STATE OF WISCONSIN

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

DISTRICT I

Case No. 2023AP2055-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY JOHN VALDEZ,

Defendant-Appellant.

ON APPEAL FROM A SENTENCE AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID BOROWSKI AND DAVID C. SWANSON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN D. FLYNN
Assistant Attorney General
State Bar #1096413

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7324
(608) 294-2907 (Fax)
flynnjd@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Valdez killed both parents of five children when he hit their car with his, going at least 110 miles per hour with a detectible amount of a controlled substance in his blood. The State charged him with two counts of homicide by intoxicated use of a vehicle and two counts of second-degree reckless homicide. The circuit court expressed skepticism at the proposed resolution, which called for a reduction in charges that would cap the maximum possible jail time at ten years of initial confinement, but ultimately accepted it. The court sentenced Valdez to eight years of initial confinement—in line with Valdez's own presentence investigation (PSI) recommendation.

Valdez sought sentence modification or resentencing based on the circuit court's seeming predetermined prison sentence and allegedly inaccurate reliance on similar cases to illustrate the lengths of sentences for similar conduct. The postconviction court denied the motion. The skepticism of the plea deal was not evidence of bias because courts have an independent obligation to—and therefore the inherent authority to—ensure that plea agreements are in the public interest. So, Valdez did not overcome the circuit court's presumption of impartiality.

The postconviction court found that Valdez did not meet his burden demonstrate reliance on inaccurate information. Valdez's contention was based on allegedly similar negligent vehicular homicide cases—both published and unpublished—and a report from a data scientist about sentences. The postconviction court found that this evidence did not demonstrate reliance on inaccurate information, and the circuit court was speaking anecdotally from its "extensive" experience on the bench.

Valdez appeals.

ISSUES PRESENTED

The State re-frames the issues:

1. Did Valdez meet his burden to demonstrate that the circuit court relied on inaccurate information?

a. Did the circuit court rely on inaccurate crime data in sentencing Valdez?

This issue was not presented to the circuit court, so this Court should deem it forfeited. If this Court addresses it, it should answer that the circuit court did not rely on inaccurate crime data and Valdez was sentenced on appropriate factors.

b. Did the circuit court rely on an inaccurate view of the length of vehicular homicide cases?

The circuit court answered: No.

This Court should answer: No.

2. Did Valdez overcome the circuit court's presumption of impartiality by showing that the court had a predetermined sentence in mind?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as this case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

A. Valdez drove his car into the victims' car at 110 miles per hour, killing both occupants.

Valdez drove his car at speeds of a least 110 miles per hour and collided with a red Dodge Journey, occupied by IV and MV.[1] (R. 2:2–3.) The Journey was "damaged almost beyond recognition and resting on [its] driver side, wrapped around the post of an overhead traffic signal." (R. 2:2.) IV and MV died of blunt force trauma. (R. 2:2.) Valdez's blood tested positive for the presence of "delta-9-tetrahydrocannabinol (THC) a restricted controlled substance." (R. 2:2–3.)

Valdez admitted to driving, but claimed that, two intersections before, another driver had pointed a gun at him, so he was fleeing that confrontation. (R. 2:3.) His passenger also claimed that they had a gun pointed at them and were fleeing that incident. (R. 2:3.)

B. The parties reached a plea agreement, but the circuit court expressed concern about the reduction in charges.

The parties requested a plea date. (R. 47:2.) However, the circuit court,[2] after reviewing the State's offer, spoke with the parties in chambers. (R. 47:2.) On the record, the court noticed the plea was to amended charges, and it "expressed grave concern to both sides about the recommendation of ten years in custody for killing two people." (R. 47:2.)

---

[1] While the State could use the victims' real names because they are victims of a homicide, the State will use the initials listed in the complaint to preserve their family's privacy. Wis. Stat. § (Rule)809.86(3).

[2] The Honorable Judge David Borowski presided over the pre-plea proceedings, the plea, and sentencing. The State refers to him as the circuit court.

The State informed the court that pre-issuance negotiations with Valdez's counsel at the time involved an offer by the State of "two counts of homicide by negligent operation of a vehicle" where Valdez would plead guilty, and "[t]he State would recommend the max in custody, which would be the ten years." (R. 47:3.) Valdez did not accept the negotiated issuance, so the charges in the criminal complaint were issued. (R. 47:4.) After taking on the case, trial counsel asked the State for the offer underlying the negotiated issuance; the State agreed if Valdez promptly set the case for a plea. (R. 47:4.)

