STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP995-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISAAC M. GABLER,

Defendant-Appellant.

On Review from a Judgment of Conviction
Entered in Calumet County Circuit
Court, the Honorable Jeffrey S. Froehlich Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

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ISSUE PRESENTED

1. Did the circuit court erroneously exercise its discretion when it considered inaccurate information when it denied Mr. Gabler's request for expungement of his conviction upon successful completion of his probationary sentence?

The circuit court denied Mr. Gabler's request for expungement eligibility at sentencing, and when reviewing the matter in response to the filing of a postconviction motion asserting the claim, held that it did not erroneously exercise its discretion in doing so.

POSITION ON ORAL ARGUMENT & PUBLICATION

Mr. Gabler welcomes oral argument on this issue if the court would find it helpful to deciding the questions posed by this appeal. Though this matter involves in part the application of settled case law set forth in *State v. Helmbrecht,* 2017 WI App 5, 373 Wis. 2d 203, 891 N.W.2d 412, further clarification and publication are needed to confirm that, as with other aspects of the sentencing decision, the court must rely only upon accurate information when determining whether an individual is eligible for expungement following successful completion of probation and that failure to do so is an erroneous exercise of discretion.

STATEMENT OF THE CASE & FACTS

For nearly all of his life, Isaac Gabler was a good student and rule follower, graduating high school in 2019. That fall, he left his home in Wisconsin to attend Drake University. After the COVID-19 pandemic halted regular courses in March 2020, Mr. Gabler returned to the home of his parents' house to continue his studies remotely. It was at that time, in March of 2020, that Mr. Gabler began experiencing symptoms of mental illness. His parents knew that Mr. Gabler needed help, but they were met with roadblocks because of his age (he was an adult) and the lack of a pending civil commitment. The disease progressed rapidly over the course of weeks and to a point where he lost grasp with reality. He began acting dramatically out of character.

In early April 2020, Mr. Gabler contacted a high school friend, E.G., and told her he was suicidal. She cut off communication at that point, but Mr. Gabler continued to contact her over the next few days, eventually coming to her parents' home on April 5, 2020. He was met in the driveway by E.G.'s parents, at which time he said he wanted E.G. to take his virginity. After this incident, E.G.'s father filed for a restraining order against Mr. Gabler on behalf of his daughter, though she was 18 years old at the time.

The TRO & Injunction Proceedings

On April 8, 2020, E.G.'s father submitted a Petition for Temporary Restraining Order and request for an injunction on behalf of his daughter. (78:14-17). On the application, her father, an attorney, alleged his daughter's birthday to be July 31, 2002, establishing her as a minor for the purposes of the petition for a

restraining order. E.G.'s birthday, however, is July 31, 2001, one year older than what was alleged in the TRO application. Thus, E.G. was 18 years old at the time of the petition and a legal adult. The petition was dated April 6, 2020. (78:14-17).

The following day, the circuit court hearing the petition for an injunction received a letter from E.G.'s father, dated April 8, 2020. The letter stated Mr. Gabler was inpatient at Roger's Memorial Hospital in Oconomowoc, Wisconsin, and that it was unclear whether he was subject to a commitment. (78:18). The temporary restraining order requested by E.G.'s father was granted by the Honorable Jeffrey S. Froehlich.

On April 10, 2020, while at Rogers Memorial Hospital in Oconomowoc, the facility prepared documents to move forward with an emergency detention of Mr. Gabler. (78:19). An emergency detention was never ultimately pursued in Waukesha County because the county and court realized Mr. Gabler's residence was in Calumet County and not Waukesha, resulting in a lack of jurisdiction to hear the matter.

On April 14, 2020, the Waukesha County Sheriff's Department performed substitute service of the petition for a temporary restraining order and petition for injunction to a Rogers Memorial Hospital staff member. An affidavit of substitute service was filed with the court stating this much on April 20, 2020. (78:20).

The following week, on April 22, 2020, a hearing on the request for an injunction was held in the Calumet County circuit court. (78:21). Mr. Gabler was not present at the hearing, nor did he appear via any other means. E.G. was likewise not present, but her father appeared

via telephone. At that hearing, the court determined that E.G.'s date of birth was incorrectly stated on the petition for a temporary restraining order and request for an injunction. Rather than dismiss the petition as invalid for lack of competency, the court continued the matter to permit E.G. to file her own petition for a temporary restraining order and injunction to stand in the place of the originally filed petition.

