

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 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. 2013AP1148

Cir. Ct. No. 2006CF748

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN LEVARE SPIGHT, SR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN A. DiMOTTO, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Kevin Lavare Spight, Sr., *pro se*, appeals an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06. Spight argues that his due process rights were violated because the circuit court sentenced him on the basis of inaccurate information. We affirm.

¶2 Spight was convicted of second-degree reckless injury, while armed, after entering a guilty plea. Spight filed a *pro se* postconviction motion to vacate the DNA surcharge imposed on him, which the circuit court granted. He did not file a direct appeal. Seven years later, Spight filed this motion for collateral postconviction relief, arguing that the circuit court sentenced him on the basis of inaccurate information. The circuit court ruled that Spight’s action was procedurally barred pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163–164 (1994). The circuit court also concluded that, even if the action was not procedurally barred, Spight failed to state a viable claim for relief.

¶3 Spight first argues that his claim is not procedurally barred under *Escalona-Naranjo*. We agree. The supreme court recently held that a motion to vacate a DNA surcharge does not procedurally bar a defendant from subsequently filing a WIS. STAT. § 974.06 motion. See *State v. Starks*, 2013 WI 69, ¶32, 349 Wis. 2d 274, 293, 833 N.W.2d 146, 156.¹ Spight’s previous motion challenged the DNA surcharge imposed on him. Therefore, Spight’s claim is not procedurally barred.

¶4 Spight next argues that the circuit court relied on inaccurate information in sentencing him. “A defendant has a constitutionally protected due

¹ A motion for reconsideration is pending in *State v. Starks*, 2013 WI 69, ¶32, 349 Wis. 2d 274, 293, 833 N.W.2d 146, 156, so it is unclear at this point if the decision will be modified.

process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. “A defendant who requests resentencing due to the circuit court’s use of inaccurate information at the sentencing hearing ‘must show both that the information was inaccurate and that the court actually relied on the inaccurate information in sentencing.’” *Id.*, 2006 WI 66, ¶26, 291 Wis. 2d at 192–193, 717 N.W.2d at 7 (one set of quotation marks and citation omitted).

¶5 Spight contends that the circuit court relied on inaccurate information because it stated at sentencing that he intentionally shot the victim, even though he was convicted of second-degree *reckless* injury. At sentencing, the circuit court stated:

Then we have got the offense here where you were [clearly using] a gun and I have to take issue with the characterization of this offense. This isn’t reckless behavior. This is intentional behavior. You shot this young man and shot him on purpose; not once, but four or five times.

¶6 The fact that the sentencing court concluded that Spight acted intentionally does not mean that Spight was sentenced on the basis of inaccurate information. The circuit court’s comments show that it was well aware that Spight had been convicted of second-degree reckless injury. The circuit court did not make a factual mistake on this point. What Spight really objects to is the circuit court’s *opinion* that he acted intentionally, which is not a “fact.” The circuit court’s opinion was soundly grounded in the circumstances of the crime. Spight repeatedly shot the victim in the legs as the victim was fleeing Spight’s car, and the victim suffered serious damage to his legs as a result. We reject Spight’s claim that the circuit court relied on inaccurate factual information when it sentenced him.

By the Court.—Order affirmed.

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

