

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2011

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 Nos. 2010AP1801-CR
2010AP2347-CR**

Cir. Ct. No. 2007CF1233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE CLIFTON GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In these consolidated appeals, Jimmie Clifton Green appeals from a judgment convicting him on his guilty pleas of armed robbery and first-degree reckless injury, both as party to the crime. Green also

appeals from the circuit court order denying his postconviction motion seeking resentencing and challenging the imposition of the DNA surcharge under WIS. STAT. § 973.046(1g) (2009-10).¹ We conclude that the circuit court properly exercised its discretion in both respects, and we affirm.

¶2 The criminal complaint alleged that Green participated in the armed robbery of a bar and that surveillance videotape showed that he shot the bar patron. At the plea hearing, Green's counsel stated that he reviewed the videotape extensively along with discovery and consulted with his client about pleading guilty. The circuit court found a factual basis for Green's guilty pleas to armed robbery and first-degree reckless injury.

¶3 At resentencing,² Green, via his counsel, denied that he shot the bar patron during the robbery and asserted that he did not intend for anyone to get hurt. During allocution, Green expressed remorse for the robbery.

¶4 In sentencing Green, the circuit court noted that the crimes were motivated by greed. The court placed the greatest weight on the aggravating factor that Green shot the bar patron, even though Green denied committing the shooting. The court did not find Green's denial of the shooting credible and, for that reason, found his expression of remorse insincere. The court found that Green was a leader in the assault on the bar and his crimes were grave. The court also

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

² Because the circuit court did not consider the WIS. STAT. § 973.017(2) sentencing guidelines at the original sentencing, the court held a resentencing. The sentencing guidelines were subsequently repealed. *State v. Barfell*, 2010 WI App 61, ¶4, 324 Wis. 2d 374, 782 N.W.2d 437, review denied, 2011 WI 15, 331 Wis. 2d 46, 794 N.W.2d 900.

considered Green's prior criminal history and that Green was supposed to cooperate with the State. The court imposed a thirty-two-year term for the armed robbery and a consecutive twenty-year term for first-degree reckless injury.

¶5 Green sought postconviction relief from his sentence on the grounds that the circuit court relied upon inaccurate information and never actually ordered Green to pay the DNA surcharge that appeared in court records as an obligation. Green contended that the court erroneously believed that Green did not admit his involvement in the armed robbery; Green only denied that he shot the bar patron. Green also complained that the court inaccurately characterized the shooting as "firing away at the victim." Green further complained that the circuit court mistakenly believed he had agreed to cooperate with the State when cooperation was not a term of the plea agreement. Finally, Green argued that the court never actually imposed the DNA surcharge even though the surcharge appeared in court records as an obligation.

¶6 At the postconviction motion hearing, the circuit court emphasized that the sentence was based on the fact that Green participated in the armed robbery, "he was unquestionably the shooter, and he's lying about that when he says, as he has, that he was not the triggerman." After the shooting, Green continued to menace bar patrons with the firearm. The court stated that it intended to fashion an appropriate sentence for someone who shoots a person to effectuate an armed robbery. Because the court's emphasis was on Green's status as the shooter, the court dismissed Green's criticism of its "firing away" comment. The court reiterated that Green was extremely dangerous, even if he only admitted participating in the armed robbery. The court found that its reference to Green's failure to cooperate did not affect the sentence.

¶7 Regarding the DNA surcharge, the court agreed that the surcharge was not discussed at sentencing. The court then imposed the surcharge because Green did not demonstrate an inability to pay. The court discussed its reasons for placing the burden of the surcharge on a culpable defendant.

¶8 On appeal, Green reiterates his claim that the circuit court considered inaccurate information at sentencing. A defendant has a due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To prevail on an inaccurate information at sentencing claim, a defendant must show that the information was inaccurate and that the circuit court actually relied upon the information. *Id.*, ¶26. We independently review whether the defendant was sentenced based on inaccurate information. *Id.*, ¶9.

¶9 We conclude that the circuit court did not rely on inaccurate information at sentencing. When reviewing a sentence, we look to the totality of court's remarks. *State v. J.E.B.*, 161 Wis. 2d 655, 674, 469 N.W.2d 192 (Ct. App. 1991). Clearly, the court's focus at sentencing was on Green's status as the shooter. The court made clear on several occasions that it placed great weight on this status and that Green's expression of remorse was insincere. A defendant's remorse can be considered at sentencing, but the weight to be given to it is within circuit court's discretion. *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶10 Green's claim that the circuit court erroneously sentenced him based on his refusal to cooperate with the State also fails. At the postconviction motion hearing, the court deemed this a "non-issue." We agree, because the clear focus of

the sentencing was Green's character, conduct, level of dangerousness and the severity of his crimes.³

¶11 Green protests the imposition of the DNA surcharge at the postconviction motion hearing. The surcharge appeared in the court records, but the court neglected to address the surcharge at the resentencing. To impose the DNA surcharge on Green, the circuit court had to engage in an exercise of discretion. *See* WIS. STAT. § 973.046(1g); *State v. Cherry*, 2008 WI App 80, ¶¶8-10, 312 Wis. 2d 203, 752 N.W.2d 393. The court gave reasons for imposing the surcharge: Green's apparent ability to pay and placing the financial burden of the surcharge on Green as a culpable person. The court stated reasons as required by *Cherry*. *See id.* Green does not argue that the circuit court lacked authority to impose the surcharge at the postconviction motion hearing.⁴

By the Court.—Judgment and order affirmed.

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

³ We note that at the original sentencing, Green's counsel reported that Green told him, as part of their consultations regarding the guilty pleas, that "we were willing to cooperate and work with the State with respect to this matter." Green's counsel spoke at sentencing as Green's agent. *See State v. Payette*, 2008 WI App 106, ¶27, 313 Wis. 2d 39, 756 N.W.2d 423. That the circuit court may have heard a reference to cooperating with the State is borne out by the record.

⁴ The oral pronouncement of sentence was silent on the question of the DNA surcharge. Because the surcharge appeared in court records in relation to the judgment of conviction, an exercise of discretion was required. In postconviction proceedings, the circuit court clarified its intent regarding the surcharge.

