

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2007

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 No. 2006AP2733-CR

Cir. Ct. No. 2004CF4931

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD TOLEFREE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 PER CURIAM. Howard Tolefree appeals from a judgment of conviction entered after he pled no contest to one count of receiving stolen property worth over \$10,000 as party to a crime. See WIS. STAT. §§ 943.34(1)(c),

939.05 (2003-04).¹ Tolefree claims that the circuit court relied on inaccurate information at sentencing. We conclude that Tolefree has shown neither that the disputed information was inaccurate nor that the court relied on it in imposing sentence. We affirm.

Background

¶2 Tolefree and three co-defendants were charged with conspiracy to commit armed robbery by threat of force as parties to a crime. Supported by statements from the co-actors, the State initially took the position that Tolefree masterminded the bank robbery that was carried out by the other three men. Witnesses' accounts changed over time, however, and the State ultimately concluded that it could not prove the original charge beyond a reasonable doubt. Pursuant to a plea bargain, the State reduced the charge and Tolefree pled no contest to receiving stolen property.

¶3 At sentencing, the State summarized the co-defendants' accounts of the robbery and the ways in which their statements implicated Tolefree, but it acknowledged that Tolefree disputed those accounts. The State argued that regardless of whose version the circuit court believed, Tolefree's plea acknowledged his knowing receipt of proceeds from a bank robbery.

¶4 Tolefree did not object when the State described the co-actors' various versions of the robbery. During his own sentencing remarks, however, Tolefree reminded the court that his plea was born of the State's inability to prove

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

his participation in the robbery beyond a reasonable doubt and contended that it was therefore unfair to sentence him for planning the robbery. Tolefree provided his version of events and urged the court to remember his right to be sentenced on the basis of accurate information.

¶5 The State recommended eight years' imprisonment, bifurcated as forty-eight months of initial confinement and forty-eight months of extended supervision. Tolefree asked for probation. The circuit court adopted neither party's sentencing recommendation. It imposed a sentence of seven years and six months of imprisonment, with forty-two months of initial confinement and forty-eight months of extended supervision. Without first filing a postconviction motion, Tolefree appealed.

Discussion

¶6 For issues to be considered as a matter of right on appeal, a defendant must first make a postconviction motion unless the ground for appeal is sufficiency of the evidence or the issues have been previously raised. *See* WIS. STAT. §§ 809.30(2)(h), 974.02(2). Tolefree did not make such a motion, nor did he make a contemporaneous objection to the State's sentencing argument. Given the paramount importance of the integrity of the sentencing process, the circuit court's opportunity to address the issue raised on appeal, and the State's acquiescence to the procedure,² we elect to address the merits of Tolefree's claim rather than consider whether his challenge has been waived. *See State v. Groth*, 2002 WI App 299, ¶¶25-26, 258 Wis.2d 889, 655 N.W.2d 163, *overruled on*

² The State has not asked us to find that Tolefree has waived the issues presented on appeal.

other grounds by State v. Tiepelman, 2006 WI 66, 291 Wis.2d 179, 717 N.W.2d 1.

¶7 A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶9. Whether a defendant has been denied this due process right is a constitutional issue that we review *de novo*. *Id.*

¶8 A defendant alleging that a sentencing decision is based on inaccurate information must prove both that the information was inaccurate and that the trial court actually relied on the inaccurate information in the sentencing. *Id.*, ¶26. The defendant must carry the burden of proving both elements. *See State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998).

¶9 The State's sentencing argument included a summary of the co-defendants' versions of the robbery incriminating Tolefree. The State may generally present such information. At sentencing, the circuit court may consider evidence of unproven offenses, uncorroborated hearsay, and even conduct for which the defendant has been acquitted. *See State v. Marhal*, 172 Wis. 2d 491, 502-03, 493 N.W.2d 758 (Ct. App. 1992).

¶10 Tolefree provided no objective data showing that his co-defendants' statements were false. His assertion that the accusations were factually inaccurate turned on the State's discretionary decision not to prosecute. This is insufficient. The State's assessment that it could not prove Tolefree guilty of armed robbery beyond a reasonable doubt was not equivalent to a finding that the charge was false. The State is not required to prosecute every case where it appears that the law has been violated. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). The law recognizes that not all the guilty are convictable. *State ex rel.*

Kalal v. Circuit Court, 2004 WI 58, ¶31, 271 Wis. 2d 633, 681 N.W.2d 110. The record is thus simply inadequate to support the first element of the *Tiepelman* analysis requiring the defendant to show that the circuit court received inaccurate information at sentencing. See *Tiepelman*, 291 Wis. 2d 179, ¶26.

¶11 We need not reach the question of whether the circuit court actually relied upon the co-defendants’ versions of the robbery because Tolefree has not demonstrated that these versions were inaccurate. See *id.* We choose to do so for the sake of completeness.

¶12 The circuit court explicitly acknowledged that defendants have a right to be sentenced on the basis of accurate information. It then recognized the “shifting” statements of the various actors and accepted the defendant’s account of the facts. The circuit court thus properly assessed the facts relevant to its sentencing decision, and it did so in Tolefree’s favor.³ See *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999).

¶13 The circuit court’s remaining discussion during the sentencing proceeding similarly reflects acceptance of Tolefree’s assertion that he was not party to the armed robbery. Cf. *State v. Anderson*, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998) (court’s comment that it did not rely on inaccurate information unpersuasive where inconsistent with other comments at sentencing). For example, the court: (1) noted that Tolefree learned of the robbery after the fact; (2) told Tolefree that his act of receiving the property was aggravated

³ The circuit court specifically stated: “this was a case of shifting factual bases. Ultimately, the court will accept the defense proffer with regard to those facts that the defense is admitting.”

because this made it easier for others to accomplish criminal acts; and (3) specifically acknowledged that Tolefree was on the fringes of “this other action.”

¶14 Tolefree asserts that the circuit court’s description of his character as “good” and his work history as “consistent” while imposing substantial imprisonment reflects its improper reliance on the robbery allegations. To the contrary, the record shows that the circuit court properly based its sentencing decision on the primary sentencing factors: gravity of the offense, character of the offender, and need for the protection of the public. *See Lechner*, 217 Wis. 2d at 421.

¶15 The court determined that the offense was aggravated because it involved a significant amount of money. The court described Tolefree’s character as “generally good” but nonetheless a matter for some concern, because a history of fourteen prior convictions for Operating After Revocation suggested an inability to follow the law. The court also determined that Tolefree’s substantial history of criminal traffic violations gave rise to some heightened need for community protection. These are relevant sentencing considerations.

¶16 The court properly recognized mitigating factors, namely Tolefree’s freedom from alcohol and drug addiction, his “generally good” character and his diminished risk to society. *See State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The court identified punishment and deterrence as the objectives of its sentence, and appropriately linked these to Tolefree’s needs. *Id.*, ¶42. The court then imposed a sentence below that recommended by the State.

¶17 Tolefree nonetheless contends that his sentence reflects improper consideration of the disputed claim that he planned the robbery because the circuit

court accepted the State's sentencing recommendation. We are unpersuaded that imposing forty-two months of initial confinement constitutes adopting a recommendation for forty-eight months.

¶18 We conclude that the record discloses no reliance on allegations that Tolefree participated in the armed robbery. Moreover, the court's sentence reflects an appropriate exercise of its discretion in light of both aggravating and mitigating factors.

By the Court.—Judgment affirmed.

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