The circuit court expressed that "this case has to be seen in light of the bigger picture." (R. 47:4.) Valdez was charged with killing two people while driving recklessly; it recalled a recent case where another defendant killed two people while driving recklessly and was sentenced to 15 years of initial confinement. (R. 47:4–5.) It remarked that "[t]his community has been savaged by reckless driving. Most reckless driving cases over the years - - not all - - result in sentences of 15 years, 20 years of initial confinement, some that are higher than that." (R. 47:5.) It noted the State's "broad latitude in charging people," and "the vast majority of times - - meaning 90 percent plus - - [it could] be convinced to accept a plea or an amendment. But there's a reason that a judge needs to sign off on an amended information and sign off on a plea agreement." (R. 47:5–6.) It expressed that it had an open mind, but the plea currently did "not strike [the court] as in the interest of justice." (R. 47:6.)

The State noted one mitigating circumstance in Valdez's case—the consistent story between Valdez and his passenger that they were fleeing someone who had threatened them—and the case the court had referenced. (R. 47:7.) Trial counsel joined the State in asking the court accept the plea agreement, noting that Valdez had no prior criminal record. (R. 47:9–10.)

The court stated that reckless driving was "an awful and terrible and atrocious epidemic" that had killed "over 100 people." (R. 47:10.) But it reiterated that Valdez was still presumed innocent. (R. 47:10.) It stated multiple times that "[o]bviously, each case is different." (R. 47:10–11.) The court remarked that killing two people factors into the gravity of the offense, if the case were to get to sentencing. (R. 47:12.) The court asked the parties to file "additional information, including additional corroborating evidence" to justify the proposed resolution. (R. 47:13.)

Trial counsel filed a memorandum in support of the plea negotiations. (R. 10.) It provided additional support for Valdez's claim of an altercation before the crash, differences from the case the court referenced, and reiterated that Valdez had no prior record. (R. 10:2–6.)

At the next hearing, the court said it felt that trial counsel made some valid points, and while it still had some concerns, it was going to accept the plea negotiations. (R. 51:3–4.)

C. The circuit court accepted the plea agreement, and Valdez pleaded guilty.

At the plea hearing, the State put its reasons for its offer on the record. (R. 52:5–6.) The circuit court made a record that it had concerns about the offer, given that two people were killed, but it noted that "every case is different, every case has its own set of circumstances." (R. 52:8.) It reiterated that trial counsel's memorandum convinced it to accept the negotiations. (R. 52:8.)

Valdez pleaded guilty to two amended counts of homicide by negligent operation of a vehicle. (R. 40:1; 52:13–14.) The State agreed to recommend 10 years of initial confinement; trial counsel was free to argue for any appropriate sentence. (R. 52:12–13.) The court told Valdez that "this is a prison case. You're going to prison; do you

understand that?" (R. 52:13.) Valdez confirmed that he did. (R. 52:13.) The court stated that "there's no doubt about that. There were two people killed. I'm sure [trial counsel] is not going to suggest anything less than some sort of a prison sentence. Two people were killed in an extremely reckless situation." (R. 52:13.) Valdez confirmed that he understood that. (R. 52:13.)

Valdez filed a private PSI. (R. 30.) The PSI author recommended an overall sentence of six to eight years of initial confinement and eight years of extended supervision. (R. 30:11.)

D. The parties made their sentencing arguments, both asking for a prison sentence.

At sentencing, the State made its recommendation of ten years of initial confinement. (R. 55:4–13.) While showing the video of the crash, the State described how Valdez's apparent speed was arrived at "based on the way the victim's car is just frankly vaporized around that pole upon the impact." (R. 55:7.) The circuit court cut the State off to interject that its "word was going to be 'obliterated,' or 'blew up,' as if it were hit by a missile." (R. 55:7.)

The State addressed the other vehicular homicide case that the circuit court had referenced, the "Ojeda" case. (R. 55:13.) The State felt that Valdez's case presented unique factors that undermined using it as a vehicle for general deterrence. (R. 55:13.) The State referenced its comments that Valdez's version of events where he was fleeing a man who threatened him with a gun had corroboration. (R. 55:7–9.)

Sentencing counsel[3] recommended five to six years of initial confinement. (R. 55:14.) She agreed that this case had "unique circumstances . . . and . . . differ[ed] from unfortunately the rash of reckless driving cases that we have seen in this city." (R. 55:14.) She largely argued that his character, limited record, family support, and age merited a lesser sentence. (R. 55:14–20.) Valdez also read a prepared statement, directed at the victims' family, expressing his remorse. (R. 55:20–21.)

E. The circuit court considered the nature of the offense, Valdez's character, and the need to protect the public from dangerous driving when sentencing Valdez.

