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OF WISCONSIN**

STATE OF WISCONSIN
C O U R T O F A P P E A L S

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

REPLY BRIEF OF THE
DEFENDANT-APPELLANT

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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.**

In its response brief, the State adopts three arguments as to why Mr. Morris should not obtain relief in this court. First, the State asserts that Mr. Morris forfeited his objection to challenge the inaccurate information presented at sentencing (the State's supposed oral recollection of its conversations with the medical examiner) when his counsel did not object at sentencing. Second, the State argues there is no evidence that the circuit court relied upon the State's inaccurate statements when ordering sentence. Third, the State contends that even if the State presented inaccurate information and the court relied upon it, the error was harmless because the same sentence would have been imposed by the court. Each of these arguments is without merit.

- A. As a general matter, a postconviction sentencing challenge based on the presentation of inaccurate information need not be raised as a claim of ineffective assistance of counsel, and in this case, trial counsel was not ineffective.

Never have Wisconsin and federal courts decided in published legal precedent that as a matter of rule that a due process challenge to one's sentence based upon the presentation of inaccurate information at sentencing must be raised under the rubric of ineffective assistance of counsel absent a contemporaneous objection to the inaccurate information at sentencing or deemed forfeited. The State, however, appears to assert that such a rule exists, relying on *State v. Pinno*, 2014 WI 74, ¶56, 356 Wis. 2d 106, 850 N.W.2d 207, *State v. Benson*, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484, and *State v. Leitner*, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207, in support of its claim. This is an incorrect view of the law, and if adopted, carries with it serious procedural consequences and will effect nearly all criminal proceedings before this state's many circuit courts.

1. The legal principles guiding forfeiture claims in this state.

The Forfeiture Rule

The failure to object to an error at the time it occurs may act to forfeit a party's right to challenge

that error on appeal. *State v. Pinno*, 2014 WI 74, ¶56; *See also State v. Leitner*, 2001 WI App 172, ¶41, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341. “In contrast, some rights are not lost by a counsel’s or a litigant’s mere failure to register an objection” at the trial level, as the “Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable.” *State v. Ndina*, 2009 WI 21, ¶¶31-32, 315 Wis. 2d 653, 761 N.W.2d 612, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

Employment of the forfeiture doctrine by appellate courts is intended to “facilitate[] fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial.” *Pinno*, 356 Wis. 2d 106, ¶56. The forfeiture rule should thus be applied only in circumstances in which employment of that rule promotes its intended values. *See Ndina*, 2009 WI 21, ¶38.

Ineffective Assistance of Counsel

An accused’s right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel’s performance satisfied this constitutional standard, Wisconsin administers the two-part test outlined in *Strickland v.*

Washington, 466 U.S. 668 (1984). *Smith*, 207 Wis. 2d 258, 273.

To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id.*

2. The appropriate rubric for assessing a due process challenge to a sentence based upon inaccurate information is illustrated in *State v. Tiepelman*, and there is no requirement that these claims be raised in the context of ineffective assistance of counsel.

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 fair sentencing process is one in which “the court goes through a rational procedure is one selecting a sentence based on relevant considerations and accurate information.” *Tiepelman* at ¶26 (quoting *U.S. ex rel. Welch v. Lane*, 738 F.2d 863, 864-865 (7th Cir. 1984)). When the sentencing proceeding is

infected with false or misleading information and 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. 736, 741).

For decades, federal and state courts alike have applied a two-prong test to determine whether a defendant seeking resentencing on grounds that the sentencing court considered inaccurate information is entitled to relief. Many published and unpublished cases from both federal and Wisconsin have addressed claims under these guidelines, completely outside of the scope of the ineffective assistance of counsel analysis, and absent a contemporaneous objection at sentencing. *See, e.g., U.S. v. Oliver*, 873 F.3d 601 (7th Cir. 2017); *State v. Tiepelman*, 2006 WI 66, ¶9; *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491; *State v. Greenwood*, 2015 WI App 58, 364 Wis. 2d 528, 868 N.W.2d 199 (unpublished, but citable for persuasive value under Rule 809.23(3)); *State v. Bunch*, 296 Wis. 2d 419, 722 N.W.2d 400 (Ct. App. 2006) (unpublished, but citable for persuasive value under Rule 809.23(3)).

In spite of this fact, the State concludes that “Morris’s failure to take advantage of multiple opportunities at sentencing to correct the prosecutor’s error constitutes forfeiture of his right to raise his due process claim on appeal.” (State’s Response, 11). The State, however, fails to point to any case in which such a requirement has been imposed as a

general matter of procedural rule, let alone in a matter where the inaccurate information provided came from the State.