The court entered an order extending the temporary restraining order until April 29, 2020, and scheduled a hearing for that date at 2:30 p.m. Following the hearing, an amended petition for a temporary restraining order and injunction is filed with the court, this time listing E.G. as the sole petitioner with her signature appearing at the bottom. (78:22-25).

The court held the adjourned injunction hearing on April 29, 2020. Mr. Gabler was present via telephone and was represented by Attorney Amy Menzel, who entered her appearance on the record two days prior. (78:26). E.G. also appeared by telephone. On the record, Attorney Menzel discussed concerns from the Gabler family expressing that they did not believe that Mr. Gabler was competent to proceed, but Attorney Menzel stated that she did not have reason to share those concerns based on her interactions with him. Service of Mr. Gabler with the petition for a temporary restraining order and the injunction was not addressed at this hearing, and personal service was not effectuated on Mr. Gabler ahead of this hearing.

Attorney Menzel entered into a stipulation on behalf of Mr. Gabler to extend the temporary restraining order for six months to allow him to participate in mental health treatment. The court signed an order granting a

temporary restraining order on the amended petition and ordered it effective until October 29, 2020. (78:27-29).

The following day, Mr. Gabler went to the home of E.G., knocked on her door and rang her doorbell in an attempt to contact with her. E.G. called the police and Mr. Gabler was arrested by the Calumet County Sheriff's Department. (79:1-2). When police arrived, it was clear that Mr. Gabler was experiencing significant symptoms of a mental illness and Calumet County moved for an emergency detention of Mr. Gabler in Case Number 2020ME42 and his placement in Winnebago Mental Health was entered. (79:3-17).

At some point after the April 29, 2020, hearing, the circuit court requested that Attorney Menzel obtain an admission of service from Mr. Gabler signature to admit service. Attorney Menzel declined to do so by letter on May 4, 2020, due to her client being incompetent. (81:4).

A Chapter 51 Commitment Petition is Filed

On May 5, 2020, A probable cause for civil commitment hearing was held in Calumet County Case Number 2020ME42. At the conclusion of the hearing, the court finds that Mr. Gabler is mentally ill, a proper subject for treatment, a danger to himself, and that he is not competent to refuse medication. The court set the matter for a final hearing and in the meantime, ordered that Mr. Gabler be detained at Winnebago Mental Health to undergo evaluations by Dr. Marshall Bales and Dr. Sangita Patel. (81:5-6). That same day, Mr. Gabler was interviewed by Dr. Marshall Bales at Winnebago Mental Health, who concludes he was not competent to refuse medications, lacked any insight

into his mental illness, and was the appropriate subject of a Chapter 51 commitment order. (81:8-11). Mr. Gabler was also interviewed by Dr. Sangita Patel at Winnebago Mental Health, who likewise concluded he was not competent to refuse medications, lacked any insight into his mental illness, and was the appropriate subject of a Chapter 51 commitment order. (82:1-7).

Criminal Charges Come Next

On May 6, 2020, the Calumet County District Attorney files a Summons and Complaint to initiate the associated criminal matter, Case Number 2020CF105. (81:12-17).

On May 11, 2020, Mr. Gabler, appearing from Winnebago Mental Health, has an initial appearance in 2020CF105. Court orders that in-patient competency evaluation be completed. (82:9-10). Two days later, the court-appointed competency evaluator, Dr. Deborah Fischer, interviewed Mr. Gabler at Winnebago Mental Health. In her subsequent court report, Dr. Fischer asserted by a reasonable degree of medical certainty that Mr. Gabler was delusional and lacked insight into the appropriateness of his conduct and was both incompetent to proceed and to refuse psychotropic medication. (77:1-10).

The Injunction Matter Continues

Following Mr. Gabler's arrest on April 30, 2020, and subsequent commitment to Winnebago Mental Health, E.G. arranged for substitute service of the Amended Petition for a Temporary Restraining Order and Injunction, which was again delivered to facility staff and not on Mr. Gabler personally. (82:8).

