

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2016

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 Nos. 2015AP803-CR
2015AP804-CR**

**Cir. Ct. Nos. 2012CF1035
2013CF270**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. WEGGE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR. and MICHAEL J. APRAHAMIAN, Judges. *Affirmed.*

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

¶1 PER CURIAM. In these consolidated matters, Michael J. Wegge appeals from judgments of conviction entered upon his guilty pleas to robbery by threat of force and armed robbery and from an order denying his postconviction

motion which requested resentencing on grounds that the sentencing court relied on inaccurate information.¹ The postconviction court determined that the circuit court relied on inaccurate information at sentencing, but that the error was harmless. Because we conclude that the State met its burden to prove that the sentencing court's reliance on inaccurate information was harmless, we affirm.

¶2 Along with his twin brother, Michael Wegge was charged with one count of armed robbery in connection with the August 2012 robbery of Harris Bank. While in custody, Wegge met with law enforcement and admitted his involvement in at least four other bank robberies. Wegge was then charged with the 2008 armed robbery of Citizen's Bank of Mukwonago. As part of a negotiated agreement, Wegge pled guilty to a reduced charge of robbery by use of force in connection with the Harris Bank offense and to the armed robbery of Citizen's Bank. The parties agreed that three additional armed robberies would be presented to the court as uncharged read-ins for purposes of sentencing.

¶3 At sentencing, the State focused on the severity and "sheer magnitude" of the instant robberies. Pointing to Wegge's prior criminal record, which dated back to 1985, the State argued that at fifty-nine years old, Wegge was old enough "and ha[d] been in the criminal justice system long enough to know better." Defense counsel pointed out that Wegge's prior convictions did not result "in particularly long sentences" and that Wegge had never "spent a particularly long amount of time in custody." In allocuting, Wegge asked for leniency, stating:

¹ The Honorable Donald J. Hassin, Jr., presided at Wegge's sentencing hearing and entered the judgments of conviction. The Honorable Michael J. Aprahamian heard and decided Wegge's postconviction motion.

I have always been an honest, responsible, sincere and hard working person helping and supporting my twin brother Patrick whom I love both emotionally and financially in prosperous times and through difficulties.

... I had been unemployed, laid off for three and a half years and homeless for two years sleeping in my brother's automobile. I don't feel that I am a danger or threat to society. I'm gentle and caring and never violent.

The sentencing court stated there were "some incongruities in all of this":

I see you've been convicted of fourth degree sexual assault, resisting, obstructing an officer as many as three times. Burglary, second degree sexual assault with the use of force. Operating under the influence. That's not to mention the five bank robberies that are before us today, Mr. Wegge.

I'm staggered by the enormity of all of this, Mr. Wegge, but I'm staggered by the explanation of all of this frankly [that] it was a bad time and so you decided to go rob banks.

¶4 Defense counsel attempted to interject: "Your Honor, if I could just add one thing, just for the record, is that Mr. Wegge I don't believe was actually convicted of second--." The sentencing court continued on:

No, that's a little difficult. I don't know what he was convicted of. He got eight months for the burglary. I don't know whatever those might have been.

The point I'm trying to make with you, Mr. Wegge, you've had 25 years or so of habitual criminality and it didn't stop until you got put in jail. And for that the community is probably grateful.

So... all the cases that you may have had in the past regarding your conduct, Mr. Wegge, apparently were lost on you and the idea that somehow that you could be looking out for your brother to rob a bank and jump in his car and have a bag explode with all the stolen money in it and away you two go, well, life doesn't work that way, Mr. Wegge.

The court imposed a global, bifurcated sentence comprising thirteen years of initial confinement followed by twelve years of extended supervision.

¶5 Wegge filed a postconviction motion alleging that the sentencing court relied on inaccurate information, namely, that he had prior convictions for burglary and second-degree sexual assault. The postconviction court found that the information was inaccurate:

According to the PSI, in 2006, Mr. Wegge was *charged* in Milwaukee County with one count each of burglary, second-degree sexual assault, and resisting or obstructing an officer. Ultimately, Mr. Wegge was convicted only of resisting or obstructing an officer, for which he received an eight-month jail sentence. Mr. Wegge was *not* convicted of the two more serious counts of burglary and sexual assault.

Though the postconviction court further determined that the sentencing court actually relied on the inaccurate information, it denied Wegge's postconviction motion, concluding there was no reasonable probability that the error contributed to Wegge's sentence.