The circuit court began by going over what it had reviewed and the appropriate sentencing factors it was considering. (R. 55:21.) The court acknowledged "the overlay of the awful, terrible epidemic of bad driving in Milwaukee County" that resulted in "70 people killed in driving accidents last year in 2021" and "almost [ ] 100 people killed in Milwaukee County" in 2020. (R. 55:21.) It then addressed the impact watching the crash video had, agreeing with sentencing counsel that it was chilling. (R. 55:22–23.)

The court addressed its initial reluctance to accept the plea agreement. (R. 55:23.) It had criticized the State and trial counsel because "we have an epidemic of bad driving and people being killed on the roads in utter carnage." (R. 55:23.) It recalled a prior vehicular homicide case it presided over from the past. (R. 55:24.) There, the defendant stole a family member's vehicle, ran a stop sign going 100 miles per hour down a hill and killed a couple instantly. (R. 55:24.) It stated

[3] Valdez's trial counsel withdrew between the plea and sentencing. (R. 20.) The State refers to Valdez's two attorneys as trial and sentencing counsel, respectively.

that that defendant was "serving 25 or 30 years in prison." (R. 55:24.) It then referenced the Ojeda case, where "Ms. Ojeda killed, as you did, a couple in their 50s who then left children . . . without parents." (R. 55:25.) Ojeda was sentenced to 15 years in prison. (R. 55:25.) The circuit court also referenced another vehicular homicide with multiple victims by a defendant who was also "wanted for a homicide in North Dakota." (R. 55:25–26.) It sentenced that defendant to "25 years in prison and, if anything, that was light on [its] part." (R. 55:26.)

The court explained that it "ultimately accepted what the State suggested, and I do think what they suggested is reasonable in the circumstances." (R. 55:25.) It recognized that, in doing so, Valdez's sentence would be "less than any sentence [it] ever handed out for a double vehicular homicide." (R. 55:25.) It confirmed that Valdez understood that, under the original charges, he "could be doing decades and decades in prison." (R. 55:26–27.)

Referencing the video, the court accepted the mitigating evidence of the blue car coming through the intersection seconds later, also driving fast. (R. 55:26.)

Going to Valdez's character, the court noted "a limited criminal record." (R. 55:26.) But the prior speeding ticket also weighed against that. (R. 55:26.) It also noted Valdez had been released on bail and had received no violations during monitoring. (R. 55:27.) Finally, it pointed out that Valdez was young, just 19 years old at the time of the plea. (R. 55:27.)

The circuit court, referencing the PSI, pointed out several of the other options open to Valdez that would have prevented this incident. (R. 55:27–28.) The court also believed that Valdez was "likely a low-to-moderate risk of recidivism." (R. 55:28–29.)

The circuit court credited Valdez for accepting responsibility by pleading guilty. (R. 55:29.)

The circuit court turned to the gravity of the offense. (R. 55:29.) If found some mitigation: "how it occurred, and it being negligent and the issue with the other car." (R. 55:29.) Nonetheless, the court rated "the gravity on a scale of 1 to 10 is a 10. You killed two people." (R. 55:29.)

The circuit court sentenced Valdez, on each count, to four years of initial confinement and four years of extended supervision, consecutive to each other. (R. 55:33–34; 40:1–2.)

F. Valdez moved for postconviction relief, alleging inaccurate information and bias.

Valdez moved for postconviction relief, alleging that the circuit court had pre-determined that the sentence should be a long prison term and that the circuit court relied on inaccurate information when it considered the sentence length in other multiple homicide car cases. (R. 71:6–14.) Valdez submitted data from other vehicular homicide cases, arguing that the circuit court's statement that these cases routinely result in 20–30-year prison sentences was substantially inaccurate. (R. 71:10–13.) He also alternatively framed these issues as plain error by considering inaccurate information and ineffective assistance of counsel for not seeking to disqualify the circuit court before sentencing. (R. 71:14–16.)

The State responded that the record belied the idea that the circuit court had pre-determined a sentence. (R. 94:1.) While the circuit court did not mince words about the plea agreement, it has inherent authority to reject plea deals when the agreement is not in the public interest, so its consideration of the public interest—the epidemic of fatal reckless driving—cannot demonstrate bias. (R. 94:3–5.) Ultimately, trial counsel persuaded the circuit court to accept the plea. (R. 94:6.) And the court specifically stated that each case was different, and its mind had not been made up. (R. 94:6.) At sentencing, the circuit court specifically

referenced and applied the *Gallion*[4] factors. (R. 94:8.) Ultimately, the circuit court sentenced Valdez below the maximum period of confinement and ordered a sentence in line with Valdez's own PSI recommendation. (R. 94:9.) While it considered similar cases, it was ensuring that the interests of the community and the victims were being served. (R. 94:6–9.)