On May 14, 2020, this court held a hearing on E.G.'s request for an injunction against Mr. Gabler. He was not present at this hearing by any means, not in person or via telephone or video conferencing. At that time, Mr. Gabler was committed to Winnebago Mental Health. Attorney Menzel waived his personal appearance and did not reference that he had been committed through the Chapter 51 process and was incompetent to proceed at that time.

The hearing moved forward without Mr. Gabler's presence and at the conclusion of the presentation of evidence, the court granted E.G.'s petition for a four-year injunction. (77:11-12).

The Criminal Case Continues

On May 20, 2020, the final competency report was filed with the court by Dr. Fischer in the criminal matter. In the report, Dr. Fischer concluded that Mr. Gabler was not competent to proceed or to assist in his own defense, which lacked the capacity to understand the benefits of medication and to refuse its administration. The doctor further opined that with appropriate mental health treatment, Mr. Gabler was likely to regain competency. (12). The following week, the court adopted the competency findings and was committed for further treatment. (14). Two months later, after received the appropriate mental health care, Mr. Gabler was found competent to proceed, and the criminal proceedings were reinstated. (77:16).

After Mr. Gabler was appropriately diagnosed, started on a medication regimen, and declared competent, his counsel negotiated a resolution on his behalf to enter a plea to the misdemeanor matters with an agreement that doing so would result in a dismissal

of the felony stalking count. Accordingly, Mr. Gabler entered his plea and the matter continued to sentencing on September 21, 2020.

At the hearing, Mr. Gabler's attorney made the request on his behalf, stating:

> I'm asking the Court to approve expungement upon successful completion of probation or expungement at some set time in the future even after probation were to expire. Isaac hopes to have a professional career someday, and he would really be grateful if this could be expunged from the public record because there's certainly barriers sometimes when there's things noted on CCAP.

(53:22-23).

The court moved on to its sentencing remarks and after accepting the agreed upon resolution for probation, it turned its attention to the sentencing question. Regarding Mr. Gabler's request, the court opined:

> As far as expungement goes here, Mr. Gabler has received the significant benefit of having the felony charge dismissed and read in, and the Court believes that there needs to be some information available to the public given the events that took place here, so the Court is not going to allow for expungement in this matter.

(53:25).

Trial counsel sought clarification of that decision, noting that the associated restraining order matter was also available for the public to see and would be accessible through any future background checks.

(53:26). The court replied that it understood that to be the case. (53:27).

A few days after sentencing, trial counsel contacted the court regarding expunction in writing and stated following:

> I am writing to clarify some remarks that were made at sentencing. As everyone is well aware, the Defendant's mental health is a significant part of this case. During the District Attorney's remarks, he generally referenced that schizophrenia can manifest itself when a person is the Defendant's age. Then, thereafter, no one specifically mentioned the Defendant's diagnosis. The Defendant's current diagnosis is major depressive disorder with psychotic features. He is not diagnosed with schizophrenia.
>
> Once again, I wanted to be sure the record was clear in this case. If this additional information would change the Court's opinion about granting expungement, I would ask the Court direct it to be noted on the Judgment of Conviction.

(39).

The court responding by letter on October 7, 2020, writing:

> …The Court recognizes that Mr. Gabler's mental health issues were a significant part of his case. The Court did not form its opinion denying expungement based upon any particular mental health diagnosis nor Mr. Jones' comments that your client may be suffering from schizophrenia. The Court's concern was that while the public might have been able to ascertain that Mr. Gabler had an injunction ordered against him that information

> was not sufficient. The Court believes there is a vast difference between having an injunction ordered against an individual and knowing that the individual violated that injunction. For public safety reasons the Court believed it was important that that information be accessible.

(49).

Postconviction Litigation

Undersigned counsel was retained to represent Mr. Gabler for postconviction proceedings on this matter. After reviewing the matter, it was determined that there were several errors in procedure surrounding the issuance of the temporary restraining order that served as a basis for the misdemeanor charge in this matter and the subsequent injunction that followed.

