the time of her death, "O.M.'s body did not reveal any signs of suffocation or that either of the adults who were reported to have been sleeping in the same bed with O.M. laid over her body, causing the death." (30). Dr. Linert also concluded that while co-sleeping may have played some role in the death of O.M., as there is a correlation between co-sleeping and an

increased risk of sudden infant death, "the medical community does not know what causes sudden infant death to occur more frequently in cases of co-sleeping, as it is not necessarily related to suffocation" of the child. (30).

During the investigation, Mr. Morris's clothing was tested for evidence of overlay. (39:9-11). Twelve samples from the back of Mr. Morris's sweatshirt were tested for O.M.'s DNA to determine if the child's saliva or contact DNA were present from being pressed against him while they slept. (39:9-11). O.M.'s DNA was not detected on any of the samples, which revealed no major DNA contributor other than Mr. Morris. (39:9-11).

The Criminal Charges

Dr. Linert discussed the findings of the autopsy and toxicological testing with Deputy District Attorney Matthew Torbenson in detail prior to the matter being charged, and in July 2016, the Milwaukee County District Attorney's office filed charges against both parents of one count of second-degree recklessly endangering safety as party to a crime, contrary to Wis. Stat. §§941.30(2), and 939.05. (1; 39). On September 15, 2016, Mr. Morris entered a guilty plea as charged. (7; 47). As part of the plea negotiations, the State recommended that Mr. Morris be sentenced to prison, with the ultimate length of the sentence to be determined by the court. (7).

The Sentencing Hearing

Mr. Morris was sentenced on October 5, 2016. In his sentencing remarks, the prosecutor (Torbenson) discussed the death of O.M. in detail. Deputy D.A. Torbenson asserted that according to his conversations with the medical examiner handling the matter (Dr. Linert), there were no overt signs that O.M. died as a result of suffocation observed, but that this cause of death should not be ruled out because "in cases of overlay, there are often no signs that the child has been suffocated." (48:8-9). The sentencing court then inquired that if it was not suffocation that killed O.M., what else had done it. (48:9). Deputy D.A. Torbenson replied directly, stating: "The synthetic marijuana in the child's system." (48:9). He continued:

> The problem with issuing a homicide charge in this particular case is that the medical examiner's office came back on the final autopsy and they said they could not determine the ultimate cause and manner of death for this child. *And the medical forensic pathologist who conducted the autopsy was very forthright in his discussions with me. He indicated that there was some problems collecting the bodily fluids from [O.M.'s] body and that there may have been some contamination or mixing of the fluids, the blood, the stomach contents.* So we know that this child had three different types of synthetic marijuana in her system, *but we don't know exactly how far the synthetic marijuana made it inside her system in order to say that that was the ultimate cause of her collapse and death.*

> We also don't know because there is a potential, a very real potential, that this defendant overlaid, laid on top of [O.M.], being under the influence of synthetic marijuana that also could have potentially caused this child's death. And *so the medical examiner's office came to the conclusion that they couldn't rule this a homicide.*

(48:11-12 (emphasis added)).

When sentencing Mr. Morris, the court, the Honorable Janet Protasiewicz, adopted the State's assertions, remarking:

> It's not a tragedy. It's a horrible, horrible, completely preventable situation. [O.M.] would be alive and well today if you and her mother had not engaged in the reckless criminal conduct the two of you chose to engage in.

(48:22).

> You believed you rolled over onto her. And then we've got all this synthetic marijuana in her system. So not only could you have suffocated her – you certainly had been negligent enough. And I hope it was negligence. I hope the two of you weren't putting anything in her bottle to make her sleep soundly so she wouldn't bother you. But that certainly comes to mind.

(48:25).

> You want to visit her grave. You know, two of you killed her. I don't even know how you think you have the right to do that and continue to grieve.

(48:26).

> [It was a] completely preventable tragedy that the two of you caused.

(48:27).

The circuit court then imposed a total of nine years imprisonment, four years initial confinement and five years extended supervision – one year shy of the maximum possible penalty. (48:27; 13).

The Postconviction Motion

On May 21, 2018, Mr. Morris filed a postconviction motion alleging that the circuit court relied on inaccurate information presented by the State regarding the medical examiner's conclusions about the cause of and factors leading to O.M.'s death. He asserted that because his constitutional right to due process at sentencing was violated, he was entitled to resentencing. (29; 30).