G. The postconviction court found Valdez did not overcome the circuit court's presumed impartiality and did not prove reliance on inaccurate information.

The postconviction court[5] denied Valdez's motion. (R. 103:5.) It found that the court's concern with the plea offer fell within its independent obligation to ensure that plea offers are in the public interest, so Valdez "cannot demonstrate objective bias merely by pointing to comments made by the court in weighing a decision within its inherent authority." (R. 103:2.) Ultimately accepting the plea agreement "demonstrate[d] an *absence* of bias." (R. 103:3.) Finally, it found that "[t]he fact that [the circuit court] imposed a *lesser* sentence than the State recommended belies a finding of bias." (R. 103:3.)

As to whether the circuit court relied on inaccurate information at sentencing, the postconviction court found that Valdez did not meet his burden. (R. 103:4.) The court was "not persuaded that the surface-level CCAP data or criminal complaints in unrelated matters demonstrate that the court relied on inaccurate information." (R. 103:4.) By referencing other cases, the circuit court was merely "speaking

---

[4] *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

[5] The Honorable David Swanson issued the postconviction decision. The State will refer to him as the postconviction court.

anecdotally based on his extensive experience in the homicide courts." (R. 103:4.) The court was satisfied that Valdez was sentenced "based on the *unique* set of facts and circumstances *in this case*, not based on any perception of sentencing norms in unrelated matters." (R. 103:5.)

Because Valdez did not meet his burden on either bias or inaccurate information, the postconviction court also denied his claims of structural or plain error and ineffective assistance of counsel. (R. 103:5.)

Valdez now appeals.

STANDARD OF REVIEW

Forfeiture

Whether a defendant has adequately preserved a claim for appeal is a question of law that this Court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

Inaccurate Information

Defendants have a constitutional right to be sentenced on accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 9. Whether a defendant has been denied this due process right and is sentenced on inaccurate information is a constitutional issue that this Court reviews independently. *Id.* Whether an error is harmless also presents a question of law that this Court decides de novo. *State v. Coffee*, 2020 WI 1, ¶ 17, 389 Wis. 2d 627, 937 N.W.2d 579.

Judicial Bias

This Court reviews claims of judicial bias de novo. *State v. Goodson*, 2009 WI App 107, ¶ 7, 320 Wis. 2d 166, 771 N.W.2d 385.

ARGUMENT

Valdez's argument has shifted on appeal. For the first time on appeal, he claims that the circuit court sentenced him based on inaccurate crime statistics by including non-vehicular homicides in the homicide numbers. Further, Valdez muddles the two other issues: whether the circuit court had a pre-determined sentence in mind before even accepting the plea and whether the circuit court relied on inaccurate information about normal lengths of vehicular homicide cases when sentencing Valdez. (Valdez's Br. 20–32.) The State will address them separately.

This Court should affirm. Because Valdez raises his issue with the allegedly inaccurate crime numbers for the first time, this Court should decline to address it. But if this Court does address the argument, the record shows that the circuit court sentenced Valdez on the unique facts of this case, so it did not rely on any allegedly inaccurate numbers. Furthermore, the record demonstrates that the circuit court relied on appropriate factors and considered the facts of this case in arriving at a sentence less than the maximum and did not pre-determine the sentence.

I. The circuit court did not sentence Valdez based on inaccurate information.

A. To warrant resentencing, the defendant must show that the circuit court actually relied on inaccurate information when imposing sentence.

"A defendant has a constitutionally protected due process right to be sentenced upon accurate information." *Tiepelman*, 291 Wis. 2d 179, ¶ 9. It is "inconsistent with due process of law" under the Fourteenth Amendment for a defendant to be "sentenced on the basis of

assumptions . . . which [are] materially untrue." *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

When a defendant claims that he was sentenced based on inaccurate information, he bears the initial burden of proof. "The defendant must show by clear and convincing evidence that: (1) some information at the original sentencing was inaccurate, and (2) the circuit court actually relied on the inaccurate information at sentencing." *Coffee*, 389 Wis. 2d 627, ¶ 38.

Inaccurate information refers to "misinformation of constitutional magnitude," *Roberts v. United States,* 445 U.S. 552, 556 (1980) (citation omitted), or "extensively and materially false" information, *Townsend*, 334 U.S. at 741. For a sentence to be constitutionally invalid because it is inconsistent with due process, a defendant must show that its foundation is "based upon materially untrue information" that is "extensively and materially false, which [the defendant] had no opportunity to correct." *State v. Travis*, 2013 WI 38, ¶¶ 17–18, 347 Wis. 2d 142, 832 N.W.2d 491.

