COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1899-CR **Cir. Ct. No. 2003CF6627**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER BUNCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Christopher Bunch appeals from a judgment and an order denying his motion requesting either sentence modification or resentencing. Bunch claims the trial court, in sentencing him, relied upon

inaccurate information. Because of our supreme court's recent ruling in ***State v. Tiepelman***, 2006 WI 66, ___ Wis. 2d ___, 717 N.W.2d 1, relating to actual reliance on inaccurate information in sentence formulation, we reverse and remand with directions.

BACKGROUND

¶2 After an unsuccessful suppression motion, Bunch pled guilty to one count of felony murder as a party to a crime, and two counts of armed robbery as party to a crime, with use of force. The three counts involved separate incidents which took place on November 6 and November 12, 2003. The trial court sentenced Bunch to a term of ten years' initial incarceration followed by five years' extended supervision on count one to run consecutive to any other sentence; ten years' initial incarceration followed by ten years' extended supervision on count two to run consecutive to any other sentence; and ten years' initial incarceration followed by ten years' extended supervision on count three to run consecutive to any other sentence. Bunch filed a motion either for sentence modification or resentencing. Without a hearing, the sentencing court, in a written decision, denied his motion. Bunch now appeals.

ANALYSIS

¶3 Since the filing of this appeal, our supreme court has issued its decision in ***Tiepelman***. Neither party to this appeal, nor the trial court for that matter, had the opportunity to consider its application to the circumstances of this case. We therefore briefly summarize its holding.

¶4 In ***Tiepelman***, the sentencing court, when referring to the Presentence Investigation Report (PSI), mistakenly stated that the PSI showed

"something over twenty prior convictions at the time of the commission of this offense back in [November] 1995." ***Id.***, ¶6. This statement was an incorrect summary of the criminal background recounted in the PSI. There were twenty charged offenses, but only five of the charges resulted in convictions as of that date. ***Id.*** The PSI correctly reported the criminal history, but the trial court incorrectly summarized it. ***Id.*** At the postconviction hearing for resentencing, the same court conceded the error, but stated that there had not been reliance on an "inaccuracy that was material, because Tiepelman conceded the pertinent underlying conduct …." ***Id.***, ¶7. Thus, it denied the motion for resentencing. ***Id.***

¶5 Tiepelman appealed from the order denying his motion. This court, citing ***State v. Groth***, 2002 WI App 299, 258 Wis. 2d 889, 655 N.W.2d 163, and ***State v. Littrup***, 164 Wis. 2d 120, 473 N.W.2d 164 (Ct. App. 1991), stated Tiepelman's burden was to show "'by clear and convincing evidence, both the inaccuracy of some information and that the sentencing judge prejudicially relied on the inaccurate information.'" ***Tiepelman***, 717 N.W.2d 1, ¶8 (citation omitted). Because the State conceded that Tiepelman had met his burden of showing the inaccuracy of the information, this court stated: "The dispositive issue here is the second prong: Did Tiepelman meet his burden of showing *prejudicial* reliance?" ***State v. Tiepelman***, 2005 WI App 179, ¶7, 286 Wis. 2d 464, 703 N.W.2d 683. We held that Tiepelman had failed to prove prejudicial reliance and therefore affirmed the disposition of the trial court. ***Id.*** Tiepelman then petitioned for review which was accepted by the supreme court.

¶6 In reversing this court and remanding to the trial court for resentencing, the supreme court engaged in a thorough review of the half dozen or so federal and state reported cases that had examined a due process challenge to a sentence that relied upon inaccurate information. *See* ***Tiepelman***, 717 N.W.2d 1,

¶¶10-25. Commencing with ***Townsend v. Burke***, 334 U.S. 736 (1948), followed by ***United States v. Tucker***, 404 U.S. 443 (1972) and ***Welch v. Lane***, 738 F.2d 863 (7th Cir. 1984), it traced the origin and development of the actual reliance standard. Our supreme court, citing ***Lane***, noted that under the ***Townsend/Tucker*** test, "[w]hether the court 'actually relied' on the incorrect information at sentencing was 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.'" ***Tiepelman***, 717 N.W.2d 1, ¶14 (citation omitted). In tracking the developmental contours of this type of due process challenge, what troubled our supreme court was the tendency of this court to vacillate from the established actual reliance standard to a standard requiring the proof of prejudicial reliance. ***Id.***, ¶15.

¶7 This conflation is readily recognizable when comparing the decisions of ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998) and ***State v. Johnson***, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990) with ***State v. Littrup***, 164 Wis. 2d 120, 473 N.W.2d 164 (Ct. App. 1991) and its progeny. As a result, in ***Tiepelman***, our supreme court expressly withdrew any language in the ***Littrup*** lineage that is contrary to the "actual reliance" standard explicated in ***Lechner***. ***Tiepelman***, 717 N.W.2d 1, ¶31. Thus, we examine Bunch's challenge under the ***Lechner*** rubric.[1]

[1] We note that the trial court cited the correct standard, but both parties to this appeal fall into the same problem addressed by our supreme court in ***State v. Tiepelman***, 2006 WI 66, ¶15, ___ Wis. 2d ___, 717 N.W.2d 1.

¶8 Bunch's claim of trial court error is based upon the following excerpts from the PSI and the sentencing record. We first cite the passage of the report that Bunch claims is inaccurate:

> On 2-8-02, after being released from Ethan Allen School, the defendant was referred to and accepted at the Martin Center, a group home where he remained until 6-14-02. He was returned to Ethan Allen School for continued law violations, which included Robbery. He was again placed at the Martin Center from 6-17-03 to 12-9-03 when he went AWOL.

¶9 Next, we cite the sentencing court's paraphrasing of the same excerpt and its reaction to it:

> "After being released from Ethan Allen, he was sent to Martin Center, at Martin Center for a couple of months, then he was returned to Ethan Allen for continued violations of the law, which included robbery." That was the very next year and just a year before the crimes I'm sentencing you for today.
>
> Then he was placed back at the group home, and the notes from that group home that you did not do well in the program.
>
> ….
>
> So the fact that these crimes repeat a pattern from 2001 and 2002, the very next year, in 2003, is seriously of concern to me.

¶10 Earlier in its sentencing remarks, the court stated:

> I very much want to believe that Darren Denson [the adult involved] who I fully acknowledge is the ringleader of these crimes accomplished his purposes with these codefendants by terrorizing them, and if I believe that, my sentence would be different than I think it will be, but I don't believe that.
>
> Had this young man not had the prior history he already comes in to these crimes with, perhaps I would see his involvement differently ….

¶11 Finally, Bunch pointed to the trial court's reliance on his pattern of criminality that forms the basis for his sentence. In his postconviction motion for sentence modification or resentencing, Bunch referred to the same excerpts of the sentencing transcript as support for the same arguments of the same challenge.

¶12 In denying the motion, the sentencing court made the following response. It found "that the information provided by the presentence report writer was not materially inaccurate." It further stated that "[n]owhere in the sentencing transcript did the court presume that he was returned to Ethan Allen for another robbery, as the defendant suggests in his motion." It thus concluded that "the information was neither materially inaccurate nor did the court rely on it when it determined what sentences to impose."

¶13 On appeal, although Bunch's argument remains substantially the same, the State takes a different argumentative tack of two sorts. First, it challenges the accuracy of Bunch's conclusion that the information supplied in the PSI states that Bunch "was returned to a correctional setting for illegal activity including a robbery, which would have occurred somewhere around June 14, 2002."

¶14 The State is correct that the PSI excerpt does not state that illegal activity occurred "somewhere around June 14, 2002," nor does it state that Bunch was returned to Ethan Allen on June 14, 2002. Nor, for that matter, does it state that he was involved in a robbery on June 14, 2002. Thus, the State correctly notes in the PSI reports that Bunch "was returned to Ethan Allen School for continued law violations, which included Robbery" without stating specifically when the events occurred.

