STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2020AP1081-CR

STATE OF WISCONSIN ,

Plaintiff-Respondent,

v.

ALEXANDREA C.E. THRONDSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL P. SCRENOCK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Alexandrea C.E. Throndson fail to meet her burden and prove that the circuit court judge was objectively biased?

The circuit court answered yes.

This Court should answer yes.

2. Did Throndson fail to meet her burden to prove that the circuit court relied upon inaccurate information at sentencing?

The circuit court answered yes.

This Court should answer yes.

INTRODUCTION

In 2018, Throndson sold cocaine. When officers searched her home, they discovered drugs and drug paraphernalia. She pled guilty to maintaining a drug trafficking place and bail jumping. At sentencing, the court referenced Throndson's prior juvenile record. It then rejected the parties' joint recommendation for probation and sentenced Throndson to nine months in jail followed by four years of probation. Postconviction, Throndson argued the court erroneously researched her record, the court granted Throndson resentencing. At the resentencing hearing, the court imposed the same sentence without mentioning her juvenile record.

Now, Throndson seeks resentencing before a different judge and argues that the sentencing judge was objectively biased because he reviewed her juvenile record and that the court relied upon inaccurate information. But Throndson fails to meet her burden to show that the judge was objectively biased or that the information was inaccurate. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

On June 29, 2018, Throndson sold $100 worth of cocaine to Derek.[1] (R. 1:2–3.) Derek was working as a confidential informant for the police at the time of the drug sale. (R. 1:2; 21.) On July 10, 2018, officer executed a search warrant at Throndson's home and recovered a plastic bag with white powder residue, items containing suspected marijuana, drug paraphernalia, and items commonly used for drug dealing. (R. 1:4.)

The State charged Throndson with delivery of cocaine and maintaining a drug trafficking place. (R. 1:1.) While the charges were pending, Throndson began harassing and threatening Derek. (R. 12:1.) The State charged Throndson with intimidation of a witness by threatening force and bail jumping. *State v. Alexandrea C.E. Throndson*, Sauk County Case 2019CF52. The State moved for joinder of the two cases. (R. 12.) The court granted that motion. (R. 57:10–11.)

Throndson pled no contest to maintaining a drug trafficking place and bail jumping. (R. 59:4–5.) In exchange for her pleas, the State agreed to dismiss the delivery of cocaine charge and the witness intimidation charge.[2] (R. 59:2.) The parties agreed to a joint recommendation of 36 months of probation. (R. 59:2.) The court disclosed to the parties that it searched Throndson's record in the statewide

[1] To comply with Wis. Stat. § (Rule) 809.86(4), the State uses a pseudonym in place of the victim's name.

[2] The criminal complaint, which formed the factual basis for her bail jumping plea, does not appear in the appellate record.

database and found 23 different matters. (R. 59:16–17.) The court told the parties that it will be hard to convince the court to impose a probation term without any conditional jail time. (R. 59:17.)

The Department of Corrections conducted a presentence investigation and issued a report that recommended a six-month jail sentence followed by three years of probation for each of the counts. (R. 23:26–27.) Derek wrote to the court that he still feels afraid and wants Throndson to stop selling drugs. (R. 21.)

At the first sentencing hearing, the circuit court discussed the severity of the crimes. (R. 60:28.) The court reviewed Throndson's history and character traits. (R. 60:29.) It noted that Throndson had a lengthy record, including juvenile adjudications. (R. 60:29.) The court discussed the multiple chances Throndson had been given and that she continued to commit crimes. (R. 60:30.) The court found Throndson untruthful, unwilling to abide by society's rules, and unable to accept blame for her own actions. (R. 60:31.)

The court concluded that probation was appropriate. (R. 60:32.) It withheld sentencing on the bail jumping and placed Throndson on probation for four years. (R. 60:33.) For the maintaining a drug trafficking place charge, the court sentenced Throndson to county jail for nine months. (R. 60:36.)

Throndson filed a motion for release or stay pending appeal. (R. 27.) Regarding her juvenile record, she argued that the circuit court committed a due process violation when it independently researched her juvenile record. (R. 27:4.) She argued that the circuit court also relied upon inaccurate information in the presentence investigation report. (R. 27:4–5.)

The court held a hearing on the motion. The court noted that it disclosed its research of Throndson's prior record at the plea hearing. (R. 61:11.) The court rejected Throndson's claim that its sentencing review was limited to the information that the parties presented at sentencing. (R. 61:12.) The court concluded that it could consider any and all information about her prior record. (R. 61:13.) The circuit court articulated that its review of the juvenile record only revealed that Throndson had been found delinquent and continued to commit crimes. (R. 61:20.) The court did not review the details of the juvenile adjudications. (R. 61:21.)