The defendant must also prove that the sentencing court "actually relied" on the inaccurate information by examining the court's "articulation" of the basis for its sentence "to determine whether the court gave 'explicit attention'" to it and whether it "formed part of the basis for the sentence." *State v. Alexander*, 2015 WI 6, ¶ 25, 360 Wis. 2d 292, 858 N.W.2d 662 (citation omitted). To determine whether a court actually relied on inaccurate information at sentencing, this Court examines "the whole sentencing transcript." *Id.* ¶ 29.

B. Valdez forfeited his right to bring a claim that the circuit court relied on inaccurate crime data.

1. By not raising the issue of inaccurate crime data in his postconviction motion, Valdez has forfeited his right to raise the claim on appeal.

Valdez complains that the circuit court relied "on fact information about crime rates and sentencing norms to reach his sentencing decision without notice to Valdez." (Valdez Br. 4.) He argues that irrelevant information was used to aggravate his sentence and the lack of notice that the court would reference this information deprived him of due process. (Valdez's Br. 15–20.) However, Valdez did not make this argument in his postconviction motion. He did not challenge the crime rates as inaccurate or his lack of notice. Instead, his postconviction motion related only to the circuit court had pre-determined that the sentence should be a long prison term and that the circuit court relied on inaccurate information when it considered the sentence length in other multiple homicide car cases. Therefore, this claim is being raised for the first time on appeal.

"Forfeiture occurs when a party fails to raise an objection." *State v. Mercado*, 2021 WI 2, ¶ 35, 395 Wis. 2d 296, 953 N.W.2d 337. "The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. Arguments raised for the first time on appeal are forfeited. *In re Guardianship of Willa L.*, 2011 WI App 160, ¶¶ 19–27, 338 Wis. 2d 114, 808 N.W.2d 155. The forfeiture rule focuses "on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *Id.* ¶ 25.

"The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *Ndina*, 315 Wis. 2d 653, ¶ 30. "The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id*.

This Court should deem this issue forfeited and not consider it. Valdez did not argue in postconviction that the crime rates cited at sentencing were inaccurate, so this Court is without the benefit of a postconviction decision on whether Valdez met his burden to show that they were inaccurate or actually relied on. *Coffee*, 389 Wis. 2d 627, ¶ 38.

2. In any event, Valdez cannot show that the circuit court relied on inaccurate crime data.

If this Court is going to review this claim, it should hold that the circuit court did not actually rely on these crime rates. For Valdez's other inaccurate information claim, the postconviction court found that the circuit court relied on the unique facts of this case and assessed them within the proper framework—the nature of the offense, Valdez's character, and the need to protect the public. (R. 103:5.) The primary factors the circuit court must consider at sentencing are "the gravity of the offense, the character of the offender, and the need to protect of the public." *Alexander*, 360 Wis. 2d 292, ¶ 22. The circuit court did just that.

In fashioning its sentence, the circuit court accepted Valdez's plausible version of events. (R. 55:26.) The circuit court credited Valdez for accepting responsibility by pleading guilty. (R. 55:29.) It noted "a limited criminal record."

(R. 55:26.) But the prior speeding ticket also weighed against that. (R. 55:26.) It also noted Valdez had been released on bail and had received no violations during monitoring. (R. 55:27.) Finally, it pointed out that Valdez was young, just 19 years old at the plea. (R. 55:27.)

The circuit court turned to the gravity of the offense. (R. 55:29.) If found some mitigation: "how it occurred, and it being negligent and the issue with the other car." (R. 55:29.) Nonetheless, the court rated "the gravity on a scale of 1 to 10 is a 10. You killed two people." (R. 55:29.)

The record is clear that the circuit court did not rely on crime rates in fashioning Valdez's sentence. It went over the facts of this case and Valdez's personal history. It crafted a unique sentence based on this case, relying on the appropriate factors. Therefore, Valdez has not proven that the circuit court relied on inaccurate information. *Coffee*, 389 Wis. 2d 627, ¶ 38.

C. Valdez did not demonstrate by clear and convincing evidence that the circuit court relied on inaccurate information about the length of vehicular homicide cases.

Valdez renews his argument that his exhibits demonstrate that "the [circuit] court's 'norm' was substantially off the mark."[6] (Valdez's Br. 25.) Valdez points

---

[6] As an initial matter, Valdez believes he "provided a compelling argument for sentence modification or resentencing." (Valdez's Br. 28.) They are conceptually different claims with different remedies for different reasons. *State v. Wood*, 2007 WI App 190, ¶ 9, 305 Wis. 2d 133, 738 N.W.2d 81. A court's reliance on inaccurate information at sentencing is not a "new factor." *Id.* ¶ 15. Each claim has a distinct test and remedy. Whether a circuit court relied on inaccurate information at sentencing is a due process claim that, if proven, requires resentencing. *Id.* By contrast, the new factor analysis invokes the sentencing court's inherent

to his review of reported cases, his affidavit of unreported cases, and a report from a data researcher. (Valdez's Br. 25–27.)