¶6 It is undisputed that the information concerning Wegge's prior convictions for second-degree sexual assault and burglary was inaccurate. On appeal, Wegge argues that the State failed to prove harmless error. The State maintains that the sentencing court did not actually rely on inaccurate information or, in the alternative, that the error was harmless.

¶7 A criminal 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. A defendant requesting resentencing due to the circuit court's use of inaccurate information must prove both that the information was inaccurate and that the circuit court actually relied on it at sentencing. *Id.*, ¶¶2, 26. Once the

defendant shows actual reliance on inaccurate information, the burden shifts to the State to prove beyond a reasonable doubt that the error was harmless. *State v. Travis*, 2013 WI 38, ¶23, 347 Wis. 2d 142, 832 N.W.2d 491. Whether a defendant has been denied the right to be sentenced on the basis of accurate information is a constitutional issue subject to de novo review. *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶8 We agree that Wegge met his burden to show that the circuit court relied on inaccurate information at sentencing. The sentencing court explicitly referenced Wegge’s prior convictions for sexual assault and burglary, thereby giving “explicit attention” or “specific consideration” to the inaccurate information such that the misinformation apparently “formed part of the basis for the sentence.” *Travis*, 347 Wis. 2d 142, ¶29; *Tiepelman*, 291 Wis. 2d 179, ¶14 (source omitted).²

¶9 Nonetheless, we conclude that the error was harmless beyond a reasonable doubt; that is, there is no reasonable probability the sentencing court’s specific reference to the nonexistent burglary and sexual assault convictions contributed to Wegge’s sentence. *Travis*, 347 Wis. 2d 142, ¶86.

² At sentencing, after Wegge’s trial counsel attempted to correct the record, the court agreed something was “difficult” and stated “I don’t know what he was convicted of.” For two reasons, we determine this does not defeat Wegge’s showing of actual reliance. First, the sentencing court proceeded to^{state} that Wegge “got eight months for the burglary.” Second, while we independently review the record of the sentencing hearing and are not bound by a circuit court’s after-the-fact assertion of nonreliance on inaccurate information, *see State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491, we will consider the circuit court’s statements made in response to a postconviction motion for resentencing. *See State v. Alexander*, 2015 WI 6, ¶¶30, 34-35, 360 Wis. 2d 292, 858 N.W.2d 662; *State v. Harris*, 2010 WI 79, ¶49, 326 Wis. 2d 685, 786 N.W.2d 409. Here, the original sentencing judge did not decide Wegge’s postconviction motion. On this record and without the ability to consider the sentencing court’s responsive remarks, we agree with the postconviction court that the sentencing transcript demonstrates actual reliance.

¶10 The sentencing court's mistaken reference to Wegge's prior convictions did not focus on their nature and was not intended to highlight either their gravity or their similarity to the crimes for which Wegge currently faced sentencing. This is illustrated by the fact that when trial counsel attempted to correct the record, the sentencing court acknowledged it was not sure "what he was convicted of" and indicated that the age rather than the nature of Wegge's criminal history was important to its analysis. Further, though the sentencing court continued to point to Wegge's twenty-five year record, it never again referenced the nature of his prior convictions.

¶11 Instead, the sentencing court mentioned the burglary and sexual assault in the context of addressing Wegge's longstanding criminal history spanning over twenty-five years, and specifically, to rebut his proffered explanation for the robberies, namely, that he was an "honest, responsible" person helping out his brother who had learned from his mistakes and was "never violent" nor "a danger or threat to society." Here, the sentencing court stated that "the idea there is some modicum of insight into all of this and some idea Mr. Wegge that you've learned from this has not been expressed to me in any way, shape or fashion." To the contrary:

All I've heard is a series of excuses about what you did and why you did it and you're a really good guy but the record points to the contrary.

Mr. Wegge, you are not a good guy. You've been around the criminal justice system for the last 25 years and we can now include for consideration here five bank robberies. People go their whole lives without committing a bank robbery much less five.

¶12 Given Wegge's lack of insight and the number and severity of the instant robbery offenses, the circuit court considered Wegge a danger to the

community and was concerned about what he might do the next time he fell on hard times. On this record, we are satisfied beyond a reasonable doubt that the same sentence would have been imposed absent the error. *Travis*, 347 Wis. 2d 142, ¶86.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

