

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2012

Diane M. Fremgen
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. 2011AP2892-CR

Cir. Ct. No. 2008CF111

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REDELL LEE ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Monroe County: MARK L. GOODMAN, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Redell Allen appeals a judgment of conviction and sentence after revocation of probation, as well as an order denying his motion for postconviction relief. Allen argues on appeal that the circuit court violated his due process rights by sentencing him based upon inaccurate information regarding his

use of drugs and alcohol, his relationships with women, and his relationship with his family. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Allen pled no contest to possession of cocaine with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(cm)1r (2009-10).¹ The circuit court withheld sentence and placed him on six years of probation. Allen's probation was revoked in July 2010, after he was arrested for shoplifting items from a supermarket, including beer, whiskey, and rum, with another individual. The terms of Allen's probation prohibited him from having contact with that individual.

¶3 The circuit court sentenced Allen to five years of initial confinement and five years of extended supervision. Allen filed a postconviction motion, arguing that the circuit court had based its sentencing after revocation decision on inaccurate facts. The circuit court denied the postconviction motion after a hearing, concluding that Allen had not met his burden to establish that there was inaccurate information before the sentencing court, or that any such information was relied upon. Allen now appeals.

DISCUSSION

¶4 On appeal, Allen argues that the circuit court violated his due process rights by sentencing him based upon inaccurate information regarding his use of drugs and alcohol, his relationships with women, and his relationship with his family. Whether a defendant has been denied his due process right to be

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

sentenced based upon accurate information is a constitutional issue that we review de novo. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant requesting resentencing must prove both that the information is inaccurate and that the circuit court relied upon it. *Id.*, ¶26.

Substance abuse

¶5 We first address Allen’s argument that the circuit court inaccurately characterized him as being a polysubstance abuser. Allen disputes allegations in the probation revocation summary that he shoplifted items, including alcohol, from a supermarket and took prescription medication from Wal-Mart without paying for it. He argues that the circuit court relied upon these allegations and, in doing so, made its sentencing decision based upon inaccurate information. Allen also asserts that, after his attempted suicide by overdose in January 2010, his mental health improved, and that there is no evidence that he used alcohol or drugs following his suicide attempt.

¶6 We note that the circuit court acknowledged on the record at sentencing that the allegations that Allen stole alcohol and prescription drugs were contested. The court afforded Allen the opportunity to address the court at sentencing. Allen stated that he had made progress and that he had stayed away from the drug scene. After considering Allen’s statement along with the other evidence, the circuit court took the view that Allen was a person who abused substances. Our review of the record on appeal reveals facts sufficient to support that view as accurate. Information that the circuit court uses to base its sentencing decision upon does not need to be established beyond a reasonable doubt. *State v. Marhal*, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992).

¶7 As Allen's counsel stated at the postconviction motion hearing, Allen has a history of addiction. In 2008, Allen pled no contest to possession of cocaine with intent to deliver. The complaint alleged that Allen was stopped on foot by police for having an outstanding warrant. A search of his person revealed seven individually wrapped baggies of crack cocaine. As a condition of Allen's probation, the court ordered that Allen undergo alcohol and drug treatment and refrain from consuming alcohol or entering bars, taverns, or liquor stores. The court dismissed but read in charges of possession of THC and possession of drug paraphernalia, contrary to WIS. STAT. §§ 939.50(3)(i) and 939.62(1)(a). Allen had a prior conviction of possession of THC in June 2005.

¶8 The revocation summary prepared by Allen's probation agent described several alcohol and drug-related violations of Allen's conditions of probation. After reviewing the revocation summary and conducting a hearing, an administrative law judge (ALJ) from the Department of Hearings and Appeals made findings of fact and revoked Allen's probation. When given the opportunity to make corrections to the revocation summary at his sentencing hearing, Allen did not do so.

¶9 The revocation summary stated that Allen consumed alcohol and used marijuana in January 2010, that he consumed alcohol at his residence between the dates of November 1, 2009 and January 5, 2010, and that he provided false information to his probation agent regarding consumption of alcohol. The summary also stated that between November 1, 2009 and January 5, 2010, Allen purchased oxycodone pills from an individual. Although Allen had a prescription for oxycodone, the pills were not purchased legally. The summary further states that, on January 5, 2010, Allen took 47 Xanax pills and 43 oxycodone pills, in an

attempt to commit suicide. He admitted to his probation agent that he had been drinking alcohol for several weeks straight.

