

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2009

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. 2008AP2063-CR

Cir. Ct. No. 2006CF63

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD F. TURNER, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard Turner, III, appeals a judgment sentencing him to fifteen years' initial confinement and ten years' extended supervision after

he pled guilty to second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2).¹ He also appeals an order denying his motion for resentencing. Turner claims the circuit court relied upon inaccurate information when determining his sentence. We affirm the judgment and order.

BACKGROUND

¶2 A complaint alleged that Turner, a twenty-nine-year-old man, had sexual intercourse with Cassandra M., a fifteen-year-old girl. The complaint also alleged that Turner encouraged Cassandra to consume alcohol and to have sex with Turner's friends, which she did.

¶3 At the preliminary hearing, Cassandra testified that Turner had sexual intercourse with her twice, on August 11 and 12, 2006. She also testified that on August 16, she was with Turner and four of his male friends near a woods in the City of Ladysmith. She testified she had sexual intercourse with three of Turner's friends in the woods and the fourth later at his house.

¶4 Cassandra stated she had sex with Turner's friends because Turner asked her to and threatened to leave if she did not. Cassandra also testified that Turner gave her alcohol and that she was intoxicated when she had sex with Turner's friends in the woods. One of Turner's friends, E.H., testified that he had sexual intercourse with Cassandra in the woods and that, beforehand, Turner encouraged him to "take her in the woods and try her out."

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 An Information was filed charging Turner with two counts of sexually assaulting a child under the age of sixteen, three counts of soliciting the sexual assault of a child under sixteen, and one count of felony bail jumping. Pursuant to a plea agreement, Turner pled guilty to count one of the Information, which alleged he had sexual intercourse with Cassandra on August 11, 2006. At Turner’s sentencing hearing, the court made comments that Turner claims reflect the court’s reliance on inaccurate information. Specifically, the court stated that Turner previously admitted “pimping” Cassandra, referenced Cassandra contracting herpes, and stated Turner provided Cassandra with drugs. These comments were the basis of Turner’s motion for resentencing, which was denied by the circuit court.

DISCUSSION

¶6 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant is entitled to resentencing if the court relied on “misinformation of a constitutional magnitude” when imposing sentence. *United States v. Tucker*, 404 U.S. 443, 447 (1972). Not all mistakes of fact constitute “misinformation of a constitutional magnitude.” *See Villa v. Fairman*, 810 F.2d 715, 719 (7th Cir. 1987). We review independently whether a defendant has been denied his constitutional right to be sentenced on accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶7 “A defendant who requests resentencing due to the circuit court’s use of inaccurate information at the sentencing hearing ‘must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.’” *State v. Lechner*, 217 Wis. 2d 392, 419, 576

N.W.2d 912 (1998) (quoting *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990)). If a defendant shows the sentencing court actually relied on inaccurate information, the burden then shifts to the State to prove the error was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶26.

¶8 During the sentencing hearing, the court asked Turner whether he admitted pimping Cassandra to his friends. Turner denied it and admitted only that he had sex with Cassandra. The court later stated:

The facts that he admitted to when I took his plea was that he pimped her with his buddies at a beer party. She talked about that in the first and second letter that she sent to me. And he admitted to those facts. He denies those facts today.

Turner argues he only admitted to the allegations associated with count 1 at the plea hearing, which was based on him having sex with Cassandra on August 11, not the incident on August 16 when Cassandra had sex with Turner's friends. Turner argues, "From the beginning of its sentencing comments, the court was seemingly focused on one thing and one thing alone: Mr. Turner's alleged admission, at the plea hearing, that he had 'pimped' the victim to his friends at a beer party."

¶9 We reject Turner's argument. Regardless whether the court believed Turner previously admitted pimping Cassandra to his friends, the court was aware of Turner's denial at the sentencing hearing. Despite Turner's denial, the court made the following findings: "[W]hat you did, Mr. Turner, was: This is going to be an easy mark. I can control her. I can make her do what I want. I can pimp her. And you did." These findings were supported by the evidence in the record. At the preliminary hearing, both Cassandra and E.H. testified that Turner

encouraged them to have sex. It is clear the court sentenced Turner based on its findings that Turner pimped Cassandra, not any admission by Turner.

¶10 Turner also relies on the court's statements alluding to Cassandra contracting herpes. At the sentencing hearing, Cassandra's parents made statements suggesting she contracted herpes as a result of Turner's conduct. Turner argues he does not have herpes and Cassandra did not contract it from him. Turner then points to the court's discussion of the impact of Turner's crime on Cassandra. The court stated:

The victim is suicidal. She went from ... an A student to an F student. There has been significant trauma to the child and to her family. And, indeed, the trauma will continue through many years, probably through many thousands of dollars of evaluation and treatment. There is a significant impact here.

Turner suggests the court attributed these impacts on Cassandra as consequences of contracting herpes from Turner.

¶11 Turner mischaracterizes the record. The court did not indicate these impacts were the result of Cassandra contracting herpes from Turner. Regarding Cassandra's parents' allegations that she contracted herpes from Turner, the court stated:

Aside from this disease that she now suffers from—I don't know what was—where that came from. I don't know. It's not relevant

She suffers from that. She's going to suffer from that for the rest of her life. Whether you caused it or not, you participated in some pretty serious behavior with a 15-year-old girl.

The court made clear it was making no finding about whether Cassandra contracted herpes as a result of Turner's conduct but was basing its sentence on other information in the record.

¶12 Finally, Turner challenges a court statement that he provided drugs to Cassandra. The court stated in part:

The defendant is 30 years old now. He was 29 years old when he engaged in this behavior with a child. She was 15 years old. He had sexual contact with her. He provided her with alcohol. He provided her with drugs.

Turner contends, and the State concedes, there is no evidence supporting the court's statement that Turner provided drugs to Cassandra. The State argues the court did not rely on this misstatement of fact as a basis for Turner's sentence.

¶13 Turner has the burden of showing the court actually relied on materially inaccurate information as a basis for its sentence. See *Tucker*, 404 U.S. at 447; *Lechner*, 217 Wis. 2d at 419. Turner's argument consists of pointing to the court's statement that "[Turner] provided [Cassandra] with drugs" and baldly asserting the court relied on it. We are not convinced.

¶14 A sentencing court can refer to inaccurate information without relying on it. See *Lechner*, 217 Wis. 2d at 421-23. Here, when viewing the court's reasoning in its entirety, the court did not base Turner's sentence on its misstatement regarding Turner providing Cassandra with drugs. See *id.* Instead, the court based its sentence on the age disparity between Turner and Cassandra, that Turner took advantage of Cassandra and encouraged his friends to do so, and the impact of Turner's behavior on Cassandra, as reflected in her letters to the court and her parents' statements. The court's single reference to Turner providing Cassandra with drugs was not "misinformation of a constitutional

magnitude” requiring resentencing. *See Tucker*, 404 U.S. at 447. Rather, the record demonstrates that Turner’s sentence was based on other facts, which were supported by the record and considered in light of the proper sentencing factors. *See Lechner*, 217 Wis. 2d at 421-23.

By the Court.—Judgment and order affirmed.

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

