STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2022AP995-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISAAC M. GABLER,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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Isaac M. Gabler, by his attorney and pursuant to sections 809.62(1g)(a) and (b), *Stats.*, respectfully petitions this court to review the April 19, 2023, adverse decision of District II of the Court of Appeals, denying Mr. Gabler's request for a limited resentencing hearing on the question of expunction on the grounds that the Honorable Jeffrey S. Froehlich, of the Calumet County Circuit Court, considered inaccurate and thus, improper information, based on uninformed and incorrect assumptions related to his alleged violation of the "injunction" in the associated civil case.

ISSUE PRESENTED

1. Did the circuit court erroneously exercise its discretion when it considered inaccurate information in denying Mr. Gabler's request for expungement of his conviction upon successful completion of his probationary sentence based upon the simple fact that he had contact with the home of E.G. contrary to a temporary restraining order, when that order had not been properly served, contained inaccurate information such that the court had no competence to grant the temporary restraining order, and that Mr. Gabler was incompetent at the time the restraining order was allegedly violated by him going to E.G.'s house?

The circuit court denied Mr. Gabler's request for expungement eligibility at sentencing, failing to state a specific reason for the denial at the hearing. After trial counsel wrote to the court to clarify Mr. Gabler's mental health diagnosis, as she suspected an inaccuracy had influenced the court's expunction decision, the circuit court issued another statement in writing related to expunction, stating it had denied

expunction for public safety reasons as it believed it was necessary for the public to know that Mr. Gabler both had an "injunction" ordered against him and that he violated that "injunction."

In response to the postconviction motion alleging that Mr. Gabler had not knowingly violated the temporary restraining order and never violated the subsequently ordered injunction (notably, the same judge had post-conviction vacated the civil injunction at Mr. Gabler's request due to issues related to service, errors in the pleadings such that the court had no competence to issue the temporary restraining order to begin with, and Mr. Gabler's lack of competence at the time of the proceedings), the court held that it was irrelevant and of "no consequence" whether Mr. Gabler knowingly violated the restraining order but rather "that there was a temporary restraining order and that the order had been violated." (98:2). The circuit court did not address the argument that it had incorrectly asserted that Mr. Gabler had violated an "injunction" rather than a "temporary restraining order".

CRITERIA FOR REVIEW

Though the legal principles establishing the need for a court to consider only accurate, truthful, and relevant information at sentencing have been around for decades, there remains significant inconsistency in the court's application of the "doctrine" such that clarity is needed from this court on the matter. Mr. Gabler's case, like *State v. Coffee*, 2020 WI 1, 289 Wis. 2d 627, 937 N.W.2d 579, where this court was unable to reach any majority consensus, demonstrates how a sentencing court can technically follow the requirements of the law

by relying upon only "accurate" facts, but still fall short in affording a defendant his constitutionally protected due process protections that require a court sentencing an individual on only relevant and truthful information.

Here, the court of appeals points out various facts to sustain its finding that the court technically relied upon an accurate factual picture when denying expunction solely on the ground that the TRO had been violated, that Mr. Gabler had been present at the restraining order hearing, had allegedly acknowledged during his arrest that he was aware of the restraining order, and had ultimately entered into a plea agreement where he entered a "no contest" plea to the relevant charge, but ignores how those supportive "facts" are completely undermined by the substantial evidence in the record that Mr. Gabler was utterly incompetent at the time of both the restraining order and the subsequent alleged violation the following day, rendering a decision on expunction linked to him somehow being more dangerous because he allegedly chose to violate the court's order problematic.

This is why Mr. Gabler implores this court to accept this case for review and conclude that the question of "inaccurate information" at sentencing and its due process implications involve more than just finding whether the reasoning can be supported by some facts in the record, but rather that the Due Process Clause of the Sixth Amendment commands a much more nuanced analysis than that.

While at first blush, this court may believe that this area of law is well-settled, a look back at the *Coffee* holding issued just three years ago demonstrates that

there remain differences of opinion about just what does and does not constitute inaccurate information.