The postconviction court found that Valdez had not met his burden when he merely provided "surface-level CCAP data or criminal complaints in unrelated matters." (R. 103:4.) By referencing other cases, the circuit court was "speaking anecdotally based on his extensive experience in the homicide courts." (R. 103:4.) The court was satisfied that Valdez was sentenced "based on the *unique* set of facts and circumstances *in this case*, not based on any perception of sentencing norms in unrelated matters." (R. 103:5.)

As an initial matter, the Wisconsin Supreme Court has expressly endorsed sentencing courts "consider[ing] information about the distribution of sentences in cases similar to the case before it." *State v. Gallion*, 2004 WI 42, ¶ 47, 270 Wis. 2d 535, 678 N.W.2d 197. So, the circuit court was expressly allowed to consider similar cases. Yet Valdez cites no authority for the proposition that the court must balance that against other cases from other times in other counties. That means unless Valdez can prove the that the circuit court was materially inaccurate about the cases it referenced, he cannot prove his inaccurate information

---

authority to modify a sentence, and pertains only to information the court was not aware of at sentencing, that was highly relevant to the sentencing decision, and that the court deems sufficiently important to justify modifying the sentence. *Id.* ¶¶ 5, 9.

Because Valdez cites only to resentencing cases, his argument for sentence modification is undeveloped. *State v. Pettit,* 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this Court does not develop arguments on a party's behalf and "may decline to review issues inadequately briefed"). The State will only address his argument that he was sentenced on inaccurate information, not whether he has demonstrated a new factor.

claim—other cases the court could have considered are simply irrelevant to this analysis. Because Valdez does not do that, this Court should affirm.

Valdez cites to two published cases for his argument. (Valdez's Br. 25.) The first, *State v. King*, 187 Wis. 2d 548, 523 N.W.2d 159 (Ct. App. 1994), is a negligent vehicular homicide case from Marathon County in 1994. The second is a 2006 case, *State v. Schutte*, 2006 WI App 135, 294 Wis. 2d 256, 720 N.W.2d 469, where the defendant was convicted of negligent vehicular homicide in Ashland County. *Schutte*, 294 Wis. 2d 256, ¶¶ 1, 8. These two cases are remote in time and location from Valdez's case; when considering the appropriate punishment for a double vehicular homicide in Milwaukee County in 2022, there is simply no authority that the circuit court had to consider these remote cases, or that presenting them now makes the court's recitation of similar cases it had before it inaccurate.

Furthermore, the conduct at issue in these cases differs greatly from Valdez's case. Valdez was charged with two reckless homicides and only resolved his case as homicides by negligent operation of a vehicle to avoid a trial. (R. 2:2; 47:3–4.)

Valdez goes over three circuit court cases he included in his affidavit. (Valdez's Br. 26–27.) "In exercising discretion, sentencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *State v. Harris*, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409. Because we have no idea the personal circumstances of those defendants and we do not know the facts of those cases, they are irrelevant.

Finally, the data researcher's report is even less helpful. (Valdez's Br. 28.) By its very nature, aggregated data contains

no information about the specific facts of the case, any aggravating or mitigating circumstances, or any other reasons how a sentence might have considered the protection of the public. *Gallion*, 270 Wis. 2d at ¶ 43 n.11. With absolutely no information on how or why these cases might be comparable to Valdez's case, Valdez cannot demonstrate that failure to consider this information means the circuit court relied on inaccurate information.

Valdez cites to *Travis*, 347 Wis. 2d 142, to analogize to a circuit court's mistaken belief that a defendant was subject to a mandatory minimum, which was inaccurate information. (Valdez's Br. 29.) This analogy is misplaced. The circuit court stated multiple times that every case is different. (R. 47:10–11.) It also recognized that Valdez's attorney would be free to make a sentencing recommendation. (R. 52:13.) At sentencing, it considered and referenced the PSI and sentencing counsel's argument. (R. 55:27–28.) It went over the *Gallion* factors and arrived at an individualized sentence. (R. 55:25–29.) Therefore, Valdez received the benefit of "a 'fair sentencing process' in which the sentencing 'court [went] through a rational procedure of selecting a sentence based on relevant considerations and accurate information.'" *Travis*, 347 Wis. 2d 142, ¶ 80 (citation omitted).

Valdez did not prove that the circuit court relied on inaccurate information. Valdez has not proven that the court recited any inaccurate information about the cases the circuit court described. And he has no authority for the proposition that the court was obligated to consider the cases or data he provided. The cases and data he cites lack sufficient meaningful detail to make them relevant consideration, so whether they would have altered the court's consideration of an appropriate is irrelevant.

II. The record demonstrates that the circuit court did not prejudge the case with a sentence in mind.

Valdez argues that the circuit court "openly prejudged what type of sentence he would impose and stated on the record what the appropriate punishment should be." (Valdez's Br. 20.) He claimed the court had an "unalterable and unyielding commitment, on the record, that [it] would be imposing a long prison term." (Valdez's Br. 21.)

A criminal defendant has a due process right to an impartial judge. *Goodson*, 320 Wis. 2d 166, ¶ 8. However, "[t]here is a presumption that a judge is free of bias and prejudice," *State v. Jensen*, 2011 WI App 3, ¶ 95, 331 Wis. 2d 440, 794 N.W.2d 482, and an appellate court therefore assumes that "a judge has acted fairly, impartially, and without bias." *Goodson*, 320 Wis. 2d 166, ¶ 8. Thus, "[t]o overcome this presumption, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence." *State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994).

There are two categories of judicial bias claims: subjective, which asks whether the judge has personal doubts about his or her own ability to be impartial; and objective, the claim at issue here. *Goodson*, 320 Wis. 2d 166, ¶ 8. Objective bias occurs either when there is an appearance of bias to a degree that the judge "could not be trusted to 'hold the balance nice, clear and true' under all the circumstances," or when objective facts show that the judge "in fact treated [the defendant] unfairly." *Id.* ¶ 9 (alteration in original) (citations omitted).

As to the first form of objective judicial bias, the legal presumption that a judge is unbiased can be rebutted only with proof of an appearance of bias that "reveals a great risk of actual bias." *State v. Herrmann*, 2016 WI 84, 364 Wis. 2d

336, ¶¶ 3, 67, 867 N.W.2d 772. However, "while a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient." *Id.* ¶ 118 (citation omitted). "In a due process recusal challenge, '[i]t is not sufficient to show that there is an appearance of bias or that the circumstance might lead one to speculate that the judge is biased.'" *Id.* (citation omitted). "Instead, based on an objective assessment of the circumstances in the particular case, there must exist 'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" *Id.* ¶ 119 (alteration in original) (citation omitted). "Thus, actual bias—either its presence, or the great risk of it—is the underlying concern of objective bias [due process] analysis." *Id.* (alteration in original) (citation omitted).

The second form of objective judicial bias asks whether "there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly." *Herrmann*, 364 Wis. 2d 336, ¶ 27 (alterations in original) (citation omitted). "In other words, the[ ] inquir[y] [is] whether a reasonable person could conclude that the trial judge failed to give the defendant a fair trial." *Id.*

Valdez cites to *Goodson*, 320 Wis. 2d 166, to claim that the circuit court "unequivocal[ly] promis[ed]" a lengthy prison term. (Valdez's Br. 22–32.) That is not the case here, because the record demonstrates no such unequivocal promise. The circuit court stated multiple times that "[o]bviously, each case is different." (R. 47:10–11.) This is not an unequivocal promise; to the contrary, it is openly equivocal about what will happen in the case, inherently promising to consider the unique facts of this case. *See Goodson*, 320 Wis. 2d 166, ¶ 13. The court's statements at sentencing show that it had not made up its mind in advance. It referenced Valdez's PSI and approved that it did not "try to make [Valdez] literally into [a] saint[ ]." (R. 55:27.) It also referenced Valdez's sentencing

counsel's argument and Valdez's allocution. (R. 55:27–28.) Finally, the circuit court handed down a sentence below the State's recommendation and maximum possible sentence, further demonstrating that it was not biased against Valdez. *See Goodson*, 320 Wis. 2d 166, ¶ 16 (finding actual bias where the "court said the maximum was appropriate 'not because that's the sentence I'm giving you today, [but] because that's the agreement you and I had back at the time you were sentenced.'")

