

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 4, 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. 2013AP1968-CR

Cir. Ct. No. 2011CF231

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARCEL L. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Darcel L. Wilson appeals from a judgment, entered upon his plea of no contest, convicting him of false imprisonment and from an order denying his postconviction motion for resentencing. Because we reject his

contention that he was sentenced in reliance on inaccurate information, we affirm the judgment and order.

¶2 According to the complaint, two women went to a bar where their friend was the bartender. Wilson, known as “Lo,” and his wife invited the women to their home for drinks. Once there, the two women split a glass of wine. Within fifteen to twenty minutes, one of them felt sick, developed projectile vomiting, and laid down on a bed. The other woman (“the victim”) drank more wine, but said she wanted no more when she noticed white specks in the bottom of her glass.¹ She believes she passed out. The next thing she knew, she awoke naked on a bed. The Wilsons were performing sex acts on her.

¶3 Reports from the state crime lab indicated that Wilson was included as a possible source of the DNA profile developed from dried secretions found on the victim’s breasts. The bartender told police he saw his two women friends interacting with a patron he knew as Lo and a woman Lo said was his wife. Lo—Wilson—denied being at the bar or meeting the women, and contended that, if anything, there may have been a consensual sexual encounter between the victim and his wife.

¶4 The State charged Wilson with two counts of second-degree sexual assault. The victim identified Wilson when she testified at the preliminary examination. Pursuant to a plea agreement, one of the counts was reduced to false imprisonment, to which Wilson pled no contest; the second count was dismissed outright.

¹ The victim slipped the wine glass into her friend’s purse. The glass later tested positive for MDMA, or “ecstasy.”

¶5 Postconviction, Wilson moved for resentencing on the basis that the court relied on inaccurate information when it imposed the maximum sentence, three years' initial confinement and three years' extended supervision. Specifically, he alleged that the prosecutor had represented that Wilson's DNA was found on the victim when, in fact, Wilson was but one of forty men whose DNA *profile* matched that of the profile created from the DNA found on her. The court acknowledged that it had relied on the DNA information but found that, coupled with the victim's statements, the DNA evidence was "certain enough." The court denied the motion. Wilson appeals.

¶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. A defendant is entitled to resentencing upon a showing that the information at the original sentencing was inaccurate and that the court actually relied on the inaccurate information at sentencing. *State v. Travis*, 2013 WI 38, ¶21, 347 Wis. 2d 142, 832 N.W.2d 491. The defendant must make the case by clear and convincing evidence. *See State v. Harris*, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409. Whether this right has been denied is a constitutional issue this court reviews de novo. *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶7 Two kinds of DNA profiling were done in this case, STR and Y-STR.² Each profile generated a separate analysis and report. The STR profile showed a mixture of DNA from three or more individuals, from which no "inclusionary statements" as to Wilson could be made. The less specific Y-STR

² A Y-STR DNA profile is not unique to a particular man; it is shared by all in a paternal line and even may be shared by unrelated men.

analysis included Wilson as a possible source of the Y-STR DNA profile. When searched against 14,875 individuals in the U.S. Y-STR Database, the profile was found to occur forty times.

¶8 Despite pleading no contest, Wilson maintained his innocence, denying that he was at the bar, that he remembered either woman, or that he ever had touched them—“not even a hand shake.” At sentencing, the prosecutor argued that Wilson’s denial “doesn’t ji[b]e with what’s in the police reports” because his DNA was found on the victim. Because he was only one of forty men who share a DNA profile, Wilson asserts that it is “not at all accurate” to say that *his* DNA was found on her.

¶9 As we read it, the essence of Wilson’s challenge goes not to the accuracy of the DNA evidence but to its strength. Wilson’s no-contest plea “relieve[d] the [S]tate of the heavy burden of proving [his] guilt beyond a reasonable doubt.” *State v. Burns*, 226 Wis. 2d 762, 764-65, 594 N.W.2d 799 (1999). The court recognized that the crime lab reports offered results less certain than some DNA analyses. It also had the victim impact statement, which was consistent with the complaint that provided the factual basis for Wilson’s plea.

¶10 The court found that Wilson’s denial of any contact with the victim was not credible and that the victim’s statement was. The court drew the inference that it was more likely that the DNA profile matched Wilson’s because he actually was the source of it than that it was due to coincidence.

¶11 True, the DNA evidence taken from secretions found on the victim does not conclusively prove that it was Wilson’s DNA, but nor does the fact that it matched profiles *in addition to* Wilson’s conclusively eliminate him as a donor. The results were submitted to the court over a year before sentencing with a

motion to join the Wilsons' trials. There was nothing inaccurate about the crime lab reports' descriptions of the DNA analyses and results. So even if the prosecutor overstated the uniqueness of the Y-STR DNA profile, the results and reports were the evidence, not the prosecutor's characterization of them. Wilson thus has not shown by clear and convincing evidence that the court actually relied on the allegedly incorrect information at sentencing, *i.e.*, that the court gave "explicit attention" or "specific consideration" to it, such that it formed part of the basis for the sentence. *See Tiepelman*, 291 Wis. 2d 179, ¶14.

By the Court.—Judgment and order affirmed.

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

