

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2010

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. 2009AP1792-CR

Cir. Ct. No. 2006CF143

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. BYRNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Michael T. Byrne appeals a judgment sentencing him for attempted second-degree sexual assault of a child. He also appeals an order denying his postconviction motion for resentencing alleging he was

sentenced on erroneous information. Because we conclude the trial court inappropriately used the sentencing guidelines for the completed crime of second-degree sexual assault of a child, we reverse the judgment and order and remand the matter for resentencing.

¶2 Byrne entered a guilty plea to attempted sexual assault of a child in an internet sting operation. The court sentenced him to four years' initial confinement and six years' extended supervision. At the sentencing hearing, the court recognized there was no sentencing guideline worksheet for attempted second-degree sexual assault of a child, and instead prepared the worksheet for the completed crime. The first section of the worksheet deals with the severity of the offense, and the court remarked, "That gets us, if we look at the grid offense severity, at intermediate." The court then considered the various risk factors described by the worksheet and remarked, "That places the risk factors in the lesser grid, the offense severity in the intermediate grid. And the grid then suggests one to seven years of confinement." Finally, after reviewing the worksheet's list of "other factors that may warrant sentence adjustment," the court reiterated, "The grid gets me to one to seven years confinement." The court imposed the sentence immediately thereafter.

¶3 A defendant has a constitutionally protected right to be sentenced on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 3. Whether he was denied this due process right is a matter we review without deference to the trial court. *See id.* A defendant seeking resentencing on the ground that the sentence was based on inaccurate information must establish that some information before the court was inaccurate and the court actually relied on the inaccurate information. *Id.*, ¶2.

¶4 We remand the matter for resentencing because the court improperly considered the guidelines for the completed crime. There is no sentencing guideline for attempted sexual assault of a child. The worksheet's recommended sentence range matrix does not apply, and does not account for the reduced maximum sentence available for attempted offenses. *See* WIS. STAT. § 939.32(1g) (2007-08). Byrne's sentence was based on inaccurate information consisting of the sentencing matrix for a crime Byrne did not commit.

By the Court.—Judgment and order reversed and cause remanded for resentencing.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

