COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2099-CR **Cir. Ct. No. 2004CF3467**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD J. VANDERHOEF,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gerald J. Vanderhoef appeals from a reconfinement order. He also appeals from an order denying his motion for reconsideration. Vanderhoef argues that the reconfinement court sentenced him on inaccurate information and, therefore, he is entitled to sentencing credit. We

conclude Vanderhoef either fails to meet his burden, or any reliance on inaccurate information was harmless. We therefore affirm the orders.

¶2 For his conviction on one count of hit and run involving great bodily harm,[1] Vanderhoef was sentenced to three years' initial confinement and three years' extended supervision. He was released to supervision in May 2008, then revoked in April 2009. The violations prompting revocation included possession and consumption of crack cocaine, possession of drug paraphernalia, and a new charge of operating a motor vehicle while intoxicated, fifth offense, for operating under the influence of cocaine, Vanderhoef's intoxicant of choice.

¶3 Vanderhoef waived a revocation hearing. Based on Vanderhoef's ongoing drug problems, the reconfinement court imposed the maximum time available for reconfinement, three years and four days. Vanderhoef moved for reconsideration, arguing the reconfinement court had sentenced him on inaccurate information, thereby violating his due process rights. The reconfinement court denied the motion, and Vanderhoef appeals.

¶4 "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. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo." ***Id.*** When alleging sentