

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2015

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. 2014AP2219-CR

Cir. Ct. No. 2013CF237

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD D. GREENWOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed.*

¶1 HRUZ, J.¹ Chad Greenwood appeals his judgment of conviction and an order denying his postconviction motion for resentencing. Greenwood argues he is entitled to resentencing because the circuit court relied on inaccurate

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 versions unless otherwise noted.

information when structuring his sentences, in violation of his due process rights. We disagree, and affirm.

BACKGROUND

¶2 After a jury trial, Greenwood was acquitted of one felony count of strangulation and suffocation, but he was found guilty of misdemeanor counts of disorderly conduct, battery, and criminal damage to property.²

¶3 At the sentencing hearing, Greenwood’s counsel explained that, as a result of this case, Greenwood’s extended supervision in an earlier case was revoked and he was serving an eighteen-month period of reconfinement. The circuit court acknowledged these circumstances.

¶4 Also at the sentencing hearing, the circuit court noted it considered Greenwood’s particular offenses very serious “because they involve[d] violent behavior to [the victim] within the residence while children [were] present. She was injured. ... I find the fact that he prevented her from calling for help and follow[ed] her to the domestic violence center to be aggravating facts.” The court observed Greenwood had presented himself at the sentencing hearing “as if he [was] the victim of what has happened here.” Further, the court stated its belief that Greenwood’s statement to the court regarding his accountability consisted of

empty words. Because they are not consistent with anything that you have articulated here today or anything that’s been presented in the pre-sentence report. Because it’s very clear that you do not accept responsibility for what

² Each count was charged as constituting domestic abuse and subject to the statutory domestic abuse repeater penalty enhancer. Upon Greenwood’s posttrial motion, the circuit court dismissed the domestic abuse penalty enhancer prior to pronouncing its sentence, given that the State did not present this issue to the jury.

happened and that you don't have any remorse for what happened. And you blame instead the victim in this matter.

The court registered its concern over Greenwood's "lengthy record for domestic violence offenses" and observed those offenses spoke to his character. It drew similarities between his conduct in this case and that which led to his previous convictions. The court also found there was "a great need to protect the public from Mr. Greenwood's behavior. He, I think, has demonstrated that he poses a significant risk to the community, particularly ... [to] anyone who enters into a relationship with him."

¶5 In pronouncing Greenwood's sentences, the circuit court noted, "one way that [it] c[ould] protect the public is to ensure that the sentence is long enough that Mr. Greenwood will hopefully gain some insight from serving the sentence that will provide some deterrent effect to him" After taking into account Greenwood's record, the facts before it, the seriousness of the offenses at issue in the case, the need to protect the public, and other relevant factors, as well as having heard the parties' sentencing recommendations, the court determined Greenwood

needs to be sentenced to the maximum period of confinement for each of these misdemeanors. ...

I think to otherwise sentence him would unduly depreciate the serious nature of this offense. I don't think it would adequately take into account his character as reflected by his prior record. And I don't think it would appropriately protect the public.

(Emphasis added.)

¶6 The circuit court sentenced Greenwood as follows:

[O]n Count One [disorderly conduct], I sentence the Defendant to serve ninety days in jail. With respect to Count Two [misdemeanor battery], I sentence the

Defendant to serve nine months in jail. ... [W]ith respect to ... Count Four ... the Criminal Damage to Property[,] I sentence the Defendant to serve nine months in jail

The court ordered Greenwood's sentences were to be served consecutively to each other and "consecutive to any other sentence that [Greenwood] is currently serving." Also, and in response to defense counsel's earlier request, the court commented that, "[w]ith respect to that sentence then, Mr. Greenwood, you'll have the opportunity to earn good time. You will be eligible to apply for [H]uber³ privileges."

¶7 Greenwood filed a postconviction motion seeking resentencing. He alleged the circuit court sentenced him under the erroneous belief that his sentences would, in fact, be served in jail, rather than in prison, including that Greenwood could potentially receive good time credit and Huber privileges. Instead, Greenwood was required to serve his sentences for the misdemeanors in prison, as he was then serving a separate sentence in prison following the revocation of his extended supervision from the earlier conviction. This result was required by WIS. STAT. § 973.03(2), which provides that "[a] defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons."

¶8 The circuit court denied Greenwood's motion in a written decision and order. The court reasoned it had not relied on any misinformation but, rather, in constructing the sentences, it intended to sentence Greenwood to "the max available for each count, regardless of where Greenwood would serve the time."

³ See WIS. STAT. § 303.08.

The court observed it “was well aware that Greenwood was serving a revocation sentence and the implications of [WIS. STAT.] section 973.03(2).”⁴ As to its statements at sentencing regarding Huber release privileges and good time eligibility, the court explained those statements were made in the event “somehow Greenwood were to serve [his] sentences in jail.” Greenwood appeals.

DISCUSSION

¶9 “A defendant has a constitutionally protected 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. In explaining this right to be sentenced on accurate information, the United States Supreme Court observed:

It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Townsend v. Burke, 334 U.S. 736, 741 (1948).

¶10 We review de novo whether a defendant has been denied this due process right to be sentenced upon accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶9. A defendant alleging such a violation of his or her rights must first establish there was inaccurate information before the sentencing court. *Id.*, ¶2. Second, the defendant must show the court actually relied on the inaccurate

⁴ At sentencing, the circuit court stated, “Ultimately, his extended supervision was revoked. And I think that his attorney spoke to that. He is serving that sentence now.”

information. *Id.* If the defendant satisfies this two-prong test,⁵ the burden shifts to the State to establish the error was harmless. *Id.*, ¶3.

