

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 7, 2008**

David R. Schanker  
Clerk of Court of Appeals

**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.

**Appeal Nos. 2006AP2655-CR  
2007AP315-CR**

**Cir. Ct. No. 2005CF234**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TROY E. WEST, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Troy West appeals a judgment of conviction and an order denying postconviction relief.<sup>1</sup> West was one of four males convicted for the sexual assault of a sixteen-year-old girl. West argues his “right to be sentenced on substantially accurate information was violated by the trial court.” West also insists he was not sentenced on the individual merits of his case. We reject West’s arguments and affirm.

¶2 West was charged with second-degree sexual assault. West faced a potential forty years’ imprisonment and a \$100,000 fine. West entered an *Alford*<sup>2</sup> plea to third-degree sexual assault, reducing his exposure to ten years’ imprisonment and a \$25,000 fine. A presentence investigation report was prepared, and West’s counsel filed a reply to the PSI. The court sentenced West to five years’ initial confinement and five years’ extended supervision. West moved for postconviction relief, seeking resentencing and a new PSI. The circuit court denied the motion orally after a hearing and subsequently entered a written order. West now appeals.

¶3 A defendant who requests resentencing due to the circuit court’s use of inaccurate information at the sentencing hearing must show both that the information was inaccurate and that the court actually relied on the inaccurate

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<sup>1</sup> As an initial matter, the State contends West only appealed the judgment of conviction and not the order denying postconviction relief. We note that West did not identify the order in his notices of appeal. However, in our February 19, 2007 order consolidating West’s two appeals, we construed one appeal as from the judgment of conviction and the other from the order denying postconviction relief. Accordingly, although we need not reach the issue because we conclude West’s arguments fail on the merits, we will proceed as if West appealed from both the judgment and order.

<sup>2</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

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.* Whether a defendant has been denied his due process right to be sentenced upon accurate information is an issue we review de novo. *Id.*, ¶9.

¶4 West argues the circuit court referenced incorrect information at the sentencing hearing. West focuses on that portion of the hearing where the court took issue with West's suggestion that he was a good student. The court stated, "[a]ccording to the pre-sentence he received discipline for excess absences from school, received truancy discipline for inappropriate behavior on three occasions, harassment in November of 2004, and he failed most of his classes and had a cumulative of 0.895." West contends the PSI is inaccurate, that West had only one adjudication for truancy, and nowhere in the record was there mention of any harassment in November 2004.

¶5 It is not clear whether the information West cites was incorrect. The PSI does not indicate that West had multiple adjudications for truancy, and the court did not so state. The PSI says only that West received discipline for excessive absences, receiving truancy notices three times, not that he had been adjudicated delinquent three times. The PSI also states West was "disciplined for inappropriate behavior on three separate occasions and harassment in November of 2004."

¶6 Additionally, West has not shown the circuit court relied upon the information he cites. In denying West's postconviction motion, the court stated that it had not relied on any of the allegedly inaccurate information in imposing the sentence. The court pointed out that the most important factors it considered

“were the participation of Mr. West in the, as I characterize it, gang rape, as well as the effect his conduct and the conduct of the others had on the victim.” The court further considered West’s conduct both individually and as part of the group that sexually assaulted E.R.D. The court also noted that the charge against West had been reduced from the charge that the facts of the case supported. We are not persuaded that the circuit court improperly relied on inaccurate information in imposing the sentence.

¶7 West also insists the PSI was inaccurate with regard to the nature of prior sexual assault allegations. West contends the PSI mentions two other incidents, in which West was “involved in” sexual assaults. West contends that in both of those incidents the female participant was older than West, and he was treated as the “victim.” However, West fails to mention that the PSI indicates he was charged with sexual assault of a child on both of these two prior occasions. The PSI states that in 2001, West engaged in sexual activity with a female who was older than him, but still underage. Both West and the female were charged with second-degree sexual assault of a child, but the district attorney’s office declined prosecution. The PSI indicates that West was later charged with third-degree sexual assault for engaging in sexual intercourse with the same female in 2003, but West again was not prosecuted.

¶8 It is unclear what circuit court error West attributes to the discussion in the PSI of his prior sexual history, because West does not assert that the court relied upon this information, and the sentencing transcript contains no mention of the court even addressing West’s prior sexual assault allegations. Regardless, West has failed to carry his burden of establishing that the court improperly relied

on any allegedly inaccurate information in imposing the sentence. The court considered the appropriate sentencing factors, including the seriousness of West's crime, his character and the need to protect the public. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The sentence was authorized by law and properly imposed.

¶9 West's remaining argument is that the circuit court did not sentence him as an individual and on the merits of the case against him, but as one of the four males who together sexually assaulted the victim. West notes that each of the four males who were charged entered pleas to third-degree sexual assault and the court imposed the maximum imprisonment for each.

¶10 A trial court may not employ a preconceived sentencing policy that is "closed to individual mitigating factors." *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). A sentence that fits the crime, and not the criminal, is improper. *Id.* (citing *McCleary v. State*, 49 Wis. 2d 263, 271, 182 N.W.2d 512 (1971)).

¶11 West argues the circuit court had a preconceived sentencing policy of sentencing each of the perpetrators to the maximum term of imprisonment. He insists the court "said that all of the people involved in *any* such crime where there are multiple participants deserve the maximum, despite what their individual actions might have been." At the same time, West contends, the court "did not deny that the decision on sentencing had been reached prior to the *writing* of West's presentence report."

¶12 West misstates the record. The transcript of the sentencing hearing makes clear that the court acknowledged defense counsel's argument that the

sentencing *recommendations* for each of the perpetrators had been decided before West's PSI was completed. The court did not state, however, that the sentencing *decision* had been made. Moreover, the court did not state that each of the perpetrators in this case deserved the maximum sentence, irrespective of their individual involvement.

¶13 As mentioned previously, the court noted at sentencing, “[i]t was and remains a gang rape, that all the individuals actively participated.” The court noted that West was the only one of the four perpetrators who knew the victim and concluded that he was the only one who could have prevented the sexual assaults from occurring. The court concluded that rather than stopping the sexual assaults, West “was the individual that I think set it up so it would happen.” The court stated: “though I certainly intend to treat each individual separately, I think the ultimate conclusions are going to be the same for the reason I stated and the reasons that have been set here by both [the assistant district attorney] as well as [the victim] and her mother.”

¶14 West has failed to show the circuit court sentenced under a preconceived sentencing policy. The court properly denied the postconviction motion.

*By the Court.*—Judgment and order affirmed.

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

