COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-0174-CR
00-0175-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

¶1 FINE, J. Christopher Townsend appeals from judgments entered on his guilty pleas to four counts of knowingly violating a domestic-abuse order, *see* WIS. STAT. § 813.12(8)(a), and to one count of disorderly conduct, *see* WIS. STAT. § 947.01. He also appeals from the trial court's order denying his motion for postconviction relief. The trial court sentenced Townsend as a habitual criminal, *see*

WIS. STAT. § 939.62, and imposed three-year terms of incarceration on each of the domestic-abuse counts. The trial court made the sentences consecutive to a term of imprisonment Townsend was then serving, but concurrent to one another. The trial court stayed the prison sentences on two of the domestic-abuse counts, and imposed concurrent periods of probation. On the disorderly conduct count, the trial court imposed a ninety-day period of incarceration, but made it concurrent to all of Townsend's other sentences. Townsend argues that sentences resulted from the trial court's reliance on inaccurate information; the trial court believed that Townsend was serving a six-year sentence when, in fact, he was serving a seven-year sentence. He seeks a new sentencing. We affirm.

I.

¶2 During Townsend's sentencing hearing, the trial court was given a copy of a judgment roll to support the habitual-criminality enhancer. The judgment roll showed that Townsend had previously been convicted of a burglary where the sentencing judge had, according to the trial court in this matter, "stayed a six-year prison sentence," and placed Townsend on probation for four and one-half years. When asked by the trial court whether she had "any challenge to the conviction that I've just read into the record that forms the basis of the habitual"-criminality enhancer Townsend's lawyer responded: "No, Your Honor." The trial court then asked Townsend's lawyer what Townsend's status was with respect to that burglary case, and we pick up the colloquy at that point.

> [Defense Counsel]: Your Honor, he has been revoked. He waived his revocation hearing.
>
> THE COURT: And is he serving a six-year prison term?
>
> [Defense Counsel]: Yes, that is correct.

Townsend was actually serving a *seven* year sentence following the revocation of his probation in a *different* burglary case. Townsend did not correct either his lawyer or the trial court.

¶3 Later in the sentencing hearing, the trial court asked Townsend's lawyer to recommend an appropriate disposition. In the course of her statement, Townsend's lawyer said:

> As I mentioned earlier, Mr. Townsend has been revoked, and in fact, he waived his revocation hearing, and he will be doing six years at Dodge Correctional, and I can inform the Court that based on my conversations with his probation officer and other information he provided to me by his probation officer that Mr. Townsend was revoked primarily because of these two cases.

Townsend did not correct his lawyer.

¶4 Before Townsend exercised his right of allocution, the trial court mentioned the supposed "six-year" term in, essentially, what appears from the transcript to be a housekeeping reference:

> [THE COURT:] I've noticed in the record before I call on Mr. Townsend, Mr. Lovern and Ms. Quezada, that the judgment roll for the burglary that he is serving his six years on, refers to another case number, 97CF973564. Is that one of the four cases that you mentioned he was convicted of?
>
> MR. LOVERN: Yes.
>
> THE COURT: And what is that conviction?
>
> MR. LOVERN: That's burglary, also.
>
> THE COURT: And I noticed that Mr. Dwayne Hughes indicated that the defendant got out of prison at some point this year.
>
> What case was he serving time on? Was he on probation on this case, on the case that he is serving six years on now? Was he ordered to probation, the stayed sentence?

> Was he serving a sentence in '98?
>
> Was he serving a sentence in '98?
>
> MS. QUEZADA: That is correct.
>
> THE COURT: And what was he serving a sentence on in '98?
>
> MS. QUEZADA: Burglary.
>
> THE COURT: Was it the November, '97, burglary?
>
> MS. QUEZADA: Yes.
>
> He indicates that's correct.
>
> THE COURT: Mr. Townsend, is there a statement that you offer to the Court at this time?
>
> If so, you may make your statement now.

Again, Townsend did not correct the trial court's impression that he was serving a six-year sentence.

¶5 Following Townsend's allocution, the trial court mentioned the "six-year" sentence in recapitulating Townsend's criminal history:

> He has been convicted of burglary in two different cases, and in one case, he had been placed on probation, has now subsequently been revoked and is serving six years at the state prison because of the revocation.

Again, Townsend did not correct the trial court.

II.

¶6 Although sentencing is within the trial court's discretion, *see* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998), that discretion must be exercised following consideration of information that is accurate, *see* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990) ("Defendants have a due process right to be sentenced on the basis of accurate information."). A defendant, like Townsend, "who requests resentencing based on inaccurate

information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." ***Ibid.*** Townsend falters on the second aspect of this two-fold requirement. It is clear from a reading of the transcript that the trial court did not *rely* on its belief that Townsend was serving six years following the revocation of his probation. Nowhere in the transcript does the trial court mention or imply that it sentenced Townsend to, in essence, a three-year consecutive term because it wanted him to face a total exposure of nine years. Indeed, the trial court's references to the "six-year" sentence were always in connection with its recitation of Townsend's history and criminality; the trial court does not mention the "six-year" sentence in relation to its assessment of what would be an appropriate number of years for Townsend to serve. Moreover, in its cogent written decision denying Townsend's motion for postconviction relief, the trial court recounts in some detail the factors upon which its sentence was based, and disclaims any reliance on the fact that Townsend was serving a six-year sentence after the revocation of his probation as opposed to any other sentence.

¶7 Although, as noted above, whether Townsend was serving six or seven years was not material to the trial court's sentencing, there is an additional reason why Townsend's appeal fails. Townsend, who presumably knew the term of his sentence following the revocation of his probation for burglary (and he does not allege that he did not know), never attempted to correct either his trial lawyer or the trial court each time they pegged his sentence-after-revocation at six years. He thus waived the issue. *See* ***United States v. Livingston***, 936 F.2d 333, 336 (7th Cir. 1991) (waiver by failure to object to alleged inaccurate information); ***United States v. Benson***, 836 F.2d 1133, 1135 (8th Cir. 1988) ("[C]omplaints not brought to the attention of the district court at the time of the sentencing hearing are not preserved for review.").

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.