As a result, Mr. Gabler filed a motion pursuant to section 806.07, *Stats.*, to reopen and vacate the injunction and court's previous orders, asserting that the court did not have competency to grant either the temporary restraining order or injunction in this case for the following reasons:

> (1) the original restraining order was improperly granted as E.G. was a competent adult at the time her father pursued the petition on her behalf, either intentionally or recklessly misleading the court into believing the appropriate jurisdiction for such an order existed;
>
> (2) that the amended restraining order signed by E.G. was not personally served on Mr. Gabler at any point in time and that even had it been, he was not competent to accept service; and

> (3) that counsel for Mr. Gabler could not waive his appearance at the injunction hearing on his behalf as he was unable to attend due to an active civil commitment and confinement to Winnebago Mental Health and even had he attended, he was indisputably incompetent to consent to any waiver or to proceed at the time the injunction was ordered.

(78:).

The court granted Mr. Gabler's request to reopen the injunction matter and it was dismissed on October 19, 2021. The court's order stated the following:

> The Court did not have competency to grant either the temporary restraining order or injunction in this case because the original restraining order was improperly granted as [E.G.] was a competent adult at the time her father pursued the petition on her behalf. The original petition for a temporary restraining and injunction order filed by [R.G.] on April 8, 2020 should have been dismissed at the April 22, 2020 hearing as it did not comply with the statutory requirements of section 813.125, Stats., because [R.G.] asserted that his daughter, [E.G.], was a minor and he incorrectly signed the petition on her behalf, and as a result, the court had no competency to hear the case.
>
> Mr. Gabler was not present at the injunction hearing via any sort of communication method and was not legally competent to have agreed to such a waiver. Counsel for Mr. Gabler could not waive his appearance at the injunction hearing on his behalf as he was unable to attend due to an active civil commitment and confinement to Winnebago Mental Health and even had he attended, he was

> indisputably incompetent to consent to any waiver or to proceed at the time the injunction was ordered.
>
> The court must vacate the injunction pursuant to Wis. Stats. §806.07.
>
> The matter is dismissed.

(76).

On February 17, 2022, Mr. Gabler filed a postconviction motion asking the court to reverse its determination regarding expungement on the grounds that the court had considered inaccurate information in its determination related to the temporary restraining order, Mr. Gabler's actions related to it, and the validity of both the TRO and injunction that followed. Specifically, Mr. Gabler asserted that the sentencing court erred when it concluded expungement was not appropriate because it relied upon the incorrect assumption that Mr. Gabler had knowingly violated an injunction ordered by the court and public safety required that this information be available to the community. The postconviction motion argued that this was problematic because:

> (1) Mr. Gabler never violated an *injunction*, but rather a temporary restraining order;
>
> (2) Mr. Gabler's actions were not knowing or intentional as he was incompetent at the time of the restraining order hearing due to substantial mental illness and had never been appropriately served with the document;

> (3) the petition for the TRO should never have been granted because it contained false assertions regarding the date of birth of E.G.; and
>
> (4) the subsequent injunction was later vacated, and no petition ever refiled based on all of the procedural and due process issues with the original proceedings.

(71).

After briefs on Mr. Gabler's motion were submitted by the parties, the court denied the postconviction request in writing. (98). The court wrote that it did not rely upon inaccurate information at sentencing and that whether the defendant knowingly "violated the restraining order is of no consequence to the Court's decision on expungement." (98:2). The court continued, stating:

> What the Court believed and continues to believe is important for the public to know, so that members of the public are "on notice" and can take measures to protect themselves and others, is that there was a temporary restraining order in place and that the order had been violated. The Court did not rely on inaccurate information when making that decision.

(98:2).

Mr. Gabler now appeals.

ARGUMENT

I. The circuit court erroneously exercised its discretion at sentencing when it denied Mr. Gabler's request for expungement of his conviction upon successful completion of his probation.

A. Applicable legal principles

1. A circuit court has discretion at sentencing to make a defendant's conviction eligible for expungement as permitted by section 973.015, *Stats*., and evidence of such a reasonable exercise of discretion must be present in the record to sustain the finding.

The expungement statute was created by the legislature with the intent "to provide a break to young offenders who demonstrate the ability to comply with the law and to provide a means by which trial courts may, in appropriate cases, shield youthful offenders from some of the harsh consequences of criminal convictions." *State v. Matasek*, 2014 WI 27, ¶ 42, 353 Wis. 2d 601, 846 N.W.2d 811 (quoting *State v. Leitner*, 2002 WI 77, ¶ 38, 253 Wis. 2d 449, 646 N.W.2d 341)(internal quotations omitted).