In *State v. Coffee,* the defendant was arrested and later charged for his role in committing two armed robberies. *State v. Coffee*, 2020 WI 1, ¶ 7, 389 Wis. 2d 627, 937 N.W.2d 579. Mr. Coffee entered a plea to all counts and the matter proceeded to sentencing a few weeks later. At the sentencing hearing, the State informed the court that Mr. Coffee had been arrested for an armed robbery in December 2011, exclaiming that while the matter was never formally prosecuted, a prior arrest for similar conduct was "alarming" because Mr. Coffee was charged in his new case with committing two armed robberies. *Id.* at ¶ 8. Postconviction litigation later revealed that the information offered by the State about Mr. Coffee's alleged prior armed robbery arrest was unquestionably suspect.

Police reports from the 2011 arrest revealed that not only was the incident described not an "armed" robbery, but more importantly, that the victim of the robbery, when he learned that Mr. Coffee had been arrested just a few hours later, informed police that Mr. Coffee was not the person who had committed the robbery. The postconviction court concluded that the State's representations regarding the prior arrest were patently inaccurate – that both the statements that it was an "armed" robbery and that Mr. Coffee was the perpetrator were untrue – but that in the end, this had not impacted the court's decision at sentencing.

Coffee ultimately made its way up this court on a question related to forfeiture of inaccurate information at sentencing claims, but that was not

the issue that strongly divided this court. Instead, there was great debate about what was truly inaccurate about the information introduced by the State. On one side of the debate were those who believed that the only clear "inaccuracy" was that it was a strong-armed robbery versus an armed robbery, not that Mr. Coffee had been definitely excluded by the victim as the perpetrator. On the other side was a strongly worded dissent with three signatories, that challenged the others' conclusions that the victim's statement that Mr. Coffee was not the person who robbed him did not make the information provided by the State completely inaccurate and not in the least relevant. Even the concurrence opined:

> If we are committed to sentences based on accurate information, it should matter whether an arrest really does evidence culpable behavior or bad character. If it doesn't matter, then we are at risk of increasing a defendant's sentence based on a criterion that says nothing relevant about him.

Id. at ¶ 63.

The concurrence only voted with the majority as they determined that the error was harmless because of other evidence in the record of the defendant's escalating criminal behavior but conceded that the additional nuance and context to the uncharged arrest mattered. *Id.* at ¶ 64.

While Mr. Gabler's claim does not involve inaccurate information related to prior and completely unrelated conduct, it is analogous in that the court's consideration of one piece of information to justify its denial of expunction – that public safety

demands that it be known Mr. Gabler violated the temporary restraining order – is undermined substantially by information not considered at the time that decision was made. Here, both the circuit court and court of appeals upheld the expunction denial even after the injunction was subsequently vacated by the circuit court for procedural errors and that Mr. Gabler was incompetent to proceed at the time the orders were instated by the court, finding that because the court relied upon technically accurate information, that there had been a violation of the terms of the TRO, there was no inaccurate information considered.

Mr. Gabler contends, however, that the court lacked the context of the alleged violation and had been misled by prior counsel regarding Mr. Gabler's mental status at the time of the restraining order hearing and violation the following day such that the court's decision no longer made sense outside of a vacuum. Because of these nuanced issues, the circuit court's ruling denying expunction was fundamentally erroneous as it was ordered without a full understanding of the alleged restraining order violation, and therefore, was premised on points that are inaccurate and misleading. The reviewing courts disagreed because there were some facts in the record to demonstrate that even though Mr. Gabler was plainly incompetent at the time, he made statements that seemingly acknowledged an understanding of the proceedings, and that was enough to render the court's determination based upon "accurate" information.

As this court had significant disagreements about what constitutes inaccurate information in the

Coffee matter just a few years ago, it is clear that there remains a ripe and present question in need of this court's answering. This is an issue that will arise in many cases, and without clear authority on the subject, there is certain to be inequity and uncertainty in postconviction and appellate review of these types of challenges, simply dependent on how the individual judge or particular panel views the importance of only relevant material and accurate information being presented at sentencing. As a result, Mr. Gabler moves this court to determine once and for all what constitutes inaccurate information at sentencing such that Sixth Amendment due process rights are implicated. Wis. Stat. §809.62(1r)(a), (b) & (c)3.