¶15 From this conclusion, the State then engages in a leap of logic by hypothesizing "[a] reasonable reading of the PSI and Bunch's juvenile corrections log could interpret Bunch's riding in a stolen vehicle [in Illinois] while AWOL from the Martin Center as a 'law violation' that 'included' robbery." The error of this hypothesis is the absence of any basis to demonstrate the indicia of a robbery. The absence of such circumstances renders the State's interpretation unreasonable. In succinct terms, there is nothing in the court record to establish that Bunch participated in a robbery from the time he was originally placed in the Martin Center in February 2002, to the time he was arrested for the crimes for which he has now been convicted.

¶16 Second, the State acknowledges that when comparing Bunch's juvenile log with the PSI, the two documents conflict with respect to when Bunch spent time at the Martin Center. The State notes that according to the PSI, Bunch was placed a second time in the Martin Center from June 17, 2003, to December 9, 2003, when he went AWOL.

¶17 In contrast, the State further notes that the chronological log of Bunch's correctional history reflects that he was picked up at his aunt's home for an unspecified reason and taken back to the Martin Center on June 17, *2002*. He went AWOL on December 10, *2002*. The log shows no entries for June 17, 2003, or December 9, 2003. According to the State, the log further shows that Bunch was AWOL on June 17, 2003, and he "had already been apprehended and placed

in custody in connection with the crimes for which he was sentenced in this case."[2]

¶18 Thus, the State concedes the PSI relied upon by the sentencing court incorrectly noted Bunch's placement at the Martin Center from June 17, 2003, to December 9, 2003; whereas, it should have reflected the dates of June 17, 2002, to December 9, 2002.

¶19 This amount of inaccurate information injects considerable confusion in the sentencing process from which the parties draw opposite conclusions. Bunch argues there is no basis in the record to attribute to him law violations including robbery between February 8, 2002, when he was first placed in the Martin Center, to when he was returned to the Ethan Allen School during 2002, as corroborated by the juvenile log. The State, on the other hand, minimizes the inaccuracies claiming they are immaterial, thus supporting the sentencing court's postconviction conclusion that the "information provided by the presentence report writer was not materially inaccurate."

¶20 The integrity of the sentencing process cannot be overemphasized. It is a lodestar in the criminal justice due process firmament. To secure this integrity, a sentencing court must base its sentence on accurate information. "Accuracy" and "reliance" are the two focal points. Contrariwise stand two equally significant factors: "non-reliance" and "inaccuracy." "A postconviction court's assertion of non-reliance on allegedly inaccurate sentencing information is

[2] The State has overlooked the fact that Bunch committed these crimes on November 6 and 12, 2003, thus rendering this statement somewhat inaccurate.

not dispositive." ***Groth***, 258 Wis. 2d 889, ¶28. This court may independently review the record to ascertain the existence of any such reliance. ***Id.***

¶21 The State contends Bunch does not carry his burden in arguing that the sentencing court relied upon inaccurate information. We are not persuaded. The PSI was misleading and thus not accurate in failing to state when Bunch was returned to Ethan Allen and for what precise reason. In the face of the contents of the PSI and the sentencing court's explicit interpretation of the specific language earlier set forth in this opinion at ¶¶9-10, we conclude the sentencing court gave "explicit attention" to the alleged reasons why Bunch was sent back to Ethan Allan School during 2002 without any discernible basis in the record. Thus, inaccurate information formed part of the basis for the sentence.

¶22 Integrity in the sentencing process requires fairness. Fairness is achieved by clarity—not confusion. The inconsistencies born from inaccuracies between the contents of the PSI and the juvenile chronological log are obvious and must be reconciled before fairness can be achieved. As in ***Groth***, and in compliance with the dictates of ***Tiepelman***, we conclude prudence dictates that resentencing ought to occur to assure the integrity of the sentencing process. A new hearing will provide the parties the opportunity to present a complete and exacting account of Bunch's pre-sentencing life from which an appropriate sentence can be fashioned. If need be, it will also afford the parties the chance to examine any harmless error implication which was not sufficiently developed in the briefs filed with this court.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.