Instead, the State, without any meaningful analysis, relies upon *State v. Benson* to support its contention that the forfeiture rule is applicable as a general matter to any claim involving a due process violation based on the consideration of inaccurate information at sentencing. (State's Response, 12). The *Benson* case, however, created no such rule.

In *Benson*, the defendant argued that he was entitled to resentencing because he was sentenced based upon inaccurate information – specifically language used by a pharmacologist hired by the defense to develop a supportive sentencing memorandum. *Id.* at ¶¶3-5, 16-17. The *Benson* court concluded in a single sentence that “[b]ecause *Benson’s counsel himself submitted Gengo’s report to the court* and failed to correct or object to Ambien-related information prior to Benson’s sentencing, Benson cannot now claim his due process rights were violated by the court’s consideration of that same information.” *Id.* at ¶17 (emphasis added).

Unlike in *Benson*, the information at issue here was introduced for the first time at sentencing by the *prosecutor*. In this case, neither Mr. Morris nor defense counsel could have anticipated that the prosecutor was going to present inaccurate descriptions of its private conversations with the medical examiner for the court’s consumption at

sentencing. Prior to sentencing, this information was not known to the defense and it would have been impossible to predict that the State would make material representations to the court at sentencing. (CITE). Thus, the *Benson* case is far from analogous, and is not instructive.

Moreover, the State asserts that this claim must be addressed under the ineffective assistance of counsel rubric, but ignores that it would be impossible to obtain relief under that standard. To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Smith*, 207 Wis. 2d 258, 273. Here, this would be impossible.

Mr. Morris's trial counsel could not be deemed deficient as a matter of law for failing to make a timely objection because he could not have reasonably been able to predict the prosecutor would bring up supposed conversations it had with the medical examiner that counsel would not been privy to. Trial counsel could not have assumed or even reasonably guessed that in representing its discussions with the medical examiner, the prosecutor was lying to the court and inaccurately summarizing Dr. Linert's conclusions and opinions.

In order for trial counsel's lack of objection to be deficient as a matter of law, Mr. Morris must prove that counsel "made errors so serious that he was not functioning as the 'counsel' guaranteed by

the Sixth Amendment.” *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). He could not do so, and therefore, there was no meritorious postconviction claim that trial counsel erred as a matter of law by failing to object.

As such, Mr. Morris, like many litigants before him, raised this matter solely as a due process challenge, asserting that his constitutional right to be sentenced based only upon accurate information was violated when the prosecutor presented materially inaccurate information to the court. (29; Opening Brief). To require otherwise denies Mr. Morris the right to a just sentence and fair appellate review.

Finally, if the court adopts the State’s position here, one of two things are likely to occur: (1) the State would be emboldened to present questionable, yet unfavorable information at sentencing, resulting in a fundamentally unfair sentencing system; or (2) defense counsel throughout this state will begin objecting and requesting adjournments regularly at sentencing to avoid the risk of being deemed ineffective down the road. Both of these potential outcomes would negatively impact the administration of justice, and as such, this court should decline to conclude that this matter should have been raised as a claim of ineffective assistance of counsel.

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, and the court relied upon it when ordering sentence.

As outlined in the opening brief, the prosecutor made several claims about the potential cause of O.M.'s death, asserting that these conclusions were drawn from the findings of Dr. Linert from the Medical Examiner's Office. (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). This, the State acknowledges, was inaccurate. (State's Response, 13). On appeal, however, the State ignores the more troubling and highly relevant statements made by the prosecutor at sentencing. (State's Response).

The State does not address in its brief that the prosecutor told¹ the court that the matter was not ruled a "homicide" by the Milwaukee Medical Examiner's Office only because an error in fluid collection complicated the autopsy and prevented the

¹ As asserted in the postconviction motion and in the opening brief, the prosecutor's remarks were egregious misrepresentations of Dr. Linert's medical conclusions. (30). Dr. Linert definitively *ruled out* that the ingestion of K2 caused the child's death and communicated this information to the prosecutor prior to the case being charged. (30).

doctor from definitively concluding that O.M.'s death was caused by the presence of K2 in her body. (State's Response; 48:11). In making these false statements, the prosecutor plainly suggested that the ingestion of K2 caused the death of O.M., and that the parents would have been subject to a homicide prosecution but for the errors in the autopsy procedure. (48:11).

