

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 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 No. 2010AP2777-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF2616

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GUADALUPE JOSE RIVAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Guadalupe Jose Rivas appeals his judgment of conviction and a trial court order denying his postconviction motion for

resentencing. Rivas pled guilty to the charge of theft from a person.¹ He was sentenced to two years of initial confinement and two years of extended supervision. Rivas filed a motion for resentencing, contending that during the sentencing hearing: (1) the trial court relied on four inaccurate facts, and (2) the sentence was unduly harsh. The trial court denied the motion. On appeal, Rivas also argues that the sentence was formulaic. We conclude that Rivas has not established that the admitted inaccuracies were facts that the trial court relied upon at sentencing. We also conclude that in view of Rivas's criminal record, his character, and the nature of the offense, the sentence imposed is not unduly harsh. Finally, we conclude that Rivas has not established that the sentence was the result of a formula rather than the proper exercise of discretion. We affirm.

BACKGROUND

¶2 According to the complaint, Rivas robbed a victim of \$1500 at gunpoint when she was trying to buy some pills from him. In carrying out this crime, Rivas had an accomplice meet with the victim and lead her to him. However, Rivas and his accomplice only pretended to have pills as part of a plan to rob the victim and did not actually have any pills to sell. The police report indicates that the victim intended to buy a large number of pills in order to resell them and make a profit. The report also indicates that the victim flagged down City of Milwaukee police officers immediately after being robbed, and that the officers located Rivas, prompting him to run. After a short foot chase, during

¹ Rivas was originally charged with one count of armed robbery, party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) & (2) & 939.05(2009-10). This carried a maximum penalty of fifteen years in prison. *See* WIS. STAT. § 939.50(3)(e)(2009-10). As part of a plea bargain, his charge was reduced in an Amended Information to one count of theft from a person, contrary to WIS. STAT. § 943.20(1)(a) & (3)(e)(2009-10), which carried a maximum exposure of ten years in prison. *See* § 939.50(3)(g)(2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

which the officers never lost sight of him, Rivas was apprehended. Rivas had only five \$20 bills on him at the time of his arrest. No drugs or guns were recovered.

¶3 Rivas pled guilty to a reduced charge of theft from a person. Rivas was sentenced to two years of initial confinement, followed by two years of extended supervision, consecutive to a prison sentence previously imposed for another offense after revocation of his extended supervision.

¶4 Rivas filed a postconviction motion arguing that the trial court relied on inaccurate facts during sentencing. Although acknowledging the inaccuracies, the trial court denied Rivas's motion on the grounds that the inaccuracies had no impact on the trial court's sentencing decision. Rivas appeals, arguing that the trial court erroneously exercised its sentencing discretion by relying on inaccurate information, and that the sentence is too harsh and excessive given the small amount of money involved and the lack of a gun or drugs. Additionally, Rivas argues that his sentence was the result of a formulaic approach to sentencing. Although we recognize that the number of factual errors contribute to Rivas's belief that inaccurate information impacted his sentence, we affirm the trial court for the reasons explained below.

DISCUSSION

¶5 Rivas argues that four instances of inaccurate information mentioned by the trial court at his sentencing require resentencing: (1) the trial court believed that Rivas had five prior felonies when he had only four; (2) the trial court mischaracterized Rivas as a drug dealer; (3) the trial court erroneously believed Rivas was addicted to cocaine and marijuana; and (4) the trial court erroneously described the victim as a "defenseless" drug addict in need of protection.

Although we acknowledge the inaccuracies, we disagree that they impacted the trial court's sentencing decision.

I. Standard of Review.

¶6 “[S]entencing decisions of the [trial] court are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted; first set of brackets in *Gallion*). The sentencing record must show the basis for the trial court's exercise of discretion. *See McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). If the record shows a process of reasoning based upon legally relevant factors, the sentence will be upheld. *See Anderson v. State*, 76 Wis. 2d 361, 364, 251 N.W.2d 768 (1977). The primary factors to consider are the gravity of the offense, the offender's character, and the public's need for protection. *See State v. Mosley*, 201 Wis. 2d 36, 43-44, 547 N.W.2d 806 (Ct. App. 1996).

¶7 A defendant has a due process right to be sentenced on the basis of accurate information. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. “A defendant is entitled to resentencing when a sentence is affected by a trial court's reliance on an improper factor.” *State v. Leitner*, 2001 WI App 172, ¶39, 247 Wis. 2d 195, 633 N.W.2d 207. A defendant claiming a trial court relied on inaccurate information must show not only that the information was inaccurate, but also that the trial court actually relied on the inaccurate information. *See Tiepelman*, 291 Wis. 2d 179, ¶31. A trial court's comments at the postconviction hearing may establish that the trial court was aware of, and did not consider, the improper factors. *See State v. Lechner*, 217 Wis. 2d 392, 419-

23, 576 N.W.2d 912 (1998) (where presentence investigation report erroneously stated that defendant had four prior convictions when he only had one, defendant did not meet the burden of showing that the trial court relied upon the erroneous report at sentencing where the trial court acknowledged at the postconviction hearing that the information was erroneous, but explained that it did not rely on that information).

¶8 In reviewing a sentence to determine whether or not discretion has been properly exercised, “there is a presumption that the trial court acted reasonably and the complainant is required to show some unreasonable or unjustifiable basis of the record for the sentence complained of.” *See Ocanas v. State*, 70 Wis. 2d 179, 184, 233 N.W.2d 457 (1975). A sentence is unduly harsh when it is “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Id.* at 185.

II. Inaccurate Information.

¶9 We separately consider each instance of inaccurate information. During Rivas’s postconviction hearing, the trial court admitted error² as to the four inaccurate statements. Specifically, as to each identified inaccuracy, the trial court stated:

² We commend the trial court for its candid recognition of several instances in which it misread information during the sentencing process. This may well have been the result of time pressures inherent in a busy urban court with a large case volume. Nonetheless, regardless of the case volume, we urge the trial court to take the time necessary to ensure that it has accurately read and understood the sentencing information before it. Otherwise the defendant may, understandably, believe that the sentence was based on inaccurate information, causing unnecessary postconviction motions and appeals.

A. The number of felonies.

I was under the assumption that Mr. Rivas had five previous felonies.... In the course of the sentencing, without anybody calling it to my attention, I realized my error; and in fact he had four felonies, three of which [were] violent and he had one misdemeanor, possession of a dangerous weapon by a child.

....

I misspoke initially when I said five felonies but when I sentenced him ... there was no question ... I knew he only had four felonies and one misdemeanor.

B. Whether Rivas was a drug dealer.

I mischaracterized Mr. Rivas as a drug dealer ... [with] a commodity of pills to sell[.]

....

I was in error, and the attorneys ... immediately called my attention to it.

....

I read the complaint a little closer and I acknowledged my error ... When I sentenced him I realized he was not a drug dealer.

C. Whether Rivas was addicted to cocaine and marijuana.

¶10 At sentencing, the trial court considered a memorandum in an earlier case in which the Department of Corrections sought revocation of Rivas's conditional release based on an allegation that he consumed marijuana and cocaine. Based on that information, the trial court said at sentencing that Rivas was "addicted to cocaine [and] ... psychologically addicted to marijuana." Neither attorney corrected the trial court's error at the time. However, during the postconviction hearing, the trial court acknowledged that the Wisconsin Division

of Hearings and Appeals found the allegation that Rivas used marijuana and cocaine to be unsubstantiated. The trial court concluded: “I was obviously under the mistaken impression that [Rivas] was addicted to cocaine and psychologically addicted to marijuana, I never should have said it.”

D. Description of the victim.

¶11 During his sentencing remarks, defense counsel referred to the victim as a “drug addict.” A few moments later, in its sentencing remarks, the trial court described the victim as a “defenseless” drug addict who “deserve[d] to be protected.” At the postconviction hearing, the trial court explained that at the time of sentencing, it did not have the police report in which the victim’s intent to resell the pills for a profit was stated, although the report had been available to counsel. The trial court acknowledged that the victim was “[h]ardly a defenseless drug addict. And I was obviously in error when I said that in sentencing.” Neither attorney corrected the error at the time of sentencing.

III. Impact of the Erroneous Information.

¶12 When erroneous information is brought to the trial court’s attention, or recognized by the trial court during the sentencing hearing, it can be corrected. *See Mosley*, 201 Wis. 2d at 44. For that reason, reliance on erroneous information may be waived when it is not timely brought to the trial court’s attention at sentencing. *See Leitner*, 247 Wis. 2d 195, ¶41. Neither attorney brought the trial court’s erroneous labeling of the victim as a “defenseless” drug addict to the trial court’s attention during the sentencing hearing. Similarly, neither attorney corrected the trial court when the court characterized Rivas as “addicted to cocaine [and] ... psychologically addicted to marijuana.” However, the trial court observed that had either attorney shown it the Administrative Law Judge’s

decision at the time of sentencing or the police report indicating that the victim was not a “defenseless” drug addict, “it would not have changed my decision at all ... [t]hose were minor factors in the [sentencing] decision.” Courts may further explain in postconviction proceedings the focus or rationale used in sentencing. *See Lechner*, 217 Wis. 2d at 422 (Noting with apparent approval the trial court’s sentencing decision, despite being presented with erroneous information, by concluding: “The [trial] court made clear at the hearing on the motion for post-conviction relief that its focus during sentencing was not on the number of the defendant’s prior convictions, but on the fact that the events giving rise to those alleged convictions evidenced the defendant’s long history of drug and alcohol abuse[.]”).