In support of his motion, Mr. Morris pointed directly to the remarks of the State, establishing that it had improperly and inaccurately represented the alleged conclusions of the medical examiner regarding O.M.'s death. (29). Attached to the postconviction motion was an affidavit notarized by Dr. Linert, which asserted his medical conclusions regarding the cause of O.M.'s death, as well as the following statement asserting that he had specifically explained his conclusions to the prosecutor prior to sentencing:

> I have been made aware that DDA Torbenson made representations to the court that this matter was not ruled a homicide by the Medical Examiner's Officer because of problems collecting the bodily fluids, and that as a result, I was unable to say with certainty that K2 was the ultimate cause of O.M.'s death. This is not accurate, as I concluded that the infants ingestion of K2 was not a cause of O.M.'s death within a degree of medical certainty and communicated that conclusion to DDA Torbenson.

(30:2).

The motion asserted that while it should be assumed that representations about the cause of death of a child in a case such as this would influence a rational judge's sentencing decision, the circuit court's echoing of the inaccurate conclusions regarding O.M.'s death made it clear that the State's remarks had affected the sentencing decision in the case. (29:5-6). Mr. Morris pointed to the court's specific inquiries about the cause of death, as well as its forceful conclusions regarding the fault the court placed on Mr. Morris for causing O.M.'s death. (29:5-6).

The State filed a written response to the postconviction motion, in which the prosecutor conceded that the information he provided to the sentencing court regarding Dr. Linert's medical conclusions and the purported cause of death of O.M. was, in fact, inaccurate. (35:6). The prosecutor also did not dispute or provide any argument

contradicting the claim that the court relied upon the inaccurate information when sentencing Mr. Morris. (35). The State argued that in spite of its misrepresentations to the court, the presentation of the false medical conclusions was harmless because there were other facts in the record that show Mr. Morris's actions could have caused the death of his child. (35:5).

The court denied Mr. Morris's postconviction motion in a written decision. (40). The court first concluded that, contrary to the State's concession, the information presented at the sentencing hearing regarding the prosecutor's conversations with Dr. Linert and the doctor's medical conclusions about the cause of death were not truly inaccurate:

> [The State may have] misquoted *Dr. Linert's* conclusions about the role of K2 in the victim's death, but it was not necessarily inaccurate. Different medical examiners can disagree about the cause of death. Dr. Linert's conclusion that K2 did not play a role in the victim's death in this case is only his medical *opinion*; it does not necessarily provide the defendant with clear and convincing evidence that the prosecutor's sentencing statements were inaccurate. *See State v. Slagoski*, 244 Wis. 2d 49 (Ct. App. 2001).

(40:4).

The court then went on to conclude that, even if the statements and representations made by the State were materially inaccurate, the court did not actually rely upon them at sentencing. (40:4). The

court asserted that "[t]he defendant reads too much into the court's sentencing remarks." (40:4). Instead, the court argued, it had only punished Mr. Morris for his *reckless behavior* and not any conclusions or beliefs it had about the cause of the child's death. (40:4-5).

Finally, the court concluded that regardless of any reliance, "the error was truly harmless," because even if O.M. died of another cause, Mr. Morris had demonstrated "incredibly poor parenting and reckless behavior" and that is what the court relied upon in sentencing him to nine years imprisonment. (40:5).

Mr. Morris now appeals.

ARGUMENT

I. By relying upon the State's inaccurate assertions regarding O.M.'s death and Mr. Morris's role in causing it, the circuit court's sentencing determination violated his due process right to be sentenced based only upon consideration of accurate information, and therefore, resentencing is required.

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). A defendant is thus entitled to a fair sentencing process in which "the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *Tiepelman* at ¶26 (quoting *Welch v. Lane*, 738 F.2d 863, 864-865 (7th Cir. 1984)). If an individual has been sentenced based on assumptions that are "materially untrue…[it] is inconsistent with due process of law, and such a conviction cannot stand." *Tiepelman* at ¶10 (quoting *Townsend*, 334 U.S. at 741).

A defendant who alleges that the court relied on inaccurate information at the time of sentencing has the burden of establishing by clear and convincing evidence that (1) the information was in fact inaccurate and (2) that the circuit court relied on the inaccurate information. *Tiepelman*, 2006 WI 66, ¶9. If the defendant meets that standard, the burden shifts to the State to establish that the error was harmless. *Id.* To show that the court's reliance on inaccurate information was harmless, the State must prove beyond a reasonable doubt that it did not contribute to the ultimate sentence ordered by the court. *See State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. If the State fails to do so, the court must vacate the original sentence and order a new sentencing hearing. *Id.*

Whether an individual has been denied their due process right to be sentenced based on accurate information is a constitutional question the appellate court reviews de novo. *Tiepelman*, 2006 WI 66, ¶9 (citing *State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993)).