Regarding the inaccuracies in general, the State asserts that Mr. Morris has not established that the court relied upon the evidence in question when ordering sentence. (State's Response, 13-14). According to the State, this is evidenced by the fact that "[t]he court did not mention the word *death* once while explaining Morris's sentence." (State's Response, 14). Instead, the State argues the court relied only upon its views on Mr. Morris's reckless behavior when sentencing him. (State's Response, 14-18).

When assessing this claim, it is important to remember that the court's consideration of Mr. Morris's reckless conduct does not mean that it did not believe that he caused the death of his child. The two are not mutually exclusive, as Mr. Morris could have been charged with reckless homicide contrary to Wis. Stat. §§940.02 or 940.06 had the evidence actually supported a conclusion that he caused O.M.'s death.

Further, Mr. Morris does not dispute that his behavior was criminally reckless. Regardless of the outcome of the health and safety of his daughter,

there was a factual basis sustaining his conviction for recklessly endangering safety based on his actions alone. He did not, however, admit to causing the death of the child, and there is no direct evidence substantiating that O.M. died from as a result of his conduct. Rather, there is evidence to the contrary, specifically the report and conclusions of Dr. Linert, the only physician who reviewed this case. (30). The prosecutor improperly argued otherwise, and incurably impacted the court's view of this case.

Further, the record reveals that the court undoubtedly relied upon the prosecutor's statements that Mr. Morris and his girlfriend were to blame for their daughter's death. That the court didn't use the term *death* as argued by State is irrelevant, as the court plainly concluded Mr. Morris was at fault for the death of O.M. and stated as much at sentencing.

To prove reliance, we need look no further than the court's sentencing remarks. The court told Mr. Morris that this was not a "tragedy," but rather a "completely preventable situation" – a "completely preventable tragedy that the two of you *caused*." (48:22, 27). The court stated that his daughter "*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). The court went further, telling Mr. Morris that he had forfeited the right to grieve his daughter's death because he had "killed her." (48:26). These statements are not harmless recitations of the facts of the case, but rather are clear examples of the court's belief that

Mr. Morris and his girlfriend caused the child's death.

The State's position that the "court was not occupied with what [or who] caused [O.M.'s] death" is a farce. (State's Response, 14). It attempts over several pages of its response brief to assign a different, benign meaning to the court's remarks at sentencing, which only goes to show just how deeply the prosecutor's comments infiltrated this proceeding. (State's Response, 14-18). This is not a situation where it is possible the court is referencing a piece of inaccurate information once or twice. Here, the court repeatedly states that Mr. Morris caused O.M.'s death.

Because the court relied upon the inaccurate information presented by the prosecutor regarding the child's cause of death and Mr. Morris's likely role in it, he is entitled to a new sentencing hearing. *See Tiepelman*, 2006 WI 66, ¶9.

- D. Based upon the record, it is unreasonable to conclude that the circuit court's reliance on the inaccurate information had no impact Mr. Morris's sentence, and therefore, the error was not harmless.

To establish that consideration of inaccurate information was harmless, the State must prove that there is "no reasonable probability that [the inaccurate information] contributed to the outcome" or resentencing is required. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. As

discussed in the opening brief and in the section above, the record clearly shows that the court was operating under the assumption that Mr. Morris and his girlfriend had “killed” their daughter with their reckless behavior. (48:22, 26-27). The court repeatedly assigned blame to Mr. Morris and even mimicked the prosecutor’s false assertions that it was either K2 or overlay that killed the child. (48:25).

On appeal, the State attempts to disassociate itself from the court’s beliefs about the case, as if the court manifested those ideas organically without any input from the prosecutor. (State’s Response, 19). The State contends it is a farfetched proposition that the prosecutor telling the court in the midst of the sentencing hearing that Mr. Morris and his girlfriend caused the child’s death, but that it simply couldn’t be proven could have led to the court’s own belief that Mr. Morris caused the child’s death. The State asks, “What possible difference would it have made to the circuit court – and to the imposition of sentence – if the court had *not* heard [the] erroneous information” from the prosecutor? (State’s Response, 19). The more appropriate question is how could the prosecutor’s false statements asserting that the child died of either K2 consumption or overlay and that Mr. Morris likely escaped homicide charges due to errors in the autopsy not impact the ultimate sentencing decision. On this record, there is no way to separate the prosecutor’s misstatements from the court’s parroting of those same false conclusions, and therefore, the State cannot establish beyond a reasonable doubt that the error was harmless. *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 23rd day of April, 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 2,983 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 23rd day of April, 2019.

Signed:

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