Wisconsin Statute §973.015 gives a circuit court authority to order expungement upon successful completion of a sentence in certain limited circumstances:

> Subject to sub. 2. and except as provided in subd. 3., when a person is under the age of 25 at the time of the commission of an offense for which the

> person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.

Wis. Stat. §973.015(1m)(a)1 (provided in relevant part).

In making this determination, the sentencing court must set forth in the record "the facts it considered and the rationale underlying its decision for deciding whether to grant or deny expungement." *State v. Helmbrecht*, 2017 WI App 5, 373 Wis. 2d 5, 891 N.W.2d 412; *See State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197.

2. A reasonable exercise of discretion requires the consideration of only accurate and correct facts. It is error to rely upon inaccurate information while engaging in an act of sentencing discretion, including the expungement determination.

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, 291 Wis. 2d 179, 717 N.W.2d, 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).

This principle was first recognized by the U.S. Supreme Court seventy years ago in *Townsend v. Burke*,

334 U.S. 736 (1948), and has been the basis for appellate relief in federal and Wisconsin courts alike for decades. A fair sentencing process in "one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *Tiepelman*, 2006 WI 66, ¶26 (quoting *U.S. ex rel. Welch v. Lane*, 738 F.2d 863, 864-865 (7th Cir. 1984)).

When the sentencing proceeding is tainted with false or misleading information, 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).

The U.S. Supreme Court laid the foundation for modern appellate review of these types of claims in *U.S. v. Tucker*, 404 U.S. 443 (1972). There, the court concluded that when inaccurate information material to a sentencing proceeding is presented, the question that concerns the reviewing court is whether the outcome of the case – the ultimate sentence ordered – might have been different. *Tiepelman*, 2006 WI 66, ¶12, citing *Tucker*, 404 U.S. 443, 448. If that answer is yes, resentencing is required.

The standard for assessing these claims was further developed in *U.S. ex rel. Welch v. Lane*, 738 F.2d 863. In *Welch,* the Seventh Circuit concluded that a sentence must be set aside and resentencing held where a defendant has established "that false information was part of the basis for the sentence." *Welch*, 738 F.2d at 865. To make such a showing, a defendant must prove that: (1) the information before the sentencing court was

inaccurate; and (2) that the sentencing court actually relied upon the inaccurate information in imposing sentence. *Id.* Reliance on inaccurate information is established where the record reflects that the sentencing judge gave "specific consideration" or "explicit attention" to the information, such that the misinformation "formed part of the basis for the sentence." *Welch*, 738 F.2d at 866 (citing *U.S. v. Hubbard*, 618 F.2d 422, 425 (7th Cir. 1979). The Seventh Circuit found that "the fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis for the sentence." *Id.* (emphasis in original).

In *Tiepelman*, this Court clarified that a defendant who claims that his sentence was based upon inaccurate information need not prove the outcome would have been different absent the misinformation because the "prejudicial reliance" test was not the proper standard of review.[1] Instead, a defendant seeking a new

[1] *Tiepelman*, 2006 WI 66, ¶2 ("We hold that in a motion for resentencing based on a circuit court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information. Here, the court of appeals applied the wrong test—prejudicial reliance—when it affirmed the circuit court. We must, therefore, reverse that affirmance, and withdraw any language in *State v. Montroy*, 2005 WI App. 230, 287 Wis.2d 430, 706 N.W.2d 145, *State v. Groth,* 2002 WI App 299, 258 Wis.2d 889, 655 N.W.2d 163, *State v. Suchocki*, 208 Wis.2d 509, 516, 561 N.W.2d 332 (Ct.App.1997), *State v. Coolidge*, 173 Wis.2d 783, 496 N.W.2d 701 (Ct.App.1993), (continued)

sentencing hearing need only demonstrate by clear and convincing evidence that the information was inaccurate and that the court actually relied upon it at the time of sentencing. *Tiepelman*, 2006 WI 66, ¶¶ 26-27.

