

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 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. 2007AP1936-CR

Cir. Ct. No. 2006CF724

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CATHERINE M. EVANICH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Catherine Evanich appeals from an order denying her motion for sentence modification. She argues that she was sentenced on the basis of inaccurate information regarding her treatment needs and eligibility for the Earned Release Program (ERP). We affirm the order appealed from.

¶2 Evanich ran a stop sign and struck another vehicle. The driver of the other vehicle sustained a serious internal injury that necessitated surgery. In addition to a charge of third offense operating while intoxicated, Evanich was charged with causing injury by intoxicated use of a vehicle, a class F felony under WIS. STAT. § 940.25(1)(a) (2005-06).¹ She entered a guilty plea to the felony charge.

¶3 At sentencing, both sides and the presentence investigation report (PSI) recommended probation. Evanich was sentenced to two years' initial confinement and five years' extended supervision. After that sentence was imposed and conditions of supervision set forth, the circuit court declared Evanich eligible for the ERP. *See* WIS. STAT. § 973.01(3g).

¶4 Evanich filed a motion for sentence modification. The motion explained that under WIS. STAT. § 302.05(3)(a)1., Evanich was not in fact eligible to participate in the ERP because she was incarcerated for a crime under WIS. STAT. ch. 940. Evanich's motion argued that her ineligibility was a new factor supporting a sentence modification because the court contemplated that Evanich would earn early release and the ERP would serve her main treatment need. In a single sentence the motion noted possible inaccuracies in the PSI regarding Evanich's atonement, commitment to sobriety, and treatment. A letter from her treatment counselor "correcting" those alleged inaccuracies was attached to the motion.

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

¶5 The circuit court denied Evanich’s motion without a hearing. It concluded that even if a new factor existed because Evanich’s was ineligible for the ERP, that factor did not frustrate the purpose of the sentence. The court also found that there are many other treatment programs available within the prison system related to alcohol abuse problems and that Evanich could utilize those programs.

¶6 After Evanich filed her appellant’s brief, the State moved for a remand to the circuit court for a hearing on Evanich’s motion for sentence modification because Evanich’s appellant’s brief argued that she was sentenced on the basis of inaccurate information in the PSI, including the indication that Evanich be eligible for the ERP. The State sought clarification of the record because the circuit court’s decision on the motion did not address whether the sentence was based on the erroneous assumption that Evanich was eligible for the ERP. The remand motion was granted to close the gap in the record regarding the claim that Evanich was sentenced upon inaccurate information and to give Evanich the opportunity to address the unpublished case relied on by the circuit court in holding that ERP ineligibility is not a factor that frustrates the sentence because ERP participation is a discretionary determination by correctional officials.²

² The circuit court cited *State v. Bliss*, 2005AP1011-CR, unpublished slip op. (Wis. Ct. App. May 23, 2006), in its written decision denying Evanich’s motion for sentence modification. Our order remanding the matter observed that the reliance on the unpublished decision was a disposition Evanich had no opportunity to anticipate or address. See *City of Sheboygan v. Nytsch*, 2006 WI App 191, ¶18 n.6, 296 Wis. 2d 73, 722 N.W.2d 626 (criticizing reliance on an unpublished Court of Appeals decision for anything more than a “starting line”), *other language stricken*, 2008 WI 64, ___ Wis. 2d ___, 750 N.W.2d 475.

¶7 A defendant has a due process right to be sentenced based upon accurate and valid information. *See State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). To establish a due process violation, the defendant 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. The State's burden is then to show that the inaccuracy was harmless. *Id.* Whether a defendant has been denied the due process right to be sentenced on accurate information is an issue that we review de novo. *Id.*, ¶9.

¶8 Evanich claims that the PSI gave inaccurate information and implied she needs more intensive counseling than programs she was participating in within the community. She is referring to information contained in the supplemental PSI. The circuit court adjourned the first sentencing hearing and directed preparation of the supplemental PSI for the purpose of providing information about the treatment Evanich had engaged in before sentencing and her prognosis. The supplemental PSI stated that according to her assessment, Evanich did not think she has an alcohol problem. It also relayed her self reporting that attending AA meetings made her "feel worse." That assessment also noted that Evanich rationalized her use of alcohol and that she plans to eventually return to drinking.