STATEMENT OF FACTS & RELEVANT PROCEDURAL HISTORY

For nearly all of his life, Isaac Gabler was a good kid: he was a great 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 his parents' house to continue his studies remotely. It was at that time that Mr. Gabler, like so many who suffer from illness do in their late teens and early twenties, began experiencing symptoms of mental illness. His parents knew that Mr. Gabler needed help, but they were met with roadblocks because of his age and the county's disinterest in pursuing a commitment (he was an adult who had not yet been subject to an emergency commitment or competency proceedings). His symptoms progressed rapidly over the course of just a few weeks, and eventually, he lost complete

grasp with reality and had no insight into his mental illness.

Within weeks, in early April 2020, Mr. Gabler contacted a high school friend, E.G., and told her he was suicidal and struggling with his mental health. He became preoccupied with talking to her and soon, she cut off communication. Mr. Gabler continued to contact her over the next few days despite her lack of response, eventually coming to her parents' home on April 5, 2020.

Mr. Gabler was met in the driveway by E.G.'s parents, at which time he told her father that he wished for E.G. to take his virginity. Immediately after the driveway incident, Mr. Gabler's parents' attempts at getting their son help amplified and eventually got him into an inpatient facility to address his rapidly declining mental health. While the family resided in Menasha, they were unable to get assistance from local resources and instead, brought their son to Rogers Behavioral Health in Oconomowoc, Wisconsin.

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). During this timeframe, Mr. Gabler was actively mentally ill and not yet on the appropriate medication regimen that would ultimately successfully and completely address the symptoms of his mental illness.

On April 8, 2020, the circuit court hearing the petition for an injunction received a letter from E.G.'s father. The letter informed the court that Mr. Gabler was inpatient at Roger's Memorial Hospital in Oconomowoc, Wisconsin, and that it was unclear to him whether Mr. Gabler was subject to a civil commitment. (78:18). In response to the submissions, 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 and civil commitment of Mr. Gabler. (78:19). An emergency detention was not ultimately granted in Waukesha County because the county and court realized early in the proceedings that Mr. Gabler's residence was in Calumet County and not Waukesha, meaning that the county did not have jurisdiction over Mr. Gabler.

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 an amendment to the petition for a temporary restraining order and injunction to stand in the place of the originally filed petition. (78:22-25). 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.

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 after meeting with him that day. Service of Mr. Gabler with the petition for a temporary restraining order and the injunction was not addressed at this hearing, though personal service had not been effectuated at that point.

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 new temporary restraining order on the amended petition and ordered it effective until October 29, 2020. (78:2729).

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 her. E.G., who was inside but did not answer, called the police. Mr. Gabler was promptly arrested by the Calumet County Sheriff's Department. (79:1-2). When police arrived, it was clear to them that Mr. Gabler was experiencing significant symptoms of a mental illness and upon his arrest, a petition for a Chapter 51 commitment was completed, Calumet County moved for an emergency detention (Calumet County Case Number 2020ME42), and he was taken to Winnebago Mental Health. (79:3-17).

In the days following the April 29, 2020, hearing, the circuit court requested in some undocumented fashion that Attorney Menzel obtain an admission of service from Mr. Gabler. Attorney Menzel declined to do so by letter on May 4, 2020, writing that she did not believe her client to be capable of acknowledging service because she now believed him to be 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 found Mr. Gabler was mentally ill, a proper subject for treatment, a danger to himself, and that he

was not competent to refuse medication. The court set the matter for a final hearing and 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. Dr. Bales concluded Mr. Gabler 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 filed a Summons and Complaint to initiate the associated criminal matter, Case Number 2020CF105 (81:12-17), and the following week, appearing from Winnebago Mental Health, Mr. Gabler's initial appearance was held. At that time, the court ordered an in-patient competency evaluation to be completed. (82:9-10). Two days later, the court-appointed competency evaluator, Dr. Deborah Fischer, interviewed Mr. Gabler at the mental health center. In her court report detailing the interview, Dr. Fischer asserted by a reasonable degree of medical certainty that Mr. Gabler was delusional, 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 served 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, despite the court's ordering of a competency evaluation in the associated criminal case the week prior. Mr. Gabler was not present at the hearing – not in person or via telephone or video conferencing – as he was at Winnebago Mental Health and subject to civil commitment proceedings. Attorney Menzel waived Mr. Gabler's personal appearance at the hearing and failed to inform the court he had been committed through the Chapter 51 process and was incompetent to proceed. 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, as he 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 without objection from the parties and was committed to an inpatient facility for further treatment. (14). Two months later, after receiving the appropriate mental health care, Mr. Gabler's mental health dramatically improved such that he 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 "no contest" plea to the misdemeanor counts in exchange for the State's agreement to dismiss of the felony stalking count. The matter proceeded to plea and sentencing pursuant to that negotiation on September 21, 2020.

