

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 22, 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. 2011AP17-CR

Cir. Ct. No. 2009CF3988

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERMAN BERNELL LUCAS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Herman Bernell Lucas, Jr., appeals from a judgment of conviction entered upon his guilty pleas to two felonies. He also appeals from the postconviction order that denied his motion for resentencing. He claims that the circuit court relied on inaccurate information in the presentence

investigation report when imposing sentence. Because we conclude that Lucas forfeited the claim when he failed to challenge the allegedly inaccurate information during the original sentencing proceeding, we affirm.

BACKGROUND

¶2 Lucas shot his girlfriend in the face. Pursuant to a plea bargain, he pled guilty to one count of first-degree reckless injury and one count of possessing a firearm after being adjudicated delinquent for committing a felonious act. At the conclusion of the plea hearing, the circuit court ordered a presentence investigation report. As relevant here, the report included information that Lucas was expelled from the school where he attended seventh grade and that he then was expelled from a second school where he attended eighth grade.

¶3 Trial counsel confirmed near the outset of the sentencing proceeding that he and Lucas had reviewed the presentence investigation report, and trial counsel offered some corrections to the content of the report. Neither trial counsel nor Lucas, however, disputed the information that Lucas had been expelled from two schools.

¶4 When imposing sentence, the circuit court discussed a wide variety of factors, and its remarks included references to Lucas's expulsions from school. The circuit court then imposed an aggregate of fifteen years of imprisonment, comprised of ten years of initial confinement and five years of extended supervision.

¶5 Lucas filed a postconviction motion seeking resentencing. He claimed that he had never been expelled from any school, and therefore he was

sentenced on the basis of inaccurate information. The circuit court denied the motion without a hearing, and this appeal followed.

DISCUSSION

¶6 A 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. To earn resentencing based on a violation of this right, a defendant must show both that the information was inaccurate and that the circuit court actually relied on the information in making its sentencing decision. *Id.*, ¶26.

¶7 A defendant, however, forfeits a challenge to the accuracy of information in a presentence investigation report by failing to raise the challenge during the sentencing proceeding. *See State v. Mosley*, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996). In *Mosley*, we noted the various safeguards developed to protect the integrity of the sentencing process, including the defendant's opportunity to review the presentence investigation report, to refute it on the record, and to file his or her own presentence memorandum containing the information that the defendant maintains is true and correct. *Id.* at 44. We then rejected a defendant's effort to mount a postconviction challenge to his sentence based on alleged inaccuracies in the presentence investigation report when the defendant and his trial counsel could have contested the accuracy of the information during the original sentencing hearing. *Id.* at 44-46. We held that "[w]here the facts stated in a presentence report are not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider them." *Id.* at 46.

¶8 Nonetheless, in an appropriate case, we will address a forfeited claim of circuit court reliance on an inaccurate presentence investigation report.

See *State v. Leitner*, 2001 WI App 172, ¶¶41-42, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341 (stating that we would “ignore the waiver” and address claim that circuit court relied on inaccurate information in presentence investigation report despite failure to raise the issue during sentencing hearing).¹ This, however, is not a proper case for such forbearance. The record includes trial counsel’s express acknowledgment that Lucas reviewed the presentence investigation report and considered its accuracy:

[w]hen I did review the presentence investigation last night with [Lucas], went over everything in the presentence, he is in agreement with pretty much everything in the presentence except we want to make sure that the Court was aware of the disposition of those – of those cases in juvenile court and my client is not in total agreement with all of the statements made by the victim in the PSI in regard to the facts of the case.

Trial counsel explained why Lucas disputed the victim’s statements, and counsel elaborated on information about Lucas’s prior record. The circuit court thus considered the uncontested information in the presentence investigation report under circumstances that fully protected the integrity of the sentencing process. See *Mosley*, 201 Wis. 2d at 44.

¹ Our supreme court recently clarified the distinction between “forfeiture” and “waiver.” See *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. “Although cases sometimes use the words ‘forfeiture’ and ‘waiver’ interchangeably, the two words embody very different legal concepts. ‘Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.’” *Id.* (citation omitted). In this case, the word “forfeiture” best describes Lucas’s actions in failing to raise his claim of inaccurate information during the sentencing hearing. We note, however, that we previously used the term “waiver” to describe a similar failure in *State v. Leitner*, 2001 WI App 172, ¶¶41-42, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341.

¶9 The circuit court can correct or discount erroneous information when a defendant advises the circuit court at the time of sentencing that a presentence investigation report contains inaccuracies. *See id.* When the defendant does not so advise the circuit court, however, it may properly consider the information presented at the sentencing hearing. *Id.* at 46. The *Mosley* rule prevents a defendant from withholding information that undermines the accuracy of a presentence investigation report, then disclosing that information later to obtain resentencing if the original sentence is not to his or her liking. The rule is appropriately applied in this case. Therefore, we will not ignore Lucas’s forfeiture.

¶10 Lucas protests that no impediment exists to raising his claim for the first time in a postconviction motion, and, in support, he cites *State v. Grady*, 2007 WI 81, 302 Wis. 2d 80, 734 N.W.2d 364. That case is inapposite. In *Grady*, the supreme court stated that “a postconviction motion is a timely means of raising an alleged error by the circuit court during sentencing.” *See id.*, ¶14 n.4. Here, however, Lucas complains that the circuit court considered information at sentencing that he did not challenge after reviewing it in the presentence investigation report. As *Mosley* explains, this complaint does not allege a circuit court error. *See id.*, 201 Wis. 2d at 46. Accordingly, *Grady* does not apply. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