At the close of the hearing, the court vacated Throndson's sentence and ordered resentencing. (R. 61:22.) Prior to resentencing, the parties stipulated to release of Throndson's juvenile records. (R. 32.)

At resentencing, Throndson objected to resentencing by the same circuit court judge. (R. 62:8–9.) The parties went through the PSI report and Throndson corrected all errors. (R. 62:10–17.) Throndson chose not to call her codefendant to testify on her behalf. (R. 62:22.)

Regarding Throndson's juvenile record, the parties discussed the details of the cases. One of the cases came about because Throndson needed protective services. (R. 62:23–24.) The only juvenile case where Throndson was adjudicated delinquent was for disorderly conduct. (R. 62:24.) Throndson's mother testified on her behalf and explained the trauma from her parents' divorce and Throndson's history with ADHD. (R. 62:27–31.)

The State reiterated the joint sentencing recommendation for 36 months of probation. (R. 62:35.) It noted Throndson's prior history of five misdemeanors, but that this was her first felony conviction. (R. 62:36–37.) It stated that the probation supervision and counseling will be best for Throndson. (R. 62:37–38.)

Throndson's attorney agreed that the joint recommendation was appropriate. (R. 62:39.) He noted that Throndson had moved to a new home and disassociated with the peers she was with when she committed her crimes. (R. 62:39.) Throndson addressed the court and apologized for her actions and her poor choices. (R. 62:41.)

The sentencing court articulated the proper sentencing factors. (R. 62:42.) It discussed Throndson's history of criminal acts and concluded that she was unwilling to take responsibility for her own actions. (R. 62:43.) It noted that Throndson failed to take responsibility for her actions and tried to present herself as the victim. (R. 62:44.) The court found that Throndson was untruthful during the PSI and COMPAS assessment. (R. 62:44.) The court concluded that Throndson tried to play the race card when arguing that she's unfairly treated by her family. (R. 62:44–45.)

The court believed that if Throndson could comply on supervision the community would be protected in the future. (R. 62:45.) The court next discussed the seriousness of the offenses and concluded that some punishment was needed to stop Throndson from committing crimes. (R. 62:46.)

For the bail jumping conviction, the court withheld sentencing and placed Throndson on probation for four years. (R. 62:47.) For the maintaining a drug trafficking place, the court sentenced Throndson to nine months in county jail. (R. 62:48.) The court made Throndson eligible for *Huber* release so that she could attend classes. (R. 62:48.)

Throndson appeals. (R. 52.)

ARGUMENT

I. Throndson failed to show that Judge Screnock was objectively biased.

A. Standard of review.

Whether a judge was objectively biased is a question of law that this Court reviews independently. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772.

B. Throndson has the burden of proving the appearance of bias.

All defendants have a fundamental due process right to an impartial judge. *State v. Marcotte*, 2020 WI App 28, ¶ 16, 392 Wis. 2d 183, 943 N.W.2d 911. A biased judge is "constitutionally unacceptable." *Herrmann*, 364 Wis. 2d 336, ¶ 25 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). A judge is presumed to have "acted fairly, impartially, and without prejudice." *Id.* ¶ 24. The burden of rebutting this presumption is on the party asserting bias, which it must do by a preponderance of the evidence. *Id.*

Throndson argues that Judge Screnock was objectively biased. (Throndson's Br. 10.) "Objective bias can exist in two situations: (1) where there is an appearance of bias; and (2) where objective facts demonstrate that a judge treated a party unfairly." *Marcotte*, 392 Wis. 2d 183, ¶ 17.

The appearance of bias is present when a reasonable person could question the court's impartiality based on its statements and could not trust the judge to "hold the balance nice, clear, and true." *Marcotte*, 392 Wis. 2d 183, ¶ 17 (citation omitted). When there is an appearance of bias and a risk of actual bias, a due process violation occurs. *Herrmann*, 364 Wis. 2d 336, ¶ 46.

C. Throndson has not shown that Judge Screnock's review of her juvenile record created the appearance of bias.

Throndson cannot meet her burden. Judge Screnock's review of Throndson's record did not create an appearance of bias, but instead reflected on the court's duty to have consider all relevant information, including her juvenile record, at sentencing. The court did not violate Throndson's due process rights. This Court should reject Throndson's claim that Judge Screnock had the appearance of bias.