B. The State presented inaccurate information at the time of sentencing concerning the medical examiner's purported conclusions about the cause of O.M.'s death.

During Mr. Morris's sentencing hearing, the prosecutor made several claims about the potential cause of O.M.'s death, asserting that these conclusions were drawn from the findings of the Medical Examiner's Office who conducted the autopsy and toxicological testing. (48:9-12). The prosecutor opined that while the official cause of death was reported as "undetermined," this was due to an error in collecting bodily fluid samples from O.M. during the autopsy. (48:11).

The prosecutor then went on to tell the court that the matter was not ruled a "homicide" by the Milwaukee Medical Examiner's Office because an error in fluid collection complicated the autopsy and prevented the doctor from definitively concluding that O.M.'s death was caused by the presence of K2 in her body. (48:11). These remarks suggested that ingestion of K2 likely caused the death of O.M., but that due to the fluid collection issue, this

determination could not be definitively made such that this manner of death could be proven beyond a reasonable doubt in the criminal court. (48:11).

These claims substantially misrepresented Dr. Linert's medical conclusions, which Dr. Linert had discussed with DDA Torbenson prior to Mr. Morris's sentencing hearing. (30). The autopsy and medical examination of O.M. did not reveal any particular cause of death, and notably, the testing performed by the Medical Examiner's Office definitively *ruled out* that the presence of K2 caused the child's death, since the drug was not present in her bloodstream or nervous system at the time of death. (30). Thus, Dr. Linert concluded that K2 could not have affected O.M.'s systems and did not cause her demise, contrary to the representations made by the State. (30).

Furthermore, the affidavit provided by Dr. Linert explained that he did not see any evidence of overlay in this case, and while sudden infant death occurs at higher rates when co-sleeping is involved, the cause of death in SIDS cases is not necessarily related to suffocation. (30:1-2). he affidavit from Dr. Linert establishes that not only were the State's assertions about the scientific conclusions regarding O.M.'s death inaccurate and misleading, the State misrepresented its conversations with Dr. Linert about why the matter was not ruled a "homicide" by the Medical Examiner's Office. (30:2). The State's remarks were therefore materially inaccurate and

denied Mr. Morris the due process right to be sentenced based upon accurate information.

Notably, this is not a situation in which there are different or competing diagnoses or medical opinions, as there is only medical expert in this case – Dr. Linert – and it is his conclusions regarding O.M.'s cause of death that were mischaracterized and inaccurately represented by the prosecutor at the time of sentencing. As such, this is not a situation in which the court can fairly discard the inaccuracies as a mere difference of scientific opinion. *See Slagoski*, 2001 WI App 112, ¶11, 244 Wis. 2d 49, 629 N.W.2d 50. Here, the sole expert concluded within a degree of medical certainty that the alleged ingestion of K2 by O.M. did not contribute to her death, that there was no evidence in the child's body or the testing of the clothing worn by Mr. Morris that supported a theory that she suffocated while co-sleeping, or that this death may have been linked to sudden infant death syndrome, of which the medical community does not know the ultimate cause. (30). The prosecutor's assertions to the contrary regarding the cause of O.M.'s death were inaccurate, and contradict the only undisputed medical evidence in the record.

For these reasons, Mr. Morris has met the first prong of the *Tiepelman* test, as it is clear that inaccurate information regarding O.M.'s death and the conclusions of the Medical Examiner's Office on that subject were presented to the court for consideration during his sentencing hearing. *Travis*, 2013 WI 38, ¶23, 347 Wis. 2d 142, 832 N.W.2d 491.

C. The record reveals that the circuit court plainly relied upon the inaccurate assertions of the State when determining the appropriate sentence in this matter.

Once a defendant has satisfied the first prong of the *Tiepelman* test and established that inaccurate information was presented at the sentencing hearing, a defendant must establish that this information formed some basis for the sentence ultimately imposed by the court. *Travis*, 2013 WI 38, ¶21.

Generally as a practical matter, the subject and nature of the inaccurate information at issue here is highly relevant to a determination of the appropriate sentence in this type of case. Mr. Morris was charged with recklessly endangering the safety of his infant daughter and the State's inaccurate allegations implicated his behavior as directly causing the death of his two-month old child. As such, it is clear that this information, if true, would be relevant to the sentencing decision of the circuit court. *State v. Gallion* requires that the court identify facts considered in arriving at a particular sentence and one of the factors specifically outlined by the Wisconsin Supreme Court as relevant is the "degree of the defendant's culpability." *State v. Gallion*, 2004 WI 42, fn. 11, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, however, it is not necessary to speak in generalities, as the record of the sentencing hearing makes it clear that the sentencing court considered the false assertions of the State and ordered a near-maximum sentence as a result. (48).

