

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2008

David R. Schanker
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. 2007AP594-CR

Cir. Ct. No. 2005CF34

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD CARL HENDEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Trempealeau County:
JOHN A. DAMON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Chad Henden appeals an order denying his motion to vacate a judgment imposing sentence after the revocation of Henden's probation. Henden argues he is entitled to resentencing because the circuit court

relied on inaccurate information. We reject Henden's argument and affirm the order.

BACKGROUND

¶2 In January 2006, Henden was convicted upon his no contest pleas to two counts of substantial battery and one count of battery. The court withheld sentence and imposed concurrent probation terms consisting of four years for each of the substantial battery convictions and two years for the battery conviction. As conditions of his probation, Henden was required to attend counseling classes, maintain full-time employment and refrain from consuming alcohol or entering taverns. Henden's probation was later revoked and the court imposed consecutive terms of one and one-half years' initial confinement and two years' extended supervision on each of the substantial battery convictions. With respect to the battery conviction, the court imposed a concurrent nine-month jail term. Henden's motion for resentencing was denied and this appeal follows.

DISCUSSION

¶3 Henden argues he is entitled to resentencing because the circuit court relied on inaccurate information. A 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. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. *Id.* A defendant who moves for resentencing on the ground that the trial court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the trial court actually relied on the inaccurate information. *Id.*, ¶31. "Whether the court 'actually relied' on the incorrect information at sentencing was based upon whether the court gave

‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Id.*, ¶14. If the defendant meets his or her burden of showing that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. *Id.*, ¶3.

¶4 Here, Henden contends the sentencing court relied on inaccurate information regarding charges against him in La Crosse County. At the hearing after revocation, the State recounted that Henden’s probation was revoked “based on him stealing cash from a safe at Downtown Market and Spirits in La Crosse on January 29, 2006.” The State added, “[h]e also consumed alcohol on that date, [and] smoked marijuana.” The State explained: “Essentially what happened is he stole \$1300 from his sister’s store, then lied to the police about it.” The State then noted that as part of a “series of pleas, there was a dismissal and read in of two counts of theft and three counts of bail jumping and one count of obstructing.” Defense counsel clarified, however:

[T]he violation that Mr. Henden committed involving the theft of money from his sister’s Downtown Market and Spirits in La Crosse was originally charged by [the] La Crosse County district attorney. After discussing the matter with him, he admitted that he shouldn’t have charged the theft of the money. His charge was six counts, two counts of theft, three counts of bail jumping, and one count of resisting officers. There’s a mistake in the judgment of dismissal acquittal, and as per the statement of negotiated plea, the theft of the money was dismissed on its merits. Count 3 to bail jumping, that was also dismissed on its merits. ... The actual violation on the probation report was the theft of money. That charge was dismissed on its merits.

¶5 Henden argues he was sentenced based on inaccurate information because the circuit court relied on the prosecutor’s misrepresentation that the theft

charge and attendant bail jumping charge were dismissed and read in, rather than dismissed on their merits. We are not persuaded. The circuit court acknowledged there was some disagreement regarding the La Crosse charges, but focused on Henden's drug and alcohol use while on probation, noting that those violations were not denied by Henden. The court further emphasized that because Henden was on probation, there was no room for violations.

¶6 At the hearing on Henden's motion for resentencing, the court reiterated that the sentence after revocation was not based on information regarding the La Crosse charges. Rather, the sentence was based on Henden's alcohol and drug violations, as well as the gravity of the underlying offenses, the character of the offender and the need for protection of the public. *See State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. We conclude the record does not support Henden's claim that the court "actually relied" on inaccurate information when sentencing him and, therefore, affirm the order denying his motion for resentencing.

By the Court.—Order affirmed.

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