¶9 The letter from Evanich's treatment counselor indicated that the information contained in the supplemental PSI "deals with the early stages of Catherine's treatment." The counselor's letter explained that generally when patients first enter treatment they are guarded, defensive, and engage in denial regarding the impact of their alcohol use. The counselor indicated that Evanich was active and positive in her treatment and motivated to maintain abstinence.

¶10 We conclude Evanich did not make a showing that the information in the supplemental PSI was inaccurate. The supplemental PSI accurately conveyed the information resulting from Evanich’s initial assessment and her attendance at treatment sessions and meetings. It did not purport to represent changes in Evanich’s attitude or commitment to treatment since that assessment. It did not directly or impliedly suggest Evanich’s treatment needs. Moreover, at sentencing Evanich pointed out that the information in the supplemental PSI was taken from the initial assessment and that Evanich was now committed to never returning to drinking. The circuit court accepted the limitation of information in the supplement PSI. It assured Evanich that it was not under “a false assumption here that’s her current attitude.” Rather, the circuit court made its own assessment of Evanich’s treatment needs in relation to her prior record and the nature of the crime. Evanich was not sentenced based on inaccurate information about her initial assessment, past treatment experience, or her current attitude towards alcohol abuse and abstinence.³

¶11 It is undisputed that the PSI was inaccurate in suggesting that Evanich be declared eligible for the ERP. Whether the court actually relied on the incorrect information at sentencing is “based upon whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Tiepelman*, 291 Wis. 2d 179, ¶14 (citation omitted).

³ Evanich further developed her commitment to abstinence at the remand hearing. Her success in various correctional treatment programs led the circuit court to invite Evanich to move for review after Evanich has served one year and nine months of her sentence. *See* WIS. STAT. § 973.195.

¶12 That the circuit court declared Evanich eligible for the ERP does not automatically demonstrate that it relied on the inaccurate information regarding eligibility in determining the sentence. Indeed, the circuit court had already explained the rationale behind the sentence and declared the length of the sentence and conditions of extended supervision *before* it even mentioned the ERP. There was no suggestion that the circuit court intended Evanich to serve less time than the sentence imposed. The circuit court explained at the remand hearing that it was aware that participation in the ERP is a discretionary decision for correctional officials to make. It further stated that the ERP eligibility declaration at the conclusion of sentencing was a matter of administrative convenience. The court sought to end the sentencing proceeding on an encouraging note and give Evanich incentive for success. The possibility that Evanich could participate and complete the ERP was not a basis for the sentence. Evanich was not sentenced on the basis of inaccurate information.

¶13 Evanich's remaining argument is that it was error for the circuit court to deny her new factor sentence modification motion on the authority of an unpublished Court of Appeals decision. This issue is raised for the first time on appeal. However, Evanich was given the specific opportunity to address the circuit court's reliance on the unpublished decision on remand. She did not take that opportunity to ask the circuit court to correct the alleged error. We properly decline to review an issue where an appellant has failed to give the circuit court fair notice that he or she objects to a particular issue. *See State v. Gilles*, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992). Because the specific issue raised in the appellant's brief is waived, it is sufficient to note that Evanich's ineligibility for the ERP did not frustrate the purpose of the sentence and therefore, was not a new factor. *See State v. Johnson*, 158 Wis. 2d at 466 (the new factor must be an

event or development that frustrates the purpose of the original sentence). *Cf. State v. Franklin*, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989) (in order for a change in parole policy to constitute a new factor, parole policy must have been a relevant factor in the original sentencing). Also, Evanich's commitment to treatment and abstinence was information the circuit court possessed at sentencing. Her later success in correctional treatment programs is not a new factor. *See State v. Crochiere*, 2004 WI 78, ¶22, 273 Wis. 2d 57, 681 N.W.2d 524 (rehabilitation while incarcerated is not a circumstance that will frustrate the purpose of a sentence).

By the Court.—Order affirmed.

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