If the defendant satisfies both prongs, the burden shifts to the State to establish that the error was harmless. *Id.*, 2006 WI 66, ¶¶27-28. To show that the court's reliance on inaccurate information was harmless, the State must prove beyond a reasonable doubt that the sentence would have been the same absent the error. *See State v. Travis*, 2013 WI 38, ¶¶73, 86, 347 Wis. 2d 142, 832 N.W.2d 491; *State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423.

B. Here, the sentencing court erroneously exercised its discretion when it relied upon inaccurate information when denying Mr. Gabler's request for expungement.

As detailed in the fact section and in the record surrounding the issue, the sentencing court specifically stated it was denying Mr. Gabler the privilege of expungement because the public had the right to know that an "injunction" had been ordered and that he had violated that "injunction" order. (49). This statement by the court is itself was based upon an inaccurate fact - Mr. Gabler's alleged actions never violated an "injunction" as that order was not issued for several more weeks following the incident underlying the criminal charges. That itself demonstrates reliance on inaccurate information. But the reliance on inaccurate information does not stop there.

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and *State v. Littrup*, 164 Wis.2d 120, 473 N.W.2d 164 (Ct.App.1991).

For the court to reasonably premise its decision to deny Mr. Gabler the right to expungement based upon the public's right to know that a TRO had been ordered and that Mr. Gabler's conduct was alleged to have violated the orders detailed in the TRO, there must be some connection to the orders and intentional and knowing conduct on Mr. Gabler's part to establish that such conduct is relevant to a public safety interest. If Mr. Gabler did not know that this order had been issued due to the lack of personal service and because he was incompetent as a matter of law at the time the TRO was issued and discussed at the subsequent hearing, how does the removal of the fact that he engaged in contrary conduct after its issuance harm the public?

Moreover, as pointed out by trial counsel at the time of sentencing, the record related to the TRO, the subsequent alleged violation, and the court's decision to issue an injunction in the weeks to follow is already a matter of public record and available through viewing on the Circuit Court Access Program website. That the injunction has subsequently been vacated and dismissed does not alter that fact. This remains the case regardless of whether or not expungement of the criminal case takes place. For these reasons, Mr. Gabler asserts that he has satisfied the burden imposed in *Tiepelman* by establishing first that the inaccurate information was considered at sentencing and second that the court actually relied upon this information when making its determination regarding expunction. *Tiepelman*, 2006 WI 66, ¶¶ 26-28.

Because Mr. Gabler has demonstrated that the court erroneously exercised its discretion by relying

upon inaccurate information regarding the expungement decision, the burden shifts to the State to prove beyond a reasonable doubt that the decision on expunction would have been the same absent the consideration of inaccurate information. *See State v. Travis*, 2013 WI 38, ¶¶73, 86, 347 Wis. 2d 142, 832 N.W.2d 491; *U.S. ex rel. Welch v. Lane*, 738 F.2d 863 (The Seventh Circuit concluded that a sentence *must* be set aside and resentencing held where a defendant has established "that false information was *part* of the basis for the sentence." (emphasis added)). Doing so under these circumstances is not possible.

The court, even with the opportunity to expand upon its reasoning in response to the postconviction motion and letter from trial counsel seeking clarification, provided no other reasoning justifying the denial of expungement. Here, the inaccurate information considered by the court is central to the exact reason for the denial. (53:22-23, 26-27; 39; 49). Moreover, the court cannot now point to other facts in the record to support its position. *U.S. ex rel. Welch v. Lane*, 739 F.2d 863 (7th Cir. 1984). This is because "the fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis of the sentence."

CONCLUSION

For all of the reasons set forth above, Mr. Gabler moves this court for an order reversing the decision of the sentencing court and remanding the case back to the circuit court for a new determination regarding expungement in this matter.

Dated this 21st day of September, 2022.

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 4877 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 21st day of September, 2022.

Signed:

NICOLE M. MASNICA
Attorney for the Defendant-Appellant

CERTIFICATION AS TO APPENDIX

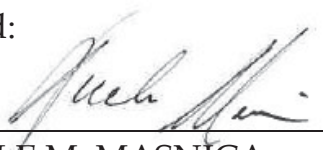
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited 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 21st day of September, 2022.

Signed:



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