

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 31, 2005

Cornelia G. Clark
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. 2005AP550-CR

Cir. Ct. No. 2004CM465

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT A. GRAZIANO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ Brent A. Graziano contends that he was sentenced on the basis of inaccurate information in a victim impact statement and

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

that the circuit court erred when it prevented him from calling a social services case worker as a witness. Graziano's failure to properly present and preserve his complaint that portions of the victim impact statement were inaccurate prevents us from considering whether he is entitled to relief. Because the circuit court has total discretion over what evidence may be presented at sentencing, we reject Graziano's second complaint. Therefore, we affirm.

¶2 Without the benefit of a plea agreement, Graziano entered a guilty plea to criminal damage to property, domestic abuse in violation of WIS. STAT. §§ 943.01(1) and 968.075(1)(a) and disorderly conduct, domestic abuse in violation of WIS. STAT. §§ 947.01 and 968.075(1)(a). The charges were issued after he argued with his estranged wife and took a helmet and shattered her windshield. His estranged wife and his thirteen-year-old daughter watched as this event happened; the thirteen year old did get glass in her eye, but she was able to remove the glass.

¶3 Prior to sentencing, Graziano's estranged wife filed a victim impact statement in which she made several claims that he had anger and control problems that scared her and their children. In preparation for sentencing, Graziano's counsel filed a sentencing statement that was devoted to events that happened during the parties' recently completed divorce. Counsel also issued a subpoena to Marianne Armaganian, a county social worker who conducts custody studies in family cases in Walworth county. On motion of the county corporation counsel, the circuit court quashed the subpoena before the sentencing hearing. Graziano's counsel also subpoenaed Attorney Carol Unger-Keizer, who served as guardian ad litem during the divorce.

¶4 At the sentencing hearing, the State recommended a withheld sentence with two years of probation, fifteen days in the county jail, a \$100 fine, counseling as recommended, restitution, a \$100 donation to the Association for the Prevention of Family Violence and no contact with the victim without her consent. Graziano's counsel challenged the circuit court's quashing of the subpoena and said that he had subpoenaed the social worker to complete the record. Counsel made a passing reference to the victim impact statement and commented that in that statement there was mention that the children are crying and do not want to be with their father. He told the court that this was in conflict with Armaganian's custody study report filed in the divorce case.

¶5 Counsel called the guardian ad litem as a witness. Her testimony was limited to stating that during the custody study and the divorce hearing, held shortly after the incident charged in the complaint, Graziano was never portrayed as an unfit parent. In his remarks to the circuit court, Graziano's counsel focused on his client's love of his children and the victim's adultery and the devastating impact that had on his client.

¶6 The court imposed the sentence recommended by the State, except it imposed ten days in the county jail. Graziano appeals.

¶7 Graziano complains that the victim impact statement contained erroneous information that the circuit court relied upon in imposing the sentence in violation of his due process rights. He points to four statements made by the court and claims that they are taken from the victim impact statement and are not true. First, the court stated that Graziano used a baseball bat when in fact it was a helmet. Second, the court stated that Graziano shows one face to the public and another to his family. Third, the court authorized AODA assessment and

treatment. Finally, the court prohibited any violent contact with his children. He also complains that the court did not permit him to call Armaganian as a witness.

¶8 To establish a due process violation at sentencing, a defendant must show both that inaccurate information was presented to the sentencing court and that the circuit court actually relied upon the inaccurate information in sentencing him or her. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). Whether a defendant has been denied the due process right to be sentenced based on accurate information is a constitutional issue presenting a question of law that we review de novo. *State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993). A defendant alleging that a sentencing decision is based on inaccurate information must prove by clear and convincing evidence both that the information was inaccurate and that the circuit court relied on it. *State v. Groth*, 2002 WI App 299, ¶22, 258 Wis. 2d 889, 655 N.W.2d 163. If a defendant establishes this, the burden shifts to the State to prove the error was harmless. *Id.*

¶9 At sentencing, Graziano did not raise an objection that the victim impact statement contained inaccurate information. Graziano never filed a postconviction motion in the circuit court seeking resentencing because the court based the sentence on inaccurate information. For issues to be considered as a matter of right on appeal, a postconviction motion must be made except as provided in WIS. STAT. § 974.02(2). See *State v. Monje*, 109 Wis. 2d 138, 153a, 325 N.W.2d 695, 327 N.W.2d 641 (1982) (on motion for reconsideration); § 974.02(2) (as amended, the statute provides that an appellant need not file a postconviction motion before raising an issue on appeal “if the grounds are sufficiency of the evidence or issues previously raised”). This is especially true where a defendant claims that a court relied upon inaccurate information because the defendant must establish by clear and convincing evidence that the information

was inaccurate and that the circuit court relied on it and, if a defendant meets those hurdles, the State has the opportunity to show that the defendant was not prejudiced. As an error-correcting court, this court is not equipped to conduct the evidentiary hearing necessary to determine if the circuit court relied upon inaccurate information. *See Lange v. LIRC*, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997).

¶10 Because Graziano never raised the objection to inaccurate information in the circuit court either during sentencing or by a postconviction motion, we do not review the merits of his argument.

¶11 Graziano's second complaint is that the circuit court erred in quashing the subpoena for Armaganian. Generally, circuit courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial; we will upset their decisions only where they have erroneously exercised that discretion. *State v. Smith*, 2002 WI App 118, ¶¶7, 14, 15, 254 Wis. 2d 654, 648 N.W.2d 15; *see* WIS. STAT. §§ 904.03 and 906.11.

¶12 “[T]he only statements which a court must permit at sentencing are those of the defendant and his counsel, the victim and the prosecutor.” *State v. Robinson*, 2001 WI App 127, ¶19, 246 Wis. 2d 180, 629 N.W.2d 810; *see also* WIS. STAT. § 972.14. The receipt or consideration of any other statements or evidence at sentencing is within the court's discretion and is conditioned upon being “relevant to the sentence.” *Robinson*, 246 Wis. 2d 180, ¶19 (citation omitted); § 972.14(3)(b). The court therefore was correct when it refused to consider the child custody dispute that occurred during the divorce in its determination of what was the appropriate sentence. The court also quashed the subpoena because the custody report prepared by Armaganian was confidential

under local court rules.² It was not error to preclude Armaganian’s testimony to prevent the dissemination of confidential and personally sensitive information.

By the Court.—Judgment affirmed.

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

² WALWORTH COUNTY CIRCUIT COURT RULES, FAMILY/DIVORCE (Mar. 13, 2002) provides in part:

1. GENERAL RULES

....

- D. Home Study/Visitation Report. Said report shall be kept “**CONFIDENTIAL.**” Attorneys shall be provided a copy which may be shared with their client. If copied, the copy must be marked “**CONFIDENTIAL.**” Parties are not to disclose contents of report to children outside the presence of their attorney or guardian ad litem. Parties shall NOT receive a copy of such report, but may review same at the Clerk of Courts office. **ATTORNEYS VIOLATING THIS RULE WILL NOT BE AFFORDED A COPY IN THE FUTURE.**