¶13 Based on our review of the record, we are persuaded that the trial court appropriately exercised its discretion after considering the relevant appropriate factors of the defendant’s character, his criminal history and the nature of the offense, and that the trial court did not rely on the admittedly inaccurate factors. The trial court is free to assign whatever weight it deems appropriate to each appropriate factor. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

IV. Unduly Harsh Sentence.

¶14 Rivas argues that once all of the inaccurate information is stripped away, the sentence imposed is unduly harsh considering the small amount of money involved—the \$100 found on him when he was arrested—and considering that no weapons were found on him. We disagree.

¶15 As discussed, a trial court has discretion in determining the length of a sentence within the permissible range set by statute and an erroneous exercise of

discretion will only be found where the sentence is so shockingly disproportionate to the offense that it violates the judgment of reasonable people regarding what is “right and proper” under those circumstances. *See Ocanas*, 70 Wis. 2d at 185. The weight given to each of the factors a trial court is to consider—the gravity of the offense, the character of the offender, and the public’s need for protection—lies within the trial court’s discretion. *See State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). The trial court may base the sentence on any or all of these factors. *See id.*

¶16 The trial court considered the gravity of the offense. Although Rivas pled guilty to theft from a person, he was originally charged with the more serious offense of armed robbery as party to a crime. No gun was found; Rivas was apprehended within minutes of the offense by officers who never lost sight of him. The lack of a weapon and the relatively small amount of money found on Rivas appear to have been factors weighing toward mitigation against the maximum sentence exposure.

¶17 The trial court also considered Rivas’s character. The trial court considered Rivas’s prior record of serious violent offenses, which included substantial battery, recklessly endangering safety both as a juvenile and as an adult, and possession of a dangerous weapon by a juvenile. The trial court noted that Rivas had been revoked from extended supervision three times and had absconded from supervision at one point. The trial court noted that the primary reason Rivas had not committed an offense in eight years was because he had been incarcerated for most of the time between 2001 and 2007. He was revoked in both 2005 and 2007. Rivas’s history appears to have weighed in favor of incarceration. The trial court acknowledged that Rivas had taken responsibility for this offense and had shown remorse, but in the context of the prior offenses and lack of success

on extended supervision, also wondered whether Rivas expressed those same sentiments when sentenced for his prior offenses.

¶18 The trial court noted that in spite of Rivas’s claim that he would change, Rivas had previously failed to appreciate the serious natures of his prior offenses while on extended supervision and chose instead to abscond. Thus, the trial court stated that Rivas’s promise to change at his sentencing hearing was “[t]oo little too late.” In light of the aggravating factors, the trial court rejected the defense’s requests for probation because Rivas had not previously succeeded on probation and it “would unduly depreciate the seriousness of the offense.”

¶19 Based on both the transcripts of the sentencing hearing and the postconviction hearing, we conclude that the trial court appropriately weighed permissible factors and explained the reasons for the sentence imposed. The record demonstrates the reasonable exercise of discretion.

V. Formulaic Sentence.

¶20 Rivas also contends that the trial court followed a predetermined, formulaic approach to his sentencing, resulting in an erroneous exercise of trial court discretion. A sentence based on “a preconceived policy of sentencing that is ‘closed to individual mitigating factors’” is a “mechanistic sentencing approach disfavored by our case law” which does not demonstrate the reasoned exercise of discretion. *See State v. Ogden*, 199 Wis. 2d 566, 571-72, 544 N.W.2d 574 (1996) (citation omitted).

¶21 Rivas’s argument that the trial court used such a formula is based on the fact that Rivas’s previous sentence involved incarceration for one and one-half years and this sentence involved incarceration for two years. Specifically, Rivas

contends that the trial court's expressed support of a "progressive discipline" principle indicates that the trial court sentenced Rivas to two years of incarceration mainly because his previous sentence was for one and one-half years of incarceration. At the postconviction hearing, the trial court said the following:

I am a firm believer in progressive discipline[.] I set forth on the record at the time of the sentencing why I thought that probation was out of the question; it would unduly depreciate the seriousness of the offense[.] [H]e obviously didn't take extended supervision seriously because he had been revoked three times.

¶22 As we have explained above, the transcripts do not demonstrate a formulaic rigidity in the trial court's sentencing decision. First, we do not understand a statement of general belief in progressive discipline to be the equivalent of imposing a formula. Second, the trial court's statement was made in the context of its observation that it might be foolish to repeat what has not worked before—specifically, probation or a short period of incarceration when the defendant has not succeeded on such sentences previously.

CONCLUSION

¶23 For all the foregoing reasons, we conclude that the trial court did not rely on inaccurate information at sentencing, that the sentence imposed was not unduly harsh and that the sentence was the result of an exercise of reasoned discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.