COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1822-CR **Cir. Ct. No. 2006CF417**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL ANTHONY BOOKOUT,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Carl Anthony Bookout appeals from a judgment of conviction and an order denying his postconviction motion. Bookout claims that he was sentenced on the basis of inaccurate information. We reject his contentions and affirm.

Background

¶2 Bookout, age twenty-nine, had sexual intercourse on several occasions with a fifteen-year-old girl, K.H., who became pregnant. Bookout was charged with one count of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2) (2005–06).[1]

¶3 Bookout entered into a plea bargain in which he agreed to plead guilty to the charge, and the State would recommend that the court impose and stay a ten-year prison sentence in favor of a five-year probationary term. As part of the plea bargain, Bookout agreed that three disorderly conduct charges would be dismissed but read in for sentencing purposes. Two of the charges involved allegations that Bookout kissed thirteen- and fourteen-year-old girls, J.S. and S.H. The third charge involved a dispute between Bookout and an adult.

¶4 Following Bookout's guilty plea, the court ordered a presentence investigation. The ensuing report reflected Bookout's unsuccessful efforts to complete sex offender treatment during his probation for an unrelated charge of unlawful use of a telephone. The report included statements from both Bookout and K.H. that the two were in love. Bookout told the presentence author that "the law makes [me] look like a pedophile, but that is not the case."

¶5 At sentencing, the circuit court described Bookout as a pedophile based on his history of associating inappropriately with young girls. After discussing a variety of sentencing factors, the court determined that Bookout was a

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

danger in the community and declined to follow the parties' recommendation for a stayed sentence with probation. The court imposed a ten-year term of imprisonment, bifurcated as six years of initial confinement and four years of extended supervision.

¶6 Bookout filed a postconviction motion, contending that the circuit court sentenced him based on the following inaccurate information: (1) he is a pedophile; (2) his kissing young teenage girls was sexually motivated; and (3) he was twice terminated from sex offender treatment for uncooperative behavior. The court denied the motion, and this appeal followed.

Discussion

¶7 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. We review a claimed violation of this right *de novo*. ***Ibid.*** To prevail, the defendant has the burden to show that the disputed information was inaccurate, and that the court actually relied on the information. *See* ***id.***, 2006 WI 66, ¶2, 291 Wis. 2d at 181, 717 N.W.2d at 2. If the defendant satisfies this burden, then the State has the burden to establish that any error was harmless. ***Id.***, 2006 WI 66, ¶3, 291 Wis. 2d at 182, 717 N.W.2d at 2.

Statement that Bookout is a Pedophile

¶8 The circuit court told Bookout: "[y]ou also state in the presentence [report] that the law makes you look like a pedophile. Sir, it's not the law. It's you. You are a pedophile." Relying on a clinical definition, Bookout states that a "pedophile" is someone who, over a period of six months or longer, acts on recurrent fantasies, urges, or behaviors involving sexual activity with a

prepubescent child, generally age thirteen or younger. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 572 (4th ed. Text Revision 2000).[2] He contends that he does not meet the clinical definition because his sexual activity involved a post-pubescent girl. Building on that assertion, Bookout concludes that the circuit court sentenced him on the inaccurate information that he posed a sexual threat to prepubescent children.

¶9 The circuit court had the opportunity to clarify its statements during postconviction proceedings. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994). The court explained that it used the term "pedophile" in order to discuss the defendant's behavioral pattern with young girls, not to evoke the definition of "pedophile" in the DIAGNOSTIC AND STATISTICAL MANUAL. As our review is *de novo*, we are not bound by the circuit court's determination. *See* ***State v. Groth***, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 909, 655 N.W.2d 163, 172 (circuit court's disclaimer of reliance on allegedly inaccurate information not dispositive), *overruled on other grounds by* ***Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d at 182, 717 N.W.2d at 2. Here, however, the record fully supports the circuit court's conclusion.

¶10 The court reviewed Bookout's sexual history with the victim, along with accusations that he kissed other minor girls. It explained that this behavior is defined by the term "pedophile:" "[y]ou have a history of associating inappropriately with young girls, and you are very much an adult. That's what

[2] "The DIAGNOSTIC AND STATISTICAL MANUAL has been described as 'the primary tool of clinical diagnosis in the psychiatric field.'" ***State v. Robertson***, 2003 WI App 84, ¶27 n.6, 263 Wis. 2d 349, 366 n.6, 661 N.W.2d 105, 113 n.6 (citation omitted).

that means. You don't like the name, but your life is what you should not be liking." The court thus used the term "pedophile" colloquially, to mean inappropriate behavior with minors, rather than clinically, to mean sexual activity with prepubescent children. We agree with the circuit court's conclusion that Bookout was not sentenced on the basis of inaccurate information in this regard.

Read-In Offenses

¶11 Two of the three disorderly conduct charges dismissed and read in at sentencing stemmed from incidents in which Bookout kissed thirteen- and fourteen-year-old girls. Bookout asserts that the circuit court improperly considered his behavior with the girls to be sexually motivated conduct.