¶10 The revocation summary indicates that Allen attended sessions for AODA outpatient treatment in 2008 and, at the completion of the sessions, his final evaluation recommended that he continue with treatment in the form of aftercare. The summary states that Allen did not follow the recommendation. Upon his release from jail on March 3, 2010, Allen was again referred to AODA programming. The summary states that Allen missed more sessions than he attended. In light of these facts, we are satisfied that the information before the circuit court about Allen's relationship with drugs and alcohol was accurate and supported by the record.

Relationships with Women

¶11 Our review of the record also reveals a factual basis for the court's statements regarding Allen's relationships with women and his inability to control his impulses. The revocation summary includes allegations of several violations of Allen's conditions of probation that are related to unauthorized contact with women and violence against women. Allen admitted to the allegations in writing, but then argued at his revocation hearing that he only admitted to the allegations so that he could get out of jail. The ALJ heard testimony at the revocation hearing from Allen and from witnesses, and concluded that Allen had engaged in the acts described in the summary. On appeal, Allen does not cite any credible record facts to dispute those findings, and our own review of the record does not reveal any.

¶12 The ALJ found that, from September 27 to October 6, 2009, and from October 8 to October 11, 2009, Allen sent text messages to his former

girlfriend, with whom he has a child. Having contact with this former girlfriend was a violation of the conditions of Allen's probation. The ALJ also found that, in October 2009, Allen went to the residence of the former girlfriend and grabbed her by the neck, rubbed her between the legs with his hand, and gave her two hickeys.

¶13 In addition, the ALJ found that Allen hit the woman who was his current girlfriend at the time, with whom Allen also has a child. The revocation summary states that Allen pulled his then-current girlfriend's hair and threatened to kill her. The summary also states that Allen told his probation agent that his girlfriend pushed him to the point where he could not control himself. The ALJ further found that, on another occasion, Allen hit the vehicle of a female he knew and threatened her. Finally, the ALJ found that Allen had had sexual contact with a female friend who was not his girlfriend, without prior approval from his probation agent. The terms of Allen's probation prohibited him from having any romantic, dating, or sexual relationship without prior approval.

¶14 As the circuit court noted at sentencing, Allen was previously convicted for failure to provide required information as a registered sex offender. The record also reflects numerous instances of Allen failing to attend domestic violence treatment and sex offender treatment programming, which were ordered as terms of his probation. We are satisfied, from the facts in the record, that the circuit court did not sentence Allen based upon inaccurate information concerning his relationships with women and lack of impulse control.

Relationship with Family

¶15 Finally, we address Allen's argument that the circuit court sentenced him based upon inaccurate information regarding his nonsupport of his two children. Allen argues that, although he may have been too poor to provide

financial support, he supported his family by staying home to take care of one of his children while her mother worked. Allen asserts that this fact is supported by an affidavit submitted by the mother of that child, which he filed along with his postconviction motion.

¶16 Even if we assume that all of the facts in the affidavit are true, the fact that Allen stayed home for a period of time with one of his children does not render inaccurate the circuit court's statement that Allen has a history of nonsupport. Other facts in the record provide a sufficient basis for the court's statement. Allen told his probation agent that he planned to terminate parental rights to his other child because the child's mother would not allow Allen to see the child. The probation revocation summary states that, on or about March 30, 2010, Allen was in non-compliance with his child support payments, and was instructed to take care of the issue. The summary states that Allen did not report to the child support office as instructed, and did so only after an apprehension request was issued. Allen does not dispute in his appellate briefs that his child support was in arrears.

CONCLUSION

¶17 After considering the facts in the record, we conclude that Allen has failed to meet his burden of showing that the information before the sentencing court regarding Allen's drug and alcohol abuse, relationships with women, and child support status was inaccurate. We affirm the circuit court on that basis. Because Allen was required to prove both inaccuracy and actual reliance, we need not consider whether the circuit court relied upon the information. *See Tiepelman*, 291 Wis. 2d 179, ¶31.

By the Court.—Judgment and order affirmed.

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

