COURT OF APPEALS
DECISION
DATED AND FILED

December 06, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP435-CR **Cir. Ct. No. 1999CF6440**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FERNANDO R. SALINAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN and JOHN SIEFERT, Judges.[1] *Affirmed.*

Before Fine, Curley and Kessler, JJ.

[1] The Honorable Kitty K. Brennan sentenced Salinas and the Honorable John Siefert denied the postconviction motion.

¶1 PER CURIAM. Fernando Salinas pled guilty to one count of second-degree reckless homicide, while armed with a dangerous weapon, and to two counts of first-degree reckless endangerment, while armed with a dangerous weapon. The court sentenced Salinas to a total of twenty-nine years in prison.[2] The only issue on appeal is whether the sentencing court misinterpreted Salinas's juvenile record. We conclude that the court did not do so, and therefore, we affirm.

BACKGROUND

¶2 A presentence investigation report (PSI) was filed with the court. Salinas's juvenile record was summarized in the PSI, in both an outline format and textually. In the outline section, four incidents and their dispositions were described:

> February 8, 1993; Recklessly endangering safety; referred to juvenile authorities
>
> September 14, 1994; Battery/Disorderly Conduct; referred to juvenile authorities
>
> November 18, 1994; Attempted Theft; one year juvenile probation
>
> February 5, 1995; Manufacture or Delivery of Controlled Substance; one year juvenile probation.

¶3 In the "Correctional Experience" textual portion of the PSI, the agent stated that Salinas, then fourteen years old, was arrested on February 8, 1993 after reportedly throwing rocks at a school bus, breaking a window and hitting a

[2] Salinas committed the crimes in 1999. Therefore, the bifurcated sentencing scheme of the truth-in-sentencing legislation does not apply. *See* WIS. STAT. § 973.01(1) (2001-02).

student. Salinas was ordered to have no contact with his accomplices and to not throw rocks at anything. The agent reported that the case "was held open for ninety days. There is no documentation of any other problems during the ninety days the case was held open and it is assumed this case was then closed."

¶4 The agent also addressed the September 14, 1994 incident in the PSI. Salinas was arrested for battery and disorderly conduct, after he was involved in "an altercation with someone at a corner store." The agent stated that the "case was referred to juvenile authorities and a case was opened regarding this incident. The length and level of supervision for this offense was not reflected in the juvenile file."

¶5 During sentencing, the court made the following remarks:

> You're only 20, and yet, from your teen years till now, you've been hanging with the wrong group constantly and making the wrong choices over and over and over again. … [W]e've offered you all kinds of help throughout the years – first, because you were a juvenile, on your first juvenile cases you were referred to juvenile authorities in 1993. You had your first recklessly endangering safety and in '94 a battery, disorderly conduct – both of those situations of anger and violence – and in both of these you were referred to the juvenile authorities. They didn't zap you with a hard sentence. They tried to work with you to fix the problem. But you were back again later in '94 – attempt driving without owner's consent. You got probation. So you had the first taste of formal supervision through the court system, who tried to help you and work with you then. We set up this whole children's court process because we're trying to treat young people different than adults to try to make sure that this kind of thing doesn't happen.
>
> In 1996 you picked up your first drug felony – drug sales, a delivery charge. But, again, you were a juvenile. You were treated rather lightly. You were given probation in the juvenile system because – and I think appropriately – the system was trying to help you work through this. We know that sometimes young boys get off on the wrong foot. You were given help by the system. It didn't do any good.

DISCUSSION

¶6 A defendant has a constitutional due process right to receive a sentence based upon accurate information. ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). Whether this right has been denied presents a question of law which we review de novo. ***State v. Groth***, 2002 WI App 299, ¶21, 258 Wis. 2d 889, 655 N.W.2d 163. A defendant alleging that a sentencing decision was based upon inaccurate information must show that: (1) the information was inaccurate; and (2) the trial court actually relied on the inaccurate information at sentencing. ***State v. Harris***, 174 Wis. 2d 367, 378, 497 N.W.2d 742 (Ct. App. 1993). The burden is on the defendant to prove by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991).

¶7 Initially, we noted that Salinas does not challenge the accuracy of the information in the PSI.[3] Rather, his argument is based on the sentencing court's use of that information. Salinas focuses on the February 1993 rock-throwing incident and the court's statement that juvenile authorities did not "zap" him "with a hard sentence." Salinas contends that the sentencing court "incorrectly implied that he had been treated leniently for an offense he allegedly committed as a juvenile even though his guilt was never adjudicated." The record defeats Salinas's argument.

[3] For that reason, Salinas's discussion of ***State v. Anderson***, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998) is extraneous. The court in ***Anderson*** held that when a defendant disputes "important and relevant portions of the PSI" a sentencing court "must resolve such disputes." ***Id.*** at 410-12. Because Salinas did not dispute the accuracy of the PSI, ***Anderson*** is not implicated.

¶8 As part of its consideration of Salinas's character, the court addressed Salinas's juvenile and adult records. The court observed that Salinas's first contacts with the juvenile justice system were in 1993 and 1994. The court noted that the 1993 contact, Salinas's "first recklessly endangering safety" and the 1994 "battery, disorderly conduct" were both "referred to juvenile authorities." Contrary to Salinas's argument, the court never stated that Salinas had been adjudicated delinquent for either of those incidents. Rather, the court noted that juvenile authorities "tried to work with [Salinas] to fix the problem." The court's acknowledgement that Salinas was not "zap[ped] … with a hard sentence" merely referred to the obvious, and accurate, observation – that Salinas's initial contacts had not resulted in delinquency adjudications. Salinas's appellate position is disingenuous, at best.

¶9 We also reject Salinas's implied argument that the court could not consider the 1993 and 1994 incidents because Salinas was not adjudicated delinquent. Just as a sentencing court may consider "uncharged and unproven offenses … because they indicate whether the crime was an isolated act or a pattern of conduct," ***State v. Mosley***, 201 Wis. 2d 36, 45, 547 N.W.2d 806 (Ct. App. 1996), so may a sentencing court consider juvenile conduct that did not result in a formal adjudication.

¶10 In imposing sentence, a court should consider the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Borrell***, 167 Wis. 2d 749, 773, 482 N.W.2d 883 (1992). In fashioning its sentence, the court engaged in a thorough examination of Salinas's character, his juvenile and adult record, and the numerous educational, employment, and treatment resources extended to Salinas within the correctional system. The court noted that shortly after Salinas was discharged from parole, he "shot and killed

[his] friend," the crime for which he was being sentenced. The court observed "[t]here's nothing else that the system knows to do with you but incarcerate you, and it's a shame, but we've given you all that help, and it didn't cause you to change your behavior." The court considered the nature of the crime and the impact on the victim's family. The court noted that "the risk to the community of your future reoffending is huge given this past background and the demonstrated repeat behavior." The record shows that the court relied on accurate information in the PSI, did not misinterpret the PSI, and properly exercised sentencing discretion.

By the Court.—Judgment and order affirmed.

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