

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2006

Cornelia G. Clark
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. 2006AP942

Cir. Ct. No. 1999CF471

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO S. JEFFREY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mario Jeffrey appeals an order denying his motion for postconviction relief. Jeffrey claims the trial court erroneously exercised its sentencing discretion after his probation revocation by sentencing him on the basis of incorrect information and by failing to adequately justify the sentence. We

conclude Jeffrey has adequately shown he was sentenced based on inaccurate information. Accordingly, we reverse the order and remand the case for resentencing.

¶2 An original Information filed September 23, 1999, charged Jeffrey with aggravated battery causing substantial bodily harm, contrary to WIS. STAT. § 940.19(3),¹ as party to a crime. An amended Information, filed November 2, charged aggravated battery causing great bodily harm, contrary to WIS. STAT. § 940.19(5), as party to a crime, and included a dangerous weapons enhancer. This Information identified the crime as a Class C felony with punishments of \$10,000 or fifteen years' imprisonment or both, with a presumptive minimum sentence of three years' imprisonment. A second amended Information was filed November 15, alleging the same § 940.19(5) violation but removing the weapons enhancer and presumptive minimum sentence and identifying the maximum possible imprisonment as ten years.

¶3 On November 16, 1999, Jeffrey was convicted of the battery charge in the second amended Information. He and his friends had severely beaten the victim while stealing a stereo. Jeffrey was sentenced to eight years' probation after a sentencing hearing in which the court articulated the many sentencing factors it was considering, including the ten-year maximum penalty.

¶4 Jeffrey's probation was revoked in July 2005. He and a friend allegedly kidnapped someone at gunpoint, threatened to kill him, and then robbed him of money and drugs. At sentencing after revocation, the court stated that its

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

“comments really don’t change much” compared to the original sentencing hearing. However, there was some apparent confusion over whether the maximum penalty was ten or fifteen years’ imprisonment. The transcript suggests the court came to believe that the maximum was fifteen years. The court noted, “I’m satisfied from this record that the crime ... is a 15-year felony, meaning that the legislature ... felt it was one of the most serious crimes.” The court ultimately sentenced Jeffrey to eight years’ imprisonment, stating it had “to look at the seriousness of this crime and the fact that I have no other option but incarceration.”

¶5 Jeffrey moved for postconviction relief, seeking resentencing. He alleged the court erroneously exercised its sentencing discretion by considering an incorrect maximum penalty and by failing to make an adequate record of the reasoning behind its sentencing decision.² The court denied the motion, considering its reference to a fifteen-year maximum to be a technical error. The court stated it was concerned with the severity of the crime and that its sentencing decision reflected that as the main concern. The court also noted that the eight-year sentence it did impose was below the ten-year maximum. Jeffrey appeals.

¶6 This appeal arises from sentencing after probation revocation. Therefore, only the sentencing issue is before us, not the original conviction. *See State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996); *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Sentencing is a

² Actually, Jeffrey contends the court abused its discretion. However, the term “abuse of discretion” was replaced by “erroneous exercise of discretion.” *City of Brookfield v. Milwaukee Metro. Sewer. Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

discretionary decision that we will not disturb absent an erroneous exercise of that discretion. *State v. Taylor*, 2006 WI 22, ¶17, 289 Wis. 2d 34, 710 N.W.2d 466.

¶7 When making a sentencing pronouncement, the court must provide a “rational and explainable basis” with “delineation of the primary sentencing factors to the particular facts of the case.” *State v. Gallion*, 2004 WI 42, ¶¶ 39, 58, 270 Wis. 2d 535, 678 N.W.2d 197. These primary factors include the gravity of the offense, the character and rehabilitative needs of the defendant, and protection of the public. See *State v. Naydihor*, 2004 WI 43, ¶78, 270 Wis. 2d 585, 678 N.W.2d 220.

¶8 A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). When a defendant alleges he has been sentenced on inaccurate information, he has the burden to show that the information was inaccurate and that the court relied on it. *Id.*

¶9 Here, Jeffrey asserts that the court failed to adequately explain his sentence and that it sentenced him on the basis of inaccurate information.³ At the sentencing-after-revocation hearing, the court referred to the comments it made at the initial sentencing and concluded its rationale had not significantly changed. The only real difference was that the court no longer had probation as a sentencing

³ Jeffrey characterizes the alleged error as sentencing based on an improper factor, but this is not the case. An improper factor is one “totally irrelevant or immaterial” to the sentencing decision. *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980). The maximum sentence is certainly relevant. However, Jeffrey’s argument makes it clear that his complaint is the court’s use of inaccurate information about the maximum sentence.

option. We will assume without deciding that this incorporation by reference created a sufficiently “rational and explainable basis” for Jeffrey’s sentence.⁴

¶10 At a minimum, however, the court must apprise itself of the correct maximum penalty in a case. When a court misapprehends the maximum penalty and believes it to be higher than it actually is, there is a very real possibility that the resulting sentence could be higher than the court might otherwise have deemed appropriate.⁵

¶11 Here, the court acknowledged its error but determined it was only a technical defect. The State asserts the court’s comments reveal it only “focused on the severity” of the crime, rather than the exact maximum penalty, and points out that the eight-year sentence is still below the maximum.

¶12 It is evident that the court relied on the maximum penalty as a means of addressing the gravity of the offense. As it noted, the higher the maximum penalty prescribed by law, the more severe the legislature considers the crime. Because the court believed the maximum penalty was fifteen, not ten, years’ imprisonment, its basis for assessing the severity of the crime was skewed. We are therefore not convinced this error was merely technical. Jeffrey must be resentenced.

⁴ This assumption is for purposes of this appeal only. On remand, the better practice would be to make specific reference to the factors the court considered at the first sentencing.

⁵ Say, for example, the court determined based on appropriate factors that a defendant should serve half of the maximum sentence. If the actual maximum is ten years’ imprisonment, the sentence pronounced would be five years. If, however, the court believes the maximum is fifteen years’ imprisonment, the sentence handed down is seven and one-half years. This does not exceed the actual maximum sentence, but is now three-quarters of the maximum, not one-half.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2003-04).

