COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2138-CR **Cir. Ct. No. 2004CF117**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES F. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Charles Smith appeals from a judgment of conviction and an order denying his postconviction motion. The issues relate to sentencing. We affirm.

¶2 Smith was sentenced on three counts of burglary. On two of the counts he was given probation, but on another there was a prison sentence of three years' initial confinement and three years' extended supervision. Smith was seven weeks short of his seventeenth birthday at the time. He later filed a postconviction motion seeking resentencing due to several alleged new factors, and other reasons, which was denied.

¶3 Smith's first argument relates to a discussion at sentencing about whether he would be housed with adult inmates if sent to prison. His attorney argued that as a young person who would be "the low man on the totem pole" and is a "follower," and this would not be a "good situation." The court asked whether a seventeen year old would go in the general prison population, and the prosecutor responded: "Not generally. They have special locations where they put the younger prisoners." The court replied: "If he turns 18 when he is in prison, then he would, I suppose."

¶4 Smith argues that the prosecutor's response was incorrect, and that in fact Smith was placed in the general population. He argues that resentencing is therefore appropriate on at least one of three theories: new factor, sentencing based on inaccurate information, or erroneous exercise of discretion.

¶5 A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the judge at the original sentencing, either because it was not then in existence or because even though it was then in existence, it was unknowingly overlooked by the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). In addition, to be grounds for resentencing, a "new factor" must be an event or development which frustrates the purpose of the original sentence, something which strikes at the very purpose for the sentence selected by

the trial court. ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989).

¶6 As to inaccurate information, a defendant who requests resentencing on that ground must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless." ***Id.*** "This constitutional issue presents a question of law which we review *de novo*." ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993).

¶7 We assume, for purposes of this discussion, that the information from the prosecutor at sentencing was inaccurate as to whether Smith would be in the general population. In response to Smith's postconviction motion, the court noted that it is not in control of where Smith would be held or in what population, and that courts understand that fact "sufficiently not to make it a basis for our sentencing." In addition, while it may be true that the court accepted the prosecutor's information as a refutation of defense counsel's argument about the conditions Smith would face in prison, there is no indication in the record that the court actually placed any weight on this factor in setting the length of sentence. No references to this point appear in the court's sentencing statement.

¶8 Furthermore, defense counsel's argument about the harshness of the adult population was not directed at helping the court set the proper length of sentence, but was instead made to support his recommendation for probation, as opposed to prison. The argument had considerably more force in that context than in the manner he is attempting to use it now. On appeal, Smith's argument, at its

core, seems to be that if the court had known he would be in the general population, the court would have imposed a lesser total sentence, on the theory that his first fourteen months as a minor in the general population would be greater punishment than the same fourteen months spent isolated from that population. However, there is simply no basis to conclude that the additional increment of perceived punishment that might result from being in the general population can reasonably be considered so great as to affect the court's calculation of the proper total sentence. And clearly, based on the total sentence given and the reasons expressed for it, a change in information about where Smith would be held would not, by itself, have caused the court to agree with the defense's recommendation of probation.

¶9 In short, we conclude that there is no basis to hold that the court relied on this information in sentencing Smith.

¶10 As a practical matter, our conclusion that the sentencing court did not rely on the inaccurate information also resolves the new factor inquiry, because a change in an unrelied upon piece of information would not be highly relevant to sentencing or have the effect of frustrating the purpose of the sentence.

¶11 Smith also argues that there was an erroneous exercise of discretion in sentencing due to the factual inaccuracy, but we conclude that theory is inapplicable. Exercises of discretion are necessarily reviewed in light of the record before the court at the time of its decision. If that record was factually inaccurate or incomplete, then "new factor" and "inaccurate information" are the applicable theories that replace a review of the exercise of discretion.

¶12 Smith's next argument concerns his eligibility for the Challenge Incarceration Program. At sentencing the court found him eligible for the program

but in his postconviction motion he asserted that the Department of Corrections had denied him participation in the program because of a categorical policy denying it for inmates facing extradition. He argues that this should be considered a new factor because of what he regards as the court's reliance on his eligibility for this program in setting his sentence.

¶13 The court and the attorneys made several references to the program during the sentencing hearing but, without attempting to recite all of them here, we conclude that none of them demonstrate that the court relied on the fact that Smith would eventually participate in the program with any certainty. There is no reason to believe the court was unaware the DOC would apply its own standards to ultimately determine whether Smith would participate, as provided by statute. *See* WIS. STAT. § 302.045 (2005-06).[1] In addition, the court specifically noted that the program would not be available if Smith was sent to Arkansas, and that he might well end up staying there for a longer sentence than in Wisconsin. For these reasons, the court was clearly aware of uncertainty about whether Smith would ultimately be in the program. And, as with the first issue above, the court specifically stated at the postconviction hearing that this was an issue courts are aware that they lack control over, and do not rely on in sentencing.

¶14 Smith's last argument concerns the nature of the charges that were eventually filed against him in Arkansas. At the sentencing hearing there were references to Smith possibly facing attempted homicide charges there, although it does not appear that charges had actually been filed yet, since it was still unknown

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

whether the matter would be handled in juvenile or adult court there. His postconviction motion asserted that, in fact, only lesser charges were later filed in Arkansas.

¶15 Smith argues that the fact that homicide charges are not being pursued is a new factor. He argues that we should conclude that the court relied on this information in sentencing because the court mentioned it. One reference by the court was during discussion with counsel about the likelihood of him being able to participate in the Challenge Incarceration Program. Another was during the court's sentencing statement, when the court noted "the approach he took to things when he went down [to] Arkansas," which the court saw as an indicator of failing to learn and accept responsibility. As to both of these points, the actual charges filed are not highly relevant to the sentence imposed. The actual charges are serious charges, apparently based on the same alleged conduct, even if not attempted homicide. By Smith's own description of the charges, he is facing a total sentence of up to forty years there.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.