The court needed to have all relevant information about Throndson at sentencing. The sentencing process is "a search for the truth." *State v. Greve*, 2004 WI 69, ¶ 8, 272 Wis. 2d 444, 681 N.W.2d 479 (citation omitted). As such, policy requires a court to have the "fullest information possible concerning the defendant's life and characteristic." *State v. Knapp*, 111 Wis. 2d 380, 385, 330 N.W.2d 242 (1983).

Here, the thrust of Throndson's argument is that her juvenile record should have been kept from the court. It is against public policy to withhold information from a sentencing court. *State v. McQuay*, 154 Wis. 2d 116, 124, 452 N.W.2d 377 (1990).

Also, the court should consider any juvenile adjudications when sentencing Throndson. Considering juvenile contacts, even if they do not result in adjudications of delinquency, are proper factors for sentencing courts to consider. *In Interest of Hezzie R.*, 219 Wis. 2d 848, 882, 580 N.W.2d 660 (1998). The court's reference to Throndson's contacts with the juvenile justice system was proper and the court was authorized to consider them.

The court properly exercised its discretion when it sentenced Throndson. The court discussed Throndson's criminal history and concluded that she refused to take responsibility for her actions. (R. 62:43.) The court considered

Throndson's character and found her untruthful. (R. 62:44.) The court concluded that the community could be protected from Throndson while she was on supervision, but that the seriousness of the crime require punishment. (R. 62:45–46.) The court considered the proper factors and fashioned an individualized sentence for Throndson.

Throndson asserts that Judge Screnock showed bias when he refused to follow the recommendations of the State and defense attorney. (Throndson's Br. 10.) But "[t]he recommendations of the prosecutor, defense counsel, victim and presentence investigation report author are nothing more than recommendations which the court is free to reject." *State v. Bizzle*, 222 Wis. 2d 100, 105–06 n.2, 585 N.W.2d 899 (Ct. App. 1998). The court's deviation from the recommendation was not an indication of bias, but a proper exercise of discretion.

Throndson's argues that Judge Screnock violated SCR 60.04(1)(g) by participating in an ex parte communication and independently investigating facts. (Throndson's Br. 11.) But Judge Screnock did not violate the rules again ex parte communication, because he disclosed the database search to the parties and allowed the opportunity to respond. The parties had an opportunity to respond to that information at the first sentencing hearing, but did not.[3] There was no violation.

And the bar on independent research does not apply to sentencing. The statement that "[a] judge must not independently investigate facts in a case and must consider only the evidence presented" does not apply at sentencing. It

[3] Throndson's attorney did not present any evidence at the first sentencing hearing about the fact that Throndson's was only adjudicated delinquent once. He had the opportunity to do so and Throndson does not raise an ineffective assistance of counsel claim on appeal.

violates public policy to keep relevant sentencing information from the court. *See McQuay*, 154 Wis. 2d at 124. Judge Screnock was right when he stated that Throndson did not have a right to be sentenced based on a whitewashed record. (R. 61:12.) By conducting a search of a public database and disclosing that search to the parties, Judge Screnock did not violate any supreme court rules.

Next, Throndson asserts that if Judge Screnock's search was proper, information inadmissible at trial would be a part of a sentencing hearing.[4] (Throndson's Br. 12.) But plenty of information inadmissible at trial is admissible at sentencing. *See State v. Straszkowski*, 2008 WI 65, ¶ 36, 310 Wis. 2d 259, 750 N.W.2d 835 (allowing consideration of uncharged and unproven offenses); *State v. Leitner*, 2002 WI 77, ¶ 42–47, 253 Wis. 2d 449, 646 N.W.2d 341 (allowing consideration of facts related to offenses for which the defendant has been acquitted and facts underlying expunged convictions). Sentencing courts are explicitly allowed to consider juvenile contacts and delinquency adjudications. *See Hezzie R.*, 219 Wis. 2d at 882. Throndson's complaints are contrary to established Wisconsin law.

Finally, Throndson complains that Judge Screnock showed the appearance of bias and functioned as a prosecutor when he drew conclusions about Throndson's statements about unfair treatment from her father. (Throndson's Br. 12.) It is not clear whether Throndson did not want the court to consider her statements in the PSI report or whether she wanted the court to consider them as a mitigating factor at sentencing. Either way, the court's conclusions and comments were part of its proper exercise of sentencing discretion. Judge

[4] Throndson wrote that the information would be admissible at a plea hearing. Given the context of the statement, the State assumes that Throndson meant to argue that it would be part of the sentencing hearing.

Screnock did not reduce the State to a bystander. The State made its sentencing argument and the court considered the sentencing factors. Each played the proper role at sentencing.

The court properly exercised its discretion when it rejected Throndson's complaints of unfair treatment and concluded that Throndson failed to take responsibility for her actions and tried to present herself as the victim. (R. 62:44.) The court found that Throndson was untruthful during the PSI and COMPAS assessment. (R. 62:44.) The court concluded that Throndson tried to play the race card when arguing that she was unfairly treated by her family. (R. 62:44–45.)

Throndson cannot prove that Judge Screnock was objectively biased. The circuit court did not create an appearance of bias when it searched Throndson's prior record on publicly available database. The information about Throndson's prior contacts with the juvenile justice system were relevant and proper to consider at sentencing. To the extent that Throndson's argument would withhold relevant information from the sentencing court, that would violate public policy. She cannot meet her burden.

II. The circuit court did not rely on inaccurate information when sentencing Throndson.

A. Standard of review

Throndson has a constitutionally protected due process 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. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo." *Id.*

B. The defendant has the burden to prove the information was inaccurate and that the court relied upon it at sentencing.

A defendant who moves for resentencing based on the circuit court's use of inaccurate information at the sentencing hearing must show both that: (1) the information was inaccurate and (2) the court actually relied on the inaccurate information in the sentencing. *Tiepelman*, 291 Wis. 2d 179, ¶ 26 (citation omitted).

Whether the court relied on the inaccurate information requires examination of the record to determine "[w]hether the circuit court 'actually relied' on the inaccurate information at sentencing." *State v. Travis*, 2013 WI 38, ¶ 28, 347 Wis. 2d 142, 832 N.W.2d 491. Whether the circuit court actually relied on the incorrect information "turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" *Id.* (*quoting Tiepelman*, 291 Wis. 2d 179, ¶ 14).

If a defendant can meet both requirements, then "the burden shifts to the [S]tate to prove [that] the error was harmless." *Tiepelman*, 291 Wis. 2d 179, ¶ 26. "The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *Travis*, 347 Wis. 2d 142, ¶ 73.

C. Throndson fails to prove that the court relied upon inaccurate information.

Throndson seeks resentencing on the grounds that her due process rights were violated when the sentencing court relied upon incomplete information. She has a due process right to be sentence based on accurate information, and the sentencing court did not rely on inaccurate information. The court properly concluded that Throndson's due process rights were not violated. This Court should affirm.

Throndson cannot prove that the sentencing court received inaccurate information. Throndson argues that the sentencing court "relied on the twenty-three cases he discovered during his independent investigation." (Throndson's Br. 14.) Throndson does not explain what was erroneous about the statement. She does not dispute the number of prior cases, but instead seems to argue that they were not relevant because they were not juvenile delinquency adjudications. She cannot meet her burden.

The court did not sentence Throndson based on 23 prior contacts with the juvenile justice system without placing the prior contacts in context. At resentencing, the parties discussed the details of Throndson's prior contacts. Throndson's attorney noted that at least three of the prior cases stemmed from the same case. (R. 62:23.) He discussed that one of the prior cases was a referral to get Throndson protection from child protective services. (R. 62:23.) He noted one case where Throndson was adjudicated delinquent for disorderly conduct. (R. 62:24.) And he noted that the close case numbering indicated that there was a cluster of incidents that took place at roughly the same time. (R. 62:25.)

This information was presented by Throndson's attorney and she does not allege that any information was inaccurate. Instead, she argues without citation that the court considered 23 different adjudications. But her claim does not rise to proof that the circuit court violated her due process rights. She does not point to any inaccurate information considered at sentencing.

Likewise, Throndson cannot prove that the sentencing court actually relied upon inaccurate information. There is no evidence in the sentencing transcript about the court considering all of the prior cases. The court mentioned the number of Throndson's prior contacts at the plea hearing. (R. 59:16–17.) At the first sentencing hearing, the court noted

Throndson's lengthy record included juvenile adjudications. (R. 60:29.) But at resentencing, the court did not draw attention to Throndson's prior juvenile record during its sentencing comments.

Based on the seriousness of Throndson's crimes, her personal characteristics and record, and the need to protect society, the court properly exercised its discretion at sentencing. Throndson cannot not show that the court actually relied upon inaccurate information. This Court should conclude that Throndson failed to show any violation of her due process rights. This Court should affirm.

CONCLUSION

This Court should affirm Throndson's judgment of conviction.

Dated this 5th day of November 2020.

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 3259 words.

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CHRISTINE A. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

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 5th day of November 2020.

_____
CHRISTINE A. REMINGTON
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