

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2014

Diane M. Fremgen
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. 2013AP445-CR

Cir. Ct. No. 2009CF5422

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL L. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael L. Moore appeals from a judgment of conviction for one count of possession of a firearm by a felon as a repeater,

contrary to WIS. STAT. §§ 941.29(2) and 939.62(1)(b) (2009-10).¹ He also appeals from an order that denied his motion for sentence modification and resentencing. Moore argues that the circuit court sentenced him based on erroneous information about a prior juvenile adjudication and that the circuit court erroneously exercised its discretion when it imposed a fine and required him to pay the DNA surcharge if he had not previously paid it. We affirm.

BACKGROUND

¶2 Initially Moore was charged with one count of first-degree reckless homicide, as party to the crime, one count of attempted armed robbery, as party to the crime, and one count of possession of a firearm by a felon. In the information, the State added repeater allegations to all of the initially charged offenses. The State also added two counts of armed robbery, as party to the crimes, and one additional count of possessing of a firearm by a felon, all as a repeater.

¶3 As a result of plea bargaining, Moore pled guilty to one count of possession of a firearm by a felon as a repeater. The circuit court accepted Moore's plea and the remaining charges against him were dismissed.² He received a nine-year sentence, comprised of four years of initial confinement and five years of extended supervision. Additionally, the court imposed a fine of \$250 and required Moore to pay a \$250 DNA surcharge if he had not previously paid it.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The Honorable Richard J. Sankovitz presided over the plea hearing. The Honorable Kevin E. Martens sentenced Moore and issued the order denying Moore's postconviction motion.

¶4 Moore filed a motion seeking resentencing and sentence modification. He argued that the circuit court sentenced him based on erroneous information about a prior juvenile adjudication and that the circuit court erroneously exercised its discretion when it imposed a fine and required him to pay the DNA surcharge if he had not previously paid it. The circuit court denied Moore's motion.

DISCUSSION

A. *Resentencing motion.*

¶5 Moore argues that he was sentenced on the basis of inaccurate information. He claims confusion arose from the use of the term “strong arm.” A defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue this court reviews independently. *Id.* A defendant who moves for resentencing on the ground that the circuit court relied on inaccurate information must establish both that the information was inaccurate and that the circuit court actually relied on the inaccurate information. *Id.*, ¶31.

¶6 When the court asked if the presentence report on file was accurate, defense counsel made corrections. One such correction related to a juvenile offense Moore committed. Defense counsel clarified the nature of that offense in the following exchange:

[Defense Counsel]: ... On the next page, on page three, there's an entry in the prior record from March 9, 2005, a strong-armed robbery. I believe the “armed” part is inaccurate. It was an unarmed robbery. I think it was meant to be written as strong-arm robbery, use of force case, but there were no weapons involved in that 2005 case.

[Prosecutor]: That is what strong-armed is. Strong-armed is armed.

[Defense Counsel]: That's fine. If that's how everybody's interpreting [sic] it, that's perfectly fine. There was just no weapons.

THE COURT: I'll so note that's accurate.

In its sentencing remarks, the State gave a run down of Moore's criminal history, and in doing so, reiterated that a firearm was not involved in the strong-armed robbery: "[H]e is eventually adjudicated delinquent of strong-armed robbery. Granted, it did not involve a firearm, but it was a robbery."

¶7 In its brief, the State concedes that that the prosecutor was wrong when he asserted that "[s]trong-armed is armed." However, as the State points out, Moore does not explain why the record supports his conclusory assertion that that "[t]he Court clearly relied on the State's characterization of the juvenile adjudication to Mr. Moore's detriment."

¶8 The court's comment, "I'll so note that's accurate," immediately followed defense counsel's statement that there were no weapons. We agree with the State that the most natural reading of this comment is that the court was accepting defense counsel's assertion that the prior offense did not involve the use or threat of use of a weapon. This reading is further supported by the parties' sentencing arguments, where neither attorney described the robbery as an armed robbery. Additionally, although the circuit court commented on Moore's juvenile history when it imposed its sentence, there is nothing in the record to indicate that it considered the robbery to have involved the use of a weapon.

¶9 Although Moore does not mention it in his brief-in-chief, the circuit court made clear in its decision denying his motion for resentencing and sentence

modification that it was not confused about the nature of the robbery. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (sentencing court has additional opportunity to explain its sentence when challenged by postconviction motion). It explained:

The defendant's position is based on his belief that the court relied on the State's original characterization of the strong-armed robbery as an armed offense.

This is not the case at all. The court's comment, "I'll so note that's accurate," referred to counsel's statement indicating, "There was just no weapons." The court's comment was a statement agreeing with defense counsel that there were no weapons involved in the 2005 strong-armed robbery. This was consistent with the "no weapons" position embraced by the prosecutor during his sentencing argument and again emphasized by defense counsel in his sentencing argument. Consequently, the court's reference about a prior strong-armed robbery during its sentencing comments includes its prior acknowledgment that the offense did not involve the use of a weapon. There is no question in the court's mind that it understood when sentencing the defendant that the prior offense involved a robbery with some use of force, but not a weapon. The defendant was not sentenced on the basis of inaccurate information, and therefore, his motion for resentencing is denied.

(Record citation omitted.)

¶10 We likewise conclude Moore has failed to establish that he was sentenced on the basis of inaccurate information.

B. Motion to modify sentence.

¶11 Moore asserts the court's imposition of a \$250 fine and the DNA surcharge was the result of an erroneous exercise of discretion. Although he cites relevant case law, Moore provides us with an undeveloped argument as to how it applies to his case. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633

(Ct. App. 1992) (we need not address arguments that are undeveloped). However, even if Moore had properly made his arguments, his claims would still fail.