¶11 Greenwood compares his sentencing to the flawed sentencing that occurred in *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. In *Travis*, the circuit court erroneously believed that the defendant was subject to a mandatory minimum five-year sentence. *Id.*, ¶26. Our supreme court held that the circuit court’s erroneous belief, which was repeated multiple times at sentencing, constituted inaccurate information that “unnecessarily limited the sentencing court’s discretion.” *Id.*, ¶¶27, 44, 78. According to Greenwood, the circuit court’s alleged mistaken belief in his case—here, as to where Greenwood would serve his sentences—similarly affected the court’s decisions regarding the length of his sentences and the framework for sentencing.

¶12 Greenwood’s reliance on *Travis* fails for the same reasons his broader arguments on appeal fail. Unlike what occurred in *Travis*, Greenwood has not established there was any inaccurate information before the circuit court during his sentencing. His argument in this regard rests on his contention the circuit court explicitly told him—and, in turn, the court believed—that Greenwood would, in fact, be serving his misdemeanor sentences in jail. This conclusion mischaracterizes what occurred at the sentencing hearing. The circuit court’s task was to sentence Greenwood for the misdemeanor convictions at issue. The court clearly and properly did so, which required, for each misdemeanor count, ordering confinement *in jail*. Likewise, individuals sentenced to confinement in jail are

⁵ The standard of proof for both prongs is by clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409.

eligible to earn good time credit and may request that a sentencing court permit Huber release privileges. *See* WIS. STAT. §§ 302.43, 303.08(1). The court's singular, passing reference to Greenwood's eligibility for these potential benefits—which otherwise would have been appropriate for the imposed misdemeanor sentences—is insufficient to clearly and convincingly demonstrate the circuit court was misinformed about anything affecting Greenwood's sentence. Furthermore, contrary to implications in Greenwood's argument, the circuit court made no comments regarding how Greenwood's sentences being served in jail (versus in prison) was to affect the length of his time actually served in confinement. As such, we cannot conclude that there was any misinformation at sentencing on that subject.

¶13 Greenwood's argument largely disregards the fact that the circuit court could not have sentenced Greenwood to prison for the offenses on which he was being sentenced. Rather, it was only through the operation of WIS. STAT. § 973.03(2) that Greenwood was required to serve his jail sentences in prison. Indeed, the statute expressly contemplates that some sentences subject to its provisions are sentences of confinement to a county jail that will not be served in the county jail. That is what occurred here. Moreover, the circuit court specifically referred to Greenwood's revoked status and the fact that he was currently serving a prison sentence based on that revocation. The circuit court's failure to explain further the statutory (and automatic) implications of Greenwood's revoked sentence under § 973.03(2), does not, in and of itself, show it inaccurately believed Greenwood would actually serve his misdemeanor sentences in jail.

¶14 None of the circuit court's comments at sentencing or the properly stated sentence itself clearly establish that the court either understood or intended

Greenwood would invariably serve his sentences in jail. Furthermore, nothing the circuit court did or stated in fashioning Greenwood's misdemeanor sentences shows it relied on information that "unnecessarily limited the sentencing court's discretion." See *Travis*, 347 Wis. 2d 142, ¶78. Instead, the court's lengthy discussion prior to sentencing Greenwood reflected it went "through a rational procedure of selecting a sentence based on relevant considerations and accurate information." *Tiepelman*, 291 Wis. 2d 179, ¶26 (citation omitted). Unlike in *Tiepelman*, where that court relied on its inaccurate belief that the defendant had twenty previous convictions, rather than twenty arrests and five convictions, here, all the information considered by the circuit court in constructing Greenwood's sentences was accurate. See *id.*, ¶6.

¶15 Even assuming there was inaccurate information before the circuit court, Greenwood fails on the second prong of the *Tiepelman* test. "Whether the court 'actually relied' on the incorrect information at sentencing [i]s based upon whether the [sentencing] court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" *Id.*, ¶14 (citation omitted). Again, unlike in *Travis*, there was no "actual reliance" on the information Greenwood alleges to be inaccurate. The court expressed no particular interest in where Greenwood would serve his sentences, but for, perhaps, its singular, passing comment concerning Greenwood's eligibility under his misdemeanor sentences for good time and Huber privileges, which allowances were made at defense counsel's request. Instead, as detailed above, *supra* ¶¶4-5, the circuit court spent the majority of its discussion, prior to pronouncing Greenwood's sentences, on the serious nature of Greenwood's offenses, Greenwood's character, the need to protect the public, and, most notably, its intention to sentence Greenwood to the maximum period of confinement possible

for the offenses. The sentences imposed clearly reflect this intent. The record belies the notion that the court, in structuring Greenwood's sentences, gave "explicit attention" or "specific consideration" as to whether he would, in fact, be confined in jail versus prison, or even whether he could actually avail himself of Huber privileges or good time attendant to his misdemeanor convictions.

¶16 Ultimately, the circuit court did not pronounce a "sentence on a foundation so extensively and materially false" so as to deprive Greenwood of his constitutionally protected rights. See *Townsend*, 334 U.S. at 741. The sentences the circuit court imposed neither clearly reflect an inherent misunderstanding of Greenwood's sentences, nor that the court otherwise actually relied on inaccurate information. The circuit court merely declined to comment further on the effect of its imposed sentences in light of Greenwood's current revocation sentence and WIS. STAT. § 973.03(2). Accordingly, there is no basis for resentencing under *Tiepelman*.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