At the hearing, Mr. Gabler's attorney made an argument and request for expunction following successful completion of probation. Counsel argued:

> 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 accepted the agreed-upon resolution between the parties and placed Mr. Gabler on probation. At the conclusion of the court's sentencing remarks, it turned its attention to the expunction question. 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).

Following that statement of the court, trial counsel responded by noting that the associated restraining order matter was also available for the public to see and would be accessible through any future background checks, challenging the court's point regarding the availability of the information on the circuit court access program (CCAP). (53:26). The court replied that it understood that to be the case and that it did not alter its decision. (53:27).

A few days after sentencing, trial counsel contacted the court regarding expunction, this time in writing. Counsel wrote the 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 responded 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. A review of the case led to the determination 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.

(78:7-10).

The court granted Mr. Gabler's request to reopen the injunction matter and subsequently vacated the injunction and dismissed the case 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).

Following a decision on the injunction matter, Mr. Gabler filed a postconviction motion asking the court to reverse its determination regarding expunction on the grounds that the court had considered inaccurate information in its expunction determination. Specifically, Mr. Gabler asserted that the sentencing court erred when it concluded expungement was inappropriate because it relied upon the incorrect assumption that Mr. Gabler had knowingly chosen to ignore the restrictions of a court order in the civil case injunction case. The postconviction motion argued that this was problematic for multiple reasons. First, Mr. Gabler never violated an injunction as stated in the letter addressing expunction written by the court, but

rather the allegation in the criminal case was that he violated the restriction of the temporary restraining order that prohibited him from having contact with E.G. and her residence. Thus, the court's decision was premised on an inaccurate belief about the nature of Mr. Gabler's alleged violation.

Next, Mr. Gabler asserted that he was actively mentally ill at the time of the alleged violation and contact with E.G. and because of his mental health status, which was well documented in contemporaneous records, he was incompetent and unable to understand the significance and conform his conduct with the law. Therefore, his actions in attempting to make contact were not knowing or intentional and as a result, consideration of this conduct was irrelevant to Mr. Gabler's character and whether he remains a danger to the public following his diagnosis and successful treatment.

Third, Mr. Gabler asserted the petition for the temporary restraining order was flawed in several ways and also had not been properly served on Mr. Gabler, details about the order the court did not know at the time the sentencing decisions were made. Therefore, not only should the order never have been granted, relying on Mr. Gabler's failure to comply with an illegal court order to deny him expunction is not a reasonable exercise of discretion. (71).

After briefs on Mr. Gabler's motion were submitted by the parties, the court denied the postconviction request in writing without a hearing. (98). The court wrote that it did not consider inaccurate information because it never believed Mr. Gabler's intent or knowledge related to the temporary

restraining order or its violation was relevant. (98:2). Rather, the court opined:

> 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).

The Case Moves to the Court of Appeals

Following the denial of his postconviction motion, Mr. Gabler filed a timely notice of appeal and sought review by the court of appeals. In a one judge opinion ordered pursuant to section 752.31(2)(f) (2021-22), the court of appeals affirmed Mr. Gabler's judgment of conviction and the order denying his postconviction motion issued by the circuit court. In affirming the lower court's ruling, the court of appeals went point by point to address Mr. Gabler's arguments.

First, the court looked at the question about the court's assertion in a written letter addressing expunction that it was denying the request because Mr. Gabler had violated an "injunction" when in fact, the allegation was that there was an alleged violation of the temporary restraining order. (COA Decision, ¶¶20-21). The reviewing court held that while Mr. Gabler was technically correct that the court used the incorrect terminology in the letter addressing the expunction question, it found that this was not meaningful to the determination as the court used the term "order" on

two occasions during the sentencing hearing. (COA Decision, ¶¶20-21). Therefore, the court concluded that the court must not have been mistaken related to the nature and timing of the alleged violation on which it was relying when it denied the expunction request, but rather that it had simply "misdescribed" the violation. (COA Decision, ¶21).

Next, while the postconviction court held that it had not relied on whether there had been a "knowing" violation of the restraining order at all in its expunction decision, the court of appeals addressed Mr. Gabler's argument that because of the procedural issues surrounding the issuance of the temporary restraining order and the service process, as well as the fact that Mr. Gabler was unquestionably mentally ill and incompetent rendering him incapable of actually understanding the terms of the court's order such that his conduct cannot be believed to have been a knowing or intentional violation of the order. (COA Decision, ¶¶22-24). The court of appeals did not dispute that Mr. Gabler was actively mental ill at the time of the restraining order hearing and the alleged violation of that order, but concluded that because Mr. Gabler was on the telephone and connected to the restraining order hearing and also because the criminal complaint noted that Mr. Gabler acknowledge to police that he "knew" a restraining order was in place. (COA Decision, ¶23). The court opined that Mr. Gabler "acknowledged that he was willing to extend the terms of the initial TRO for six months and that he knew he would have to follow them." (COA Decision, ¶23). The court also pointed to the fact that Mr. Gabler had declined to pursue a plea of non-responsibility due to mental defect and instead, entered a "no contest" plea to the charge of knowingly violating a temporary restraining order and that the

court subsequently found him guilty of that offense, relying on the criminal complaint when doing so. (COA Decision, ¶23).

As a result, the court of appeals held that the lower court's denial of expunction was a reasonable exercise of discretion. (COA Decision, ¶25). The court wrote: "the circuit court could…reasonably conclude that expungement would deprive the community of one way to learn that Gabler had violated the amended TRO." (COA Decision, ¶25). It continued, holding that the denial of expunction rests of an "application of the correct law to the relevant facts and is one a reasonable judge could make." (COA Decision, ¶25). Therefore, it affirmed the lower court's ruling.

Mr. Gabler now petitions this court for review.

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 as it considered an inaccurate factual picture surrounding the issuance and violation of the temporary restraining order, and both the circuit court and court of appeals decisions demonstrate a need for this court to clarify what it means to rely upon "inaccurate information" at sentencing.

A. Applicable legal principles

1. A sentencing court holds the discretion to make a defendant's conviction eligible for expungement as permitted by section 973.015, *Stats*., and evidence of a reasonable exercise of discretion must be present in the record to sustain the court's 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 a hallmark for appellate relief in federal and Wisconsin courts alike in the decades to follow. A fair sentencing process is "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 even misleading information such that it caused

an individual to be sentenced based on assumptions that are "materially untrue…[such a sentence] 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 considered by the court, 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 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

[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)

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 was based upon an inaccurate fact as Mr. Gabler's alleged actions never violated an injunction as the injunction order was not issued until several weeks following the incident underlying the criminal charges. That itself demonstrates reliance on inaccurate information, and that the court may not have had an accurate memory of the procedural history of the injunction matter. But the reliance on inaccurate information does not stop there.

Mr. Gabler contends that he did not knowingly violate the temporary restraining order due to his significant mental health crisis that had not yet been diagnosed and had not been properly treated. This is a fact of key importance to the expunction determination because for the court to reasonably premise its decision to deny Mr. Gabler the right to expungement because public safety demands that it be known that he allegedly violated 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 and Mr. Gabler's character. 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. Therefore, the removal of the fact that he engaged in contrary conduct to the order after its issuance when he was incapable of understanding the order, how his conduct violated it, and the potential consequences does not harm the public.

The reviewing court's act of simply pointing to statements or facts in the record that in a vacuum would tend to imply that Mr. Gabler fully understood the proceedings and restraining order illustrates why additional clarity is needed on this issue. To the uninformed listener, highlighting these various facts in the record to assert that Mr. Gabler was well-aware of the restraining order justifies the court's decision, but it is the nuance of the situation that demonstrates why such a cursory review is not appropriate in cases like this. While substitute service occurred in this case (though this was not done properly pursuant to section 801.11(1)(b), *Stats*., as the TRO was not left at his regular abode, but rather with a mental hospital staff member at the facility where he was temporarily residing and there is no evidence demonstrating Mr. Gabler personally received or read that paperwork), Mr. Gabler was present at the April 29, 2020, hearing with counsel, and that he agreed to an extension of the TRO for six months, Mr. Gabler also believed that his parents and dog were possessed at the time by the devil. (79:7). While he allegedly nodded in the affirmative when the officer asked if he knew about the restraining order during his arrest on April 30, Mr. Gabler told the same officer that he had to get out of his home because he was not "safe in [the] house" (79:7-8) because his parents taped a printed picture of two hands in

handcuffs to inform him he could be arrested. (79:8). That he fled to E.G.'s house to avoid the possibility of arrest at his parents' home demonstrates Mr. Gabler certainly did not know that if he went to E.G.'s home, he would be in violation of the court's order and subject to arrest.

That Mr. Gabler was incompetent and did not understand the restraining order, its restrictions, and the consequences for violating the provisions must matter in this case. It should not be simply enough to argue, as the State did to the court of appeals, that assuming Mr. Gabler was incompetent at the time the TRO hearing was held and when he went to E.G.'s house the following day, the fact that he was unable to adhere or understand the no contact provisions is grounds to deny expunction for public safety reasons. (Respondent's Brief, 26-27). If that were the basis for the court's ruling, it would run contrary to well-established confidentiality protections the Wisconsin legislature has provided those suffering from both acute and chronic mental illness set forth in Chapter 51 as the State is asserting in different words that the public has a right to know when people in the community are mentally ill and cannot conform their actions to court orders. Section 51.30 specifically dictates that records related to court proceedings and treatment for those committed under section 51.15, or 51.20, *Stats.*, are to remain closed and sealed from general public view. Therefore, the court's decision denying expunction must be based on something more and there is nothing in the record demonstrating that to be the case.

Ultimately, the court of appeals holding fails to demonstrate that the circuit court relied only upon a correct understanding of the factual picture or that the court engaged in a proper exercise of discretion when

denying Mr. Gabler the right to expungement. As the circuit court noted in its decision denying the postconviction motion, "whether the defendant knowingly or unknowingly violated the restraining order is of no consequence to the Court's decision on expungement." (98:2). If that is truly the case, then why deny expunction? The circuit court asserted that it is important for the public to be aware that a temporary restraining order had been issued and "that the order had been violated," but if that conduct was not knowing and not intentional because of the issues with notice and Mr. Gabler being unable to comprehend the proceedings at the time due to his substantial untreated illness, there has been no violation of the temporary restraining order as knowledge and intent are necessary elements of such a crime. *See* Wis. Stat. §813.125(7); WIS JI-CRIMINAL 2040, fn. 5. If Mr. Gabler did not know that a restraining order had been issued, had not been properly served, did not know what it meant to violate such an order, and did not understand the proceedings and nature of the consequences due to mental illness, there was no violation of the temporary restraining order as this charge is not a strict liability offense. Thus, a decision positing reliance on that fact is based on inaccurate information and an erroneous understanding of the law and circumstances surrounding the case and cannot stand.

Because Mr. Gabler has demonstrated that the court erroneously exercised its discretion by relying upon inaccurate information, 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. The State presented no argument related to harmless error to contradict Mr. Gabler's position at any point thus far, and as a result, Mr. Gabler moves this court to reverse the decision of the circuit court and to remand his case back to the circuit court for a new hearing on expungement decision.

CONCLUSION

For the reasons set forth above, the defendant-appellant-petitioner, moves this court for an order granting his petition for review.

Dated this 17th day of May, 2023.

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 7,923 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 17th day of May, 2023.

Signed:

NICOLE M. MASNICA
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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 17th day of May, 2023.

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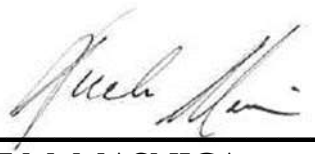

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