¶12 “Sentencing lies within the discretion of the circuit court.” *State v. Kuechler*, 2003 WI App 245, ¶7, 268 Wis. 2d 192, 673 N.W.2d 335. Our review “is limited to determining whether there was an erroneous exercise of discretion. There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably.” *Id.* (internal citation omitted).

¶13 A sentencing decision includes a determination as to the amount of a fine. *See* WIS. STAT. § 973.017(1). In making the determination as to whether to impose a fine and its amount, our supreme court has cited with approval the following considerations set forth by the American Bar Association:

(i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his other obligations;

(ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;

(iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime; and

(iv) whether there are particular reasons which make a fine appropriate as a deterrent to the offense involved or appropriate as a corrective measure for the defendant.

Kuechler, 268 Wis. 2d 192, ¶15 (citations omitted).

¶14 Additionally, at the time of Moore’s sentencing, the circuit court had discretion to decide whether to impose the DNA surcharge.³ *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. A proper exercise of discretion requires the court to give an on-the-record explanation for imposing the surcharge. *See id.*, ¶¶9-10. This entailed the circuit court “do[ing] something more than stating it is imposing the DNA surcharge simply because it can.” *Id.*, ¶10.

¶15 Applying these standards to this case, we conclude that the circuit court adequately explained why it was imposing the fine and the DNA surcharge. During sentencing, the court set forth its reasoning:

Looking at your age, the circumstances of this case, the length of sentence that the Court is imposing, the ability to pay, rehabilitative needs and considering acceptance of responsibility, the Court imposes a fine in this matter of \$250.

You will have to pay, in addition, costs, fees and assessments. You will have to provide a DNA sample and pay the DNA surcharge. I order that based on the same considerations relative to the fine.

Maximum prison earnings, monies received in prison accounts to apply. Balance is to be paid by the end of sentence under any schedule set forth by agent. Nonpayment converts to a civil judgment.

¶16 Later, when defense counsel advised that Moore had previously provided a DNA sample, the circuit court clarified its earlier remarks: “With

³ Effective January 1, 2014, the statutory authority for the discretionary imposition of the DNA surcharge, WIS. STAT. § 973.046(1g), was repealed and § 973.046(1r) was amended to make the imposition of the DNA surcharge mandatory for felonies. *See* 2013 Wis. Act 20, §§ 2353-2355 & 9426.

respect to payment of surcharge, if Mr. Moore paid the surcharge on any prior felony case, I will agree to waive it in this case so he doesn't have to pay it twice.”

¶17 Again here, the circuit court further explained its reasons for imposing the fine and the DNA surcharge in its decision denying Moore's motion for resentencing and sentence modification. *See Fuerst*, 181 Wis. 2d at 915. The court stated:

Ordering the defendant to pay the DNA surcharge and a fine for rehabilitation purposes was logical considering that his crime involved a volitional act of arming himself with a firearm despite being previously informed that he could not possess a firearm....

Moreover, the court was informed that the defendant previously had employment. An extremely modest fine was imposed to be paid from 25% of prison funds and was not an abuse of discretion. The Court of Appeals in *State v. Dugan*, 193 Wis. 2d 610, 625[, 534 N.W.2d 897] (Ct. App. 1995), indicated that the defendant's ability to pay “should not be restricted to the offender's financial condition only at the moment of sentencing.” There is no showing that the defendant will not have the means to acquire employment when he is released on extended supervision or that he will not be able to earn minimal wages while incarcerated.[⁴]

¶18 As additional support in the record for Moore's ability to pay, we note that in his remarks, defense counsel advised the court:

⁴ As the State notes, *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995), was a restitution case. Moore does not, however, challenge the circuit court's reliance on *Dugan* or otherwise acknowledge the State's position that this court can look to restitution cases for guidance in determining standards applicable to a defendant's ability to pay a fine. *See Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted).

Now, Mr. Moore also has some mental health issues. I don't think they're severe, but he was receiving SSI for the ADHD and the bipolar disorder. However, to his credit, he's been able to do well when he's in school when he was behaving, of course, but he did make it through the 11th grade. He did finish up and get his high school diploma.

When he was on probation for his 2008 case, he did attend MATC for about three months in the cosmetology and business management program, and he's continuing in that now while he's at Green Bay in both programs.

In his own statement to the court, Moore described his plans for the future: "I do a lot of independent study on small business and entrepreneurship in the hopes of one day owning and running my own business."

¶19 As the State points out, to the extent Moore is arguing he has an inability to pay the fine and surcharge, the argument is amorphous and undeveloped. Although he describes the financial information available to the court at the time of sentencing, Moore does not present an argument based on that information and simply asks that we order an indigency hearing to determine his financial ability to pay the monetary obligations imposed by the circuit court. Moreover, he does not acknowledge—much less challenge—the circuit court's conclusion in its decision denying his motion for resentencing and sentence modification that "[a]bsent a showing that the defendant is unable to pay the amount of the fine and surcharge during his prison sentence, the court declines to grant a hearing or waive the charges." Because he relied on conclusory assertions that are insufficient, we agree with the State that Moore has not shown that the circuit court erred when it determined he was able to pay the fine and surcharge in this matter. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (holding that conclusory allegations presented without adequate factual basis and legal argument in support of the allegation do not entitle a defendant to relief).

By the Court.—Judgment and order affirmed.

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

