

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2011

A. John Voelker
Acting 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 Nos. 2010AP1327-CR
2010AP2036-CR**

Cir. Ct. No. 2008CM1624

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. HOFFMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Thomas J. Hoffman appeals from a judgment of conviction and a circuit court order denying his motion for reconsideration. The

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(continued)

circuit court sentenced Hoffman on a withheld sentence following a probation revocation. Hoffman challenges the circuit court's consideration of a pending charge at sentencing and also the manner in which the circuit court conducted the postconviction hearing on Hoffman's motion for sentence modification. The circuit court determined that Hoffman failed to establish by clear and convincing evidence that the court relied upon inaccurate information at sentencing. While Hoffman has completed his sentence under the judgment and his appeal is moot, we nevertheless conclude that the circuit court did not err. We affirm the judgment and order.

BACKGROUND

¶2 Hoffman pled guilty to obstructing an officer after he misled the police during an investigation of a substantial battery. On December 15, 2008, the circuit court entered a judgment withholding Hoffman's sentence and imposing one year of probation. Hoffman was subsequently served with revocation papers based on a disorderly conduct charge and, on July 22, 2009, Hoffman filed a motion for rejection of probation. The court held a sentencing hearing on August 19, 2009, at which it advised Hoffman that if he chose to proceed with probation revocation, the court would take the disorderly conduct allegations as true and would also consider the fact that it had previously sentenced Hoffman in a substantial battery case. Hoffman chose to proceed. In reaching its sentencing determination, the circuit court recounted the allegations against Hoffman

We note that these consolidated appeals concern the same underlying offense. The initial notice of appeal for No. 2008CM1624 was filed with the court of appeals in May 2010 before the entry of a written order denying Hoffman's postconviction motion. A second notice of appeal was then filed in August 2010 following the entry of a written order. The court of appeals granted Hoffman's motion to consolidate the appeals by order dated September 17, 2010.

including witness statements. Hoffman's counsel in turn noted discrepancies in the witness accounts underlying the disorderly conduct charge. The court acknowledged counsel's concern, informed Hoffman that the court was considering the pending charge for purposes of sentencing, and stated, "if it is demonstrated that [Hoffman is] actually innocent, then I will accept a request for a modification of this sentence." The circuit court sentenced Hoffman to seven months in jail.

¶3 On March 25, 2010, Hoffman filed a postconviction motion for modification or reduction in sentence. Hoffman asserted in part that the circuit court erred in its reliance on Hoffman's suspected guilt in the disorderly conduct charge, a matter of which "he was later acquitted." Hoffman argued that he should have enjoyed a presumption of innocence in that matter and that the circuit court "ultimately based its sentence on what was found to be inaccurate information." Hoffman acknowledged that the dismissal of the disorderly conduct case occurred after the sentencing at issue and after Hoffman had served the entirety of that sentence. The State countered that the issue was moot and requested that the motion be denied.

¶4 In an order dated April 7, 2010, the circuit court took the State's mootness objection under advisement and scheduled a hearing to determine the facts underlying the State's dismissal of the disorderly conduct charge against Hoffman. At the subsequent hearing, the State indicated that it intended to "reissue the case" but was not sure it could succeed at a preliminary hearing because the victim was recanting. Hoffman's counsel conceded that the charge, while not being pursued by the State at that time, could still be reissued. As to mootness, Hoffman's counsel argued that the length of the sentence could have a

future impact if he were to be sentenced for a subsequent offense and could impact employment and residential options.

¶5 Hoffman’s motion for sentence modification proceeded to an evidentiary hearing at which the circuit court provided Hoffman the opportunity to prove his “actual innocence” in the disorderly conduct case. Both Hoffman and the State had the opportunity to present witnesses and elicit testimony regarding the disorderly conduct charge. Hoffman testified. At the close of the hearing, the court found that the State’s evidence “all fits together” and that Hoffman had failed to meet his burden of proving that the court relied on inaccurate information at sentencing. The court denied Hoffman’s motion for postconviction sentence modification. Hoffman appeals.

DISCUSSION

¶6 At the outset, the State contends that Hoffman’s appeal is moot; he has served his entire seven-month sentence and this court’s review on his motion for sentence modification will have no practical effect. The State cites to *State v. Walker*, 2008 WI 34, 308 Wis. 2d 666, 747 N.W.2d 673, in support. There, the supreme court held that a challenge to a reconfinement order was moot because the defendant had completed the reconfinement term and the court’s decision would not affect the underlying controversy. *Id.*, ¶¶1, 14. Reviewing courts generally decline to decide moot issues but may do so under certain circumstances, including when the issue (1) is of great public importance; (2) occurs so frequently that a definitive decision is necessary to guide circuit courts; (3) is likely to arise again and a decision of the court would alleviate uncertainty; or (4) will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical

effect on the parties. *State v. Morford*, 2004 WI 5, ¶7, 268 Wis. 2d 300, 674 N.W.2d 349. While the *Walker* court chose to address the issue because of the frequency with which courts address reconfinement issues, *Walker*, 308 Wis. 2d 666, ¶14, no such exception applies to this fact-specific motion for sentence modification. Nor does Hoffman’s contention that he may someday feel the effects of the court’s sentence when applying for employment or living accommodations persuade us otherwise. See *State v. Zisch*, 243 Wis. 175, 178, 9 N.W.2d 625 (1943) (the defendant must show an existing legal right is affected).

¶7 Although Hoffman’s appeal is moot, we nevertheless affirm the circuit court’s decision on the merits. Hoffman contends that the postconviction evidentiary hearing was tantamount to a jury trial on the disorderly conduct charge, but without a jury. In doing so, Hoffman focuses on the procedure and abandons any argument that the circuit court erred in its determination that he had not met his burden. The issue presented on appeal arose with the circuit court’s consideration of the pending disorderly conduct charge at sentencing, something Hoffman concedes the circuit court was entitled to do.² See *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. However, once the disorderly conduct charge was dismissed, Hoffman requested sentence modification. As is reflected in the facts, Hoffman’s challenge to the circuit court’s consideration of the pending disorderly conduct charge (which was later dismissed) resulted in

² As explained by the supreme court in *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341: “[S]entencing courts are obliged to acquire the ‘full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.’ A sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted.” (Citation omitted.)

much discussion and a postconviction evidentiary hearing to resolve any factual disputes relevant to the sentencing decision.

¶8 A defendant has a 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. As part of this guarantee, a defendant has the right to rebut disputed factual information considered by the sentencing court. *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999). A defendant who requests resentencing due to the circuit court’s use of inaccurate information at the sentencing hearing must show by clear and convincing evidence “both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.” *Tiepelman*, 291 Wis. 2d 179, ¶26 (citation omitted); *see also State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. Here, the disputed facts related to witness accounts of the disorderly conduct and, as such, Hoffman was afforded an evidentiary hearing. *See State v. Anderson*, 222 Wis. 2d 403, 412, 588 N.W.2d 75 (Ct. App. 1998) (“the trial court has an important factfinding role to perform if facts relevant to the sentencing decision are in dispute [and] the sentencing court must resolve such disputes”). The hearing was not for purposes of determining guilt as to a new charge, but solely for the purpose of assessing the accuracy of the information relied on at sentencing.

¶9 After considering the testimony of the witnesses, including Hoffman himself, the circuit court expressly found the testimony in support of the State’s position to be more credible and determined that Hoffman had failed to carry his burden of establishing the inaccuracy of the facts relied on at sentencing. While Hoffman contends that the court erred in requiring him to prove “actual innocence” for a charge that had been dismissed and, thus, of which he had been

acquitted, we note that the sentencing court would have been entitled to consider the disorderly conduct charge even if it had been dismissed and not pending at the time of sentencing. *See Leitner*, 253 Wis. 2d 449, ¶45 (“A sentencing court may consider ... facts related to offenses for which the defendant has been acquitted.”) Based on our review of the postconviction evidentiary hearing, we see no error in the circuit court’s conduct of the hearing or its determination that Hoffman failed to demonstrate the inaccuracy of the information relied on at sentencing.

CONCLUSION

¶10 We conclude that Hoffman’s appeal is moot; nevertheless, our review of the record reveals no error by the circuit court. The circuit court was entitled to consider charges pending at the time of sentencing and although that charge was later dismissed, Hoffman failed to establish that the facts surrounding the alleged conduct and considered by the court at sentencing were inaccurate. We affirm the judgment and order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