¶12 Bookout first stresses that both he and the fourteen-year-old denied the incident to police. We do not see the relevance of this assertion. "[O]ffenses that are dismissed and read in are admitted by the defendant for purposes of consideration at sentencing on the crime or crimes for which the defendant is convicted." ***State v. Martel***, 2003 WI 70, ¶21, 262 Wis. 2d 483, 492, 664 N.W.2d 69, 73. Indeed, Bookout stated during the plea hearing that the facts were "basically true."

¶13 Bookout further contends that kissing the thirteen-year-old on the lips was not sexual but was somehow "brotherly," and that his association with both young girls reflects "his immaturity and overpowering need for attention." At bottom, his contention is that the circuit court drew an erroneous inference from the facts that he admitted. This argument cannot support a claim that Bookout was sentenced on inaccurate information. It is long settled that the circuit court may base a sentence on inferences reasonably derived from the record. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971). We cannot

say that the circuit court acted unreasonably by inferring that kisses on the lips have a sexual motivation. Accordingly, the circuit court did not rely on inaccurate information, but rather properly exercised its discretion in this regard. *See* ***ibid.***

Termination from Sex Offender Treatment

¶14 Last, Bookout seeks resentencing because the court misunderstood the outcome of the sex offender treatment ordered during his probation for an earlier offense. Bookout asserts that the court wrongly believed that he was twice terminated from treatment for "simply being uncooperative." He argues that, in fact, his first effort to participate in sex offender treatment ended with a transfer to a different treatment group, and his second effort ended with a suspension to permit evaluation of his other mental health needs.

¶15 In resolving the postconviction motion, the circuit court reviewed the log of Bookout's supervision on probation. This material contains a chronology of Bookout's participation in sex offender treatment. The court found that Bookout's first course of treatment was terminated "due to tardiness and absences." This finding is supported by a log entry stating: "Spoke with [treatment provider] …. As a result of this [lateness] and other absences, the offender has been terminated from S[ex] O[ffender] T[reatment]." The circuit court's finding that Bookout was terminated from treatment for being uncooperative is an inference reasonably drawn from the record. Accordingly, we will not disturb it. *See* ***State v. Friday***, 147 Wis. 2d 359, 370–371, 434 N.W.2d 85, 89 (1989).

¶16 The probation log reflects that Bookout's therapist removed him from treatment a second time following an episode of self-mutilation. Bookout subsequently rejected additional treatment and other alternatives to revocation. He

told the presentence investigator that he preferred serving his sentence to being on probation.

¶17 In its postconviction order, the circuit court acknowledged its impression that noncooperation rather than self-mutilation led to Bookout's second termination from treatment. The court concluded, however, that this impression was insignificant and had no impact on the sentence. The important fact was Bookout's failure to complete sex offender treatment, not the specific reasons for his failure.

¶18 The record supports the circuit court's conclusion. The court stated that Bookout might have avoided criminal charges if he had addressed his treatment needs "but [he had] shown absolutely no ability or willingness to do so." The comment reflects that the court attached no importance to whether Bookout's failures at treatment stemmed from unwillingness to cooperate or from inability to participate.

¶19 Further, the record reflects that the circuit court imposed sentence after considering a panoply of mandatory and permissive sentencing factors. The court considered the primary sentencing factors of "the gravity of the offense, the character of the offender, and the need for protection of the public." *See* ***State v. Lechner***, 217 Wis. 2d 392, 421, 576 N.W.2d 912, 926 (1998) (citations omitted). The court discussed the gravity of impregnating a fifteen-year-old, and the "irreparable" changes to the victim's life as a result. It discussed Bookout's character at length, taking particular note of Bookout's history of threats and his lack of insight into the effect his fondling and other abusive behavior had on his young victims. In considering the need for community protection, the court gave

weight to Bookout's inappropriate behavior with young girls and his escalating criminal behavior.

¶20 The court considered numerous other factors, both positive and negative. These included Bookout's intelligence, his drug and alcohol abuse, his history of absconding from supervision, and his poor employment record. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606–607, 712 N.W.2d 76, 82 (court may rely on a wide variety of factors relating to the defendant, the victim, and the community). Also relevant was Bookout's failure to complete sex offender treatment in two attempts, as was his behavior while undergoing treatment. In this regard, the court accurately observed that Bookout was "terminated twice and was uncooperative." The court could properly consider Bookout's documented history of uncooperativeness in treatment. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 237, 688 N.W.2d 20, 26 (selection of relevant factors and weight attached to those factors lie within the circuit court's discretion).

¶21 The circuit court did not actually rely on any factual inaccuracies. It properly exercised its discretion by considering relevant and appropriate factors in fashioning a reasonable sentence. Because Bookout did not satisfy his burden to prove that the court actually relied on inaccurate information, we need not reach the question of harmless error. *See* ***Tiepelman***, 2006 WI 66, ¶3, 291 Wis. 2d at 182, 717 N.W.2d at 2 (no burden on State to show harmless error until the defendant shows that the circuit court relied on inaccurate information).

By the Court.—Judgment and order affirmed.

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