Valdez also cites to an unpublished decision, *State v. Lamb*, No. 2017AP1430-CR, 2018 WL 4619535 (Wis. Ct. App. Sept. 25, 2018) (unpublished)[7], to argue that the circuit court's comments before sentencing amount to a due process violation. (Valdez's Br. 23–24.) The facts in this case, though, are very different. In *Lamb*, Lamb refused to cooperate with the PSI investigator, stormed out of a hearing before getting the next date, and had to be arrested on a bench warrant. *Lamb*, 2018 WL 4619535, ¶ 3. Despite both the State and Lamb's attorney recommending probation, the circuit court stated that Lamb would be "going to prison today . . . because we're sick and tired of you." *Id.* ¶ 6. This Court found that the court's statement, and particularly their timing and lack of a PSI, demonstrated a risk of actual bias. *Id.* ¶ 15. The lack of a PSI mattered because it "would have contained essential sentencing information about the offense and Lamb's character, as well as an additional sentencing recommendation." *Id.*

---

[7] Valdez cites to Wis Stat. § (Rule) 809.23(3)(b) for the proposition that he can cite to an authored unpublished case for persuasive value, but he has failed to include it in his appendix as required by Wis. Stat. § (Rule) 809.19(2)(a). This Court could decline to consider Valdez's argument on this point as a sanction, which this Court can impose for failure to comply with the rules of appellate procedure. Wis. Stat. § (Rule) 809.83(2). The State will include a copy of this unpublished decision in its appendix.

This case is different from *Lamb*. First, the circuit court's statements considering whether the plea agreement was in the public interest were not prejudging the case. The court said it was considering the case against the bigger picture. (R. 47:4.) It referenced what it saw as the epidemic of reckless driving and that it normally sentences people convicted of vehicular homicide that kill multiple people to lengthy prison sentences. (R. 47:5–6.) However, both the State and trial counsel began to explain the mitigating circumstances of this case. (R. 47:7, 9–10.) Crucially, the circuit court reiterated that Valdez was still presumed innocent. (R. 47:10.) It stated multiple times that "[o]bviously, each case is different." (R. 47:10–11.)

At the plea, the circuit court reiterated its statement that "every case is different, every case has its own set of circumstances." (R. 52:8.) During the colloquy, it also confirmed that Valdez's "attorney is free to make an argument." (R. 52:13.) At sentencing, the court demonstrated its open mind when it explained that it "ultimately accepted what the State suggested, and I do think what they suggested is reasonable in the circumstances." (R. 55:25.) The court had read Valdez's PSI and called it "somewhat helpful," approvingly distinguishing it from other defense PSIs "that border on preposterous. . . . That's not what occurred in this case." (R. 55:27.)

Ultimately, the circuit court followed Valdez's PSI's recommended sentence, lower than the State or maximum punishment. (R. 30:11; 55:33–34; 40:1–2.)

The postconviction court found that the court's concern with the plea offer fell within its independent obligation to ensure that plea offers are in the public interest, so Valdez "cannot demonstrate objective bias merely by pointing to comments made by the court in weighing a decision within its inherent authority." (R. 103:2.) Ultimately accepting the plea agreement "demonstrate[d] an *absence* of bias." (R. 103:3.)

Finally, it found that "[t]he fact that [the circuit court] imposed a *lesser* sentence than the State recommended belies a finding of bias." (R. 103:3.)

The postconviction court was correct: the circuit court's independent determination of whether a plea agreement is in the public interest necessitates some evaluation of what the public's interest is—in this case, the epidemic of fatal reckless driving in Milwaukee County. "[A] circuit court may, in an appropriate exercise of discretion, reject a plea agreement that it deems not to be in the public interest." *State v. Conger*, 2010 WI 56, ¶ 27, 325 Wis. 2d 664, 797 N.W.2d 341. When considering the public interest, our supreme court expressly endorsed considering "the court's ability to dispose of the case in a manner commensurate with the seriousness of the criminal charges. *Id.* ¶ 32. It also noted that courts can consider "the disproportion between the authorized punishment and the particular offense or offender." *Id*. ¶ 34. It would be impossible for a court to evaluate these factors without some idea of what a possible appropriate punishment might be in order to articulate why "the authorized punishment and the particular offense" are disproportionate. *Id*.

Additionally, the circuit court, multiple times, reiterated that each case is different—a recognition that its mind was not made up and it would evaluate the appropriate sentence based on the facts of this case. (R. 47:10–11.) It also recognized that Valdez's attorney would be free to make a sentencing recommendation. (R. 52:13.) At sentencing, it considered and referenced the PSI and sentencing counsel's argument. (R. 55:27–28.) It went over the *Gallion* factors and arrived at an individualized sentence. (R. 55:25–29.) Therefore, Valdez has not overcome the presumption that the circuit court was impartial.

CONCLUSION

This Court should affirm.

Dated this 11th day of June 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John D. Flynn
JOHN D. FLYNN
Assistant Attorney General
State Bar #1096413

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7324
(608) 294-2907 (Fax)
flynnjd@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,823 words.

Dated this 11th day of June 2024.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of June 2024.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN