

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 2, 2010

A. John Voelker
Acting 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. 2010AP83-CR

Cir. Ct. No. 2007CF3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON C. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County:
JAMES J. DUVALL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. Jason Walker was sentenced after revocation of his probation. The sentencing court considered probation violations that Walker denied committing. Because of his denial, Walker argues the court could not consider the violations unless the State proved he committed them. We disagree.

Walker had the obligation to rebut the alleged violations. He could not stand on his mere denial.

BACKGROUND

¶2 In December 2007, Walker was convicted of felony bail jumping. The circuit court withheld sentence and placed him on three years' probation.

¶3 In August 2009, Walker's probation agent recommended Walker's probation be revoked. The agent's revocation summary alleged Walker had violated his rules of supervision by: (1) having unapproved guests at his residence after 11:00 p.m.; (2) having sexual intercourse with a minor female; and (3) attempting to have sexual intercourse with an adult female against her will. Walker denied having sexual contact with either woman but admitted having both women at his apartment after 11:00 p.m. He waived a revocation hearing and his probation was revoked.

¶4 At sentencing after revocation, Walker's counsel acknowledged Walker had waived his revocation hearing. On that basis, the circuit court stated, "I think I'm entitled to assume for purposes of this hearing that the facts alleged for this revocation existed and exist for purposes of the sentencing on the old charge." Walker's counsel argued the court could only consider the probation violation Walker had admitted—having two unapproved guests at his residence after 11:00 p.m. Counsel conceded the sexual assault allegations in the revocation summary were the subject of pending criminal charges in another county. However, he argued the court could not consider those allegations because Walker denied the sexual conduct and planned to contest the charges. The court disagreed, stating, "I think I'm entitled to find for the purpose of this hearing all three violations occurred."

¶5 The court then imposed a four-and-a-half-year sentence, consisting of eighteen months' initial confinement and three years' extended supervision. It is undisputed that the court's sentencing decision was founded, in part, on the sexual assault allegations in the revocation summary. Walker now appeals, arguing the circuit court violated his right to due process by sentencing him based on probation violations that the State never proved he committed.

DISCUSSION

¶6 A criminal defendant has a due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. As part of this guarantee, a defendant has the right to rebut disputed factual information considered by the sentencing court. *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). A defendant who alleges the circuit court used inaccurate information at sentencing has the burden to show both that the information was inaccurate and that the court actually relied on the information in making its sentencing decision. *Tiepelman*, 291 Wis. 2d 179, ¶26. Whether a defendant has been denied due process at sentencing is an issue of constitutional law that we review independently. *Id.*, ¶9.

¶7 In his initial brief, Walker contends the circuit court sentenced him based on factually incorrect information. Walker argues that, because he denied

the sexual assault allegations during the sentencing hearing, the State had to prove the allegations before the court could consider them.¹

¶8 We disagree. Instead, to prove his due process rights were violated, we conclude Walker has the burden to show that the court relied on factually inaccurate information. *See id.*, ¶26. Walker has not met this burden. His mere denial of the sexual assault allegations during the sentencing hearing did not constitute evidence rebutting them, nor did counsel's statement that Walker intended to defend against the pending charges. It was Walker's burden to prove the allegations were factually inaccurate, and he has not done so.

¶9 In his reply brief, Walker acknowledges he has not actually demonstrated that his sentence rests on inaccurate factual information. However, he argues, "[I]t can equally be said that the disputed revocation summary ... did not demonstrate that Walker's sentence after revocation rests on materially accurate information." Again, Walker's argument fails because it is not the State's burden to prove that the information the sentencing court relied on is accurate.

¶10 Walker further argues that, because the facts surrounding the alleged sexual assaults were disputed, he had a right to rebut the allegations before the sentencing court relied on them. *See Spears*, 227 Wis. 2d at 508. He argues the court should have held an evidentiary hearing to establish whether the allegations were true.

¹ Walker concedes that Wisconsin law permits a sentencing court to consider information relating to uncharged, unproven, or even acquitted crimes as evidence of a defendant's character. *See State v. Lechner*, 217 Wis. 2d 392, 422-23, 576 N.W.2d 912 (1998); *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). However, he contends this principle does not apply where a defendant denies the uncharged, unproven, or acquitted crime.

¶11 The problem with Walker’s argument is that he had an opportunity to rebut the allegations during the sentencing hearing, but he did not do so. Nor did he ask for an evidentiary hearing to rebut the allegations. He never presented any evidence in the circuit court that the allegations were false. He merely offered a bare denial. Walker was not deprived of the opportunity to rebut disputed factual information at sentencing. Rather, he chose not to avail himself of that opportunity.

By the Court.—Judgment affirmed.

Recommended for publication in the official reports.

