COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-2433-CR
03-2434-CR
03-2435-CR

Cir. Ct. Nos. 01CF000413
01CF000166
01CF000397

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. MOLA,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Thomas Mola appeals an amended judgment convicting him of fleeing an officer and operating while intoxicated (OWI) as a fourth offense, an amended judgment convicting him of OWI as a fifth offense,

and an amended judgment convicting him of bail jumping and OWI, his sixth offense, all counts as a repeater. He also appeals the circuit court's order denying his motion for postconviction relief. The issues are: (1) whether the circuit court erred when it resentenced Mola; and (2) whether Mola was sentenced on the basis of inaccurate information. We affirm.

¶2 Mola first argues that the circuit court erred when it resentenced him for OWI as a fourth offense without holding a resentencing hearing. We agree that Mola should have been present at resentencing pursuant to ***State v. Upchurch***, 101 Wis. 2d 329, 336, 305 N.W.2d 57 (1981) ("It was improper to resentence a defendant in his absence after the imposition of a previously ordered invalid sentence."). Even so, we conclude that the error was harmless. *See* ***State v. Stenseth***, 2003 WI App 198, ¶17, 266 Wis. 2d 959, 669 N.W.2d 776, *review denied*, 2003 WI 140, 266 Wis. 2d 65, 671 N.W.2d 851 (Oct. 21, 2003) (No. 02-3330-CR) ("Violation of the right to be present [at resentencing] is subject to a harmless error analysis."). "An error is harmless if it does not affect the [defendant's] substantial rights." ***Stenseth***, 266 Wis. 2d 959, ¶17.

¶3 The circuit court originally sentenced Mola for fleeing an officer and OWI as a fourth offense to three years of imprisonment, with eighteen months of initial confinement and eighteen months of extended supervision, to be served concurrently. The circuit court amended the sentence on the OWI to three years of imprisonment, all to be served in prison with no extended supervision, to be served concurrently. The circuit court amended the sentence because it was informed by the Department of Corrections that OWI as a fourth offense was a misdemeanor for which a bifurcated sentence could not be imposed.

¶4 When the court amended Mola's sentence, that amendment had no practical effect because Mola had been sentenced to a longer term of initial confinement in a different case, and the sentences were concurrent. Mola had been sentenced to five years of initial confinement and five years of extended supervision for his sixth OWI offense. Because the sentence for the sixth OWI was the longest, it set the length of the time Mola would actually serve. Therefore, the circuit court's error in resentencing Mola without holding a hearing at which he was present was harmless.[1]

¶5 Mola next argues that he was sentenced on the basis of inaccurate information. Mola contends that the circuit court erroneously believed that there were thirty-four read-in charges when, in fact, the number was much lower.[2]

¶6 A defendant has a due process right to be sentenced on the basis of accurate information. *See* ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). To obtain relief, a defendant has to show that the information was inaccurate and that the inaccurate information prejudiced the circuit court's sentencing decision. ***Id***. at 132.

¶7 Regardless whether the circuit court believed there were more read-ins than was accurate, Mola has not shown that the number of read-ins considered

[1] Mola appears to also argue that the error was not harmless because he was deprived of the opportunity to present a new factor argument since no hearing was held. However, Mola was able to and did raise this argument in his postconviction motion, but did not pursue this challenge on appeal. Because he was afforded the opportunity to raise the new factor argument with the circuit court, this contention does nothing to support his claim that the error was not harmless.

[2] Mola contends both that there were in fact fewer read-ins and that there *should have been* fewer read-ins because the prosecutor incorrectly charged Mola. We do not address this issue.

by the circuit court prejudiced him. Our review of the sentencing transcript shows that the court focused on Mola's inability to stop himself from drinking and driving, his extensive criminal history, and the fact that the public needed protection from Mola so that he did not harm someone when driving drunk. The court expressed concern that Mola would kill someone while driving drunk. In addition, in its decision on the postconviction motion, the circuit court specifically said that a reduced number of read-ins would not have changed its sentence because its focus had been on Mola's inability to stop himself from drinking and driving. Therefore, we reject Mola's challenge based on the read-ins considered by the sentencing court.

By the Court.—Judgments and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).