

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 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 No. 2007AP1277-CR

Cir. Ct. No. 2006CF1892

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SYLVESTER HARRINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sylvester Harrington appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the circuit court relied on inaccurate information when it sentenced him and, consequently, he is entitled to be

resentenced. Because we conclude that Harrington has not established that he is entitled to be resentenced, we affirm.

¶2 Harrington was convicted of one count each of felon in possession of a firearm and bail jumping. Before sentencing, the court ordered a presentence investigation report. At the sentencing hearing, the court asked Harrington's counsel if he had reviewed the report with Harrington. Counsel responded: "I have. I read it to him verbatim." Harrington's counsel then noted three inaccuracies in the presentence investigation report. The court sentenced Harrington to a total of seven years and six months on both counts. The court made brief mention of the report in its sentencing remarks. The court noted that Harrington had been incarcerated eight previous times, and that the writer of the presentence investigation report recommended he be sentenced to four years of initial confinement, but had stated the wrong maximum possible penalty. The court also stated that the "presentence report is frankly one of the most disturbing ones I've read."

¶3 Harrington then brought a motion for postconviction relief. In the motion, he identified eleven statements in the presentence investigation report that he claimed were inaccurate, and claimed that the court had relied on the inaccurate information when it sentenced him. At the motion hearing, defense counsel said that she planned to have Harrington testify about the inaccuracies. The court then asked the prosecutor if the State was disputing that Harrington would testify that the eleven inaccuracies he had identified were, in fact, inaccurate. The prosecutor said that he was not challenging that Harrington would testify that the eleven things were inaccurate. Eventually, the circuit court denied the motion finding that it had not relied on the inaccurate information when it sentenced Harrington.

¶4 A defendant has a due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. “[I]n a motion for resentencing based on a circuit court’s alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information.” *Id.*, ¶2. The test for determining whether the sentencing court “actually relied” on the inaccurate information is “whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.*, ¶14 (citation omitted). Once the defendant meets the burden of showing that the sentencing court actually relied on the information, then the burden switches to the State to prove that the error was harmless. *Id.*, ¶3.

¶5 To protect the integrity of the sentencing process, “[t]he defendant and defense counsel are allowed access to the presentence investigation report and are given the opportunity to refute what they allege to be inaccurate information.” *State v. Mosley*, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996). Further, the defendant and defense counsel are present at the sentencing hearing and given the opportunity to make statements. *Id.* When a defendant does not challenge facts in a presentence investigation report at the sentencing hearing, the court does not misuse its discretion if it considers those facts. *Id.* at 46. “Whether, given the paramount importance of the ‘integrity of the sentencing process,’ waiver may be invoked to preclude a defendant’s challenge to a sentencing based on inaccurate information remains unclear.” *State v. Groth*, 2002 WI App 299, ¶25, 258 Wis. 2d 889, 655 N.W.2d 163 (citation omitted), *overruled on other grounds by Tiepelman*, 291 Wis. 2d 179, ¶¶2, 24-25. Despite the defendant’s failure to object to inaccurate information, however, “we may address the merits of the defendant’s

claim.” *Id.* We may, therefore, decide in the interest of fairness to “ignore the waiver.” *Id.*

¶6 During the sentencing hearing, Harrington’s counsel identified three statements in the presentence investigation report that Harrington thought were inaccurate. Harrington had the opportunity to object to any other inaccurate statements in the presentence investigation report. He and his counsel chose to identify certain statements and not others. This is not a situation, as in *Groth*, in which fairness requires that we ignore the waiver. We conclude that Harrington waived his right to challenge the statements he claims are inaccurate.

¶7 Nonetheless, we will also address whether Harrington could succeed on the merits of his claim. Even assuming that the eleven statements Harrington identifies are inaccurate, we conclude that Harrington did not meet his burden of showing that the circuit court actually relied on the misinformation. “A postconviction court’s assertion of non-reliance on allegedly inaccurate information is not dispositive. We may independently review the record to determine the existence of any such reliance.” *Id.*, ¶28 (citation omitted).

¶8 At this point, the parties do not dispute that there were at least some inaccuracies in the presentence investigation report. While Harrington now identifies eleven statements that he claims were inaccurate, he has not identified one instance when the sentencing court relied on one of the inaccurate statements. At the postconviction hearing, the circuit court identified the specific statements in the presentence investigation report that it had relied on in its sentencing remarks. The court asked Harrington’s counsel if those specific statements were true, and counsel agreed that they all were. We agree that the record supports the postconviction court’s conclusion that it did not rely on the inaccurate statements

when it sentenced Harrington. Consequently, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

