

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 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. Walker argues the court could not consider the violations because the State did not prove he committed them. He contends the sentencing

court was obligated to resolve the factual dispute about whether the violations occurred, but had no basis to do so without holding an evidentiary hearing.

¶2 We disagree. The sentencing court had sufficient evidence to conclude that the probation violations occurred, and Walker did not present any evidence to the contrary. On appeal, it is Walker's burden to show that the court relied on inaccurate information when it sentenced him. Walker has not met this burden. We therefore affirm.

BACKGROUND

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

¶4 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woman but admitted having both women at his apartment after 11:00 p.m. He waived a revocation hearing and his probation was revoked.

¶5 At sentencing after revocation, Walker's counsel acknowledged Walker had waived his revocation hearing. Counsel repeated that Walker denied the two sexual assault allegations and argued the court could only consider the probation violation Walker 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. The court disagreed, stating, “I think I’m entitled to find for the purpose of this hearing all three violations occurred.”

¶6 The court then imposed a four-and-one-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

¶7 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.

¶8 Walker argues the sentencing court could not rely on the sexual assault allegations in the revocation summary because the State did not prove them. Had the State presented bare allegations, without any underlying facts, we would agree with Walker that the court’s reliance on the sexual assault allegations was improper. However, the trial court did receive evidence that the sexual

assaults occurred. Specifically, the revocation summary contained a detailed description of the alleged assaults.

¶9 The revocation summary stated the names of the victims, the date of the offenses, and the location where the assaults allegedly took place. Furthermore, according to the revocation summary, both victims were interviewed by police. The minor victim admitted having sexual intercourse with Walker. She also told police she saw Walker trying to remove the adult victim's pants and heard the adult victim repeatedly tell Walker, "No." The adult victim told police Walker forcefully tried to remove her pants in order to have sex with her. She further stated she saw Walker engaging in intercourse with the minor victim.

¶10 Thus, the State did not rest on mere allegations. The revocation summary was evidence that the sexual assaults occurred. The rules of evidence do not apply at sentencing. WIS. STAT. § 911.01(4)(c) (2007-08). Accordingly, both this court and the sentencing court are entitled to consider the facts set forth in the revocation summary as evidence supporting the sexual assault allegations.

¶11 Walker cites *State v. Anderson*, 222 Wis. 2d 402, 412, 588 N.W.2d 75 (Ct. App. 1998), for the proposition that "the trial court has an important factfinding role to perform if facts relevant to the sentencing decision are in dispute. In that setting, the sentencing court must resolve such disputes." Walker contends that, because he denied the sexual assault allegations during the sentencing hearing, there was a factual dispute about the truth of those allegations. He argues the circuit court had no basis upon which to resolve the dispute without holding an evidentiary hearing. He states that a sentencing court may not assume the truth of disputed facts in the absence of supporting evidence.

¶12 We agree with Walker that, when facts relevant to a sentencing decision are disputed, the sentencing court must resolve the factual dispute. We also agree that a sentencing court may not assume the truth of disputed facts without supporting evidence. However, we disagree with Walker's contention that the circuit court improperly resolved the factual dispute in this case by assuming the truth of disputed facts. Here, the court relied on the revocation summary, which contained a detailed description of the alleged sexual assaults. Because Walker did not present any evidence contradicting the revocation summary, the only relevant facts before the sentencing court supported the allegations. As a result, the sentencing court could reasonably conclude, based on the evidence before it, that the allegations were true.¹

¶13 Furthermore, facts do not become disputed simply because the defendant says they are disputed. To dispute an allegation, the defendant must offer evidence that contradicts the allegation. Here, Walker did not offer any evidence that the sexual assault allegations were false. He merely denied the allegations, without offering any factual support for his denial.

¶14 Walker argues he was entitled to an evidentiary hearing because he had a right to rebut the disputed sexual assault allegations before the sentencing court relied on them. *See Spears*, 227 Wis. 2d at 508. The problem with Walker's

¹ Walker contends that under federal constitutional law a court may not rely on disputed facts at sentencing unless those facts are proved by a preponderance of evidence. We question whether the cases Walker relies on actually stand for that proposition. In fact, in the past we have specifically declined to adopt a formal burden of proof requirement for factual findings at sentencing. *See State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). But more to the point, even if the preponderance standard applies, that standard was satisfied here. The only facts before the court were those in the revocation summary, which supported the sexual assault allegations. Although Walker denied the allegations, he did not present any contrary facts.

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.

¶15 We conclude *Tiepelman* places the burden on Walker to show that the sentencing court relied on factually inaccurate information when it accepted the sexual assault allegations as true. *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. On appeal, Walker has the burden to prove the allegations were factually inaccurate, and he has not done so.

¶16 Walker argues *Tiepelman* is inapplicable because it involved a motion for resentencing rather than an appeal from a sentence imposed after revocation. However, Walker does not explain why this procedural difference affects the legal principle set forth in *Tiepelman* that it is the defendant's burden to demonstrate the sentencing court relied on inaccurate information. We do not believe the procedural differences between *Tiepelman* and this case merit application of a different legal standard.

¶17 Walker also contends the language we rely on in *Tiepelman* is dicta. However, the court of appeals may not dismiss as dicta language from a supreme court opinion. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

By the Court.—Judgment affirmed.

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