First, early on in the sentencing hearing, the circuit court interrupted the State during its remarks to inquire what caused O,M.'s death. (48:9). The court's specific inquiry reflects that the court found the cause of the infant's death directly relevant to the sentencing determination. Notably, the court's interjection was made at the precise moment the State was discussing the cause of the child's death and was directly followed by the State's misrepresentations about the cause of O.M.'s death. (48:9-12).

Next, the circuit court repeatedly referenced the State's false claims during the sentencing hearing, even directly discussing it when pronouncing sentence. The court opined that O.M.'s death with not some accidental tragedy, but "a horrible, horrible, completely preventable situation." (48:22).

Furthermore, the court accepted the State's reference to Mr. Morris's remark to detectives that it was possible he could have unknowingly laid upon O.M. while sleeping as an admission that this is what had occurred. (48:25). The court stated:

> You believed you rolled over onto her. And then we've got all this synthetic marijuana in her system. So not only could you have suffocated her – you certainly had been negligent enough. And I hope it was negligence. I hope the two of you weren't putting anything in her bottle to make her sleep soundly so she wouldn't bother you. But that certainly comes to mind.

(48:25). The court continued in referencing its belief that O.M. was killed by her parents, saying:

> You want to visit her grave. You know, two of you killed her. I don't even know how you think you have the right to do that and continue to grieve.

(48:26).

The court's remarks directly reflect the tone of the State's inaccurate assertions regarding the autopsy and subsequent testing – that Mr. Morris's actions resulted in O.M.'s death, but that due to errors in the autopsy, the State could not prove it.

Given the court's clear reliance at sentencing on the inaccurate information regarding the cause of O.M.'s death, Mr. Morris has satisfied the second prong of the *Tiepelman* test. *See Tiepelman*, 2006 WI 66, ¶14. The burden now shifts to the State to prove that the court's reliance on inaccurate information in sentencing Mr. Morris was harmless.

D. Based upon the record, the State cannot prove beyond a reasonable doubt that the circuit court's reliance on the inaccurate information regarding the cause of O.M.'s death did not impact the ultimate sentencing decision, and therefore, the error was not harmless.

When a defendant has met the threshold burden of establishing that inaccurate information was presented at sentencing and that this

information formed any basis for the sentence imposed, the State must prove that there is "no reasonable probability that [the inaccurate information] contributed to the outcome" of the case or resentencing is required. *Payette,* 2008 WI App 106, ¶ 46. Here, the State cannot meet its burden, as the record reveals that the inaccurate information set the tone of the sentencing hearing and was the topic of discussion throughout the circuit court's remarks and sentence pronouncement. To ignore that the State's inaccurate assertions regarding the cause of O.M.'s death invaded the province of the sentencing court derails the thrust of the *Tiepelman* decision – that a defendant has not been properly sentenced if the court relied in any way on "evidence" that turned out to be materially untrue. *See Tiepelman*, 2006 WI 66, ¶¶9-10. Like in *Travis,* the State's false assertions about O.M.'s death and Mr. Morris's supposed role in causing it permeated the entire sentencing procedure as evidenced by the record in this case. *Travis*, 2013 WI 38, ¶¶6, 85.

Based upon the facts as they exist in this matter and the remarks of the court during the sentencing hearing, it would be unreasonable to conclude that the court's reliance on the inaccurate information was harmless and that the sentence would have been identical had the State not misrepresented the facts underlying the death of O.M. Therefore, Mr. Morris asks this court to remand this matter to the circuit court for a new sentencing hearing. *Id.*

CONCLUSION

For the reasons stated, Mr. Morris requests that this court conclude that the State presented inaccurate information at the time of sentencing, that the court relied upon this information in sentencing, and that the reliance on this information was not harmless beyond a reasonable doubt. Mr. Morris asks that the court order this matter remanded to the circuit court for a new sentencing hearing.

Dated this 15th day of November, 2018.

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 3,746 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 15th day of November, 2018.

Signed:

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NICOLE M. MASNICA
Assistant State Public Defender

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 including 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 15th day of November, 2018.

Signed:

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APPENDIX

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TO
APPENDIX

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Decision and Order Denying Motion for Postconviction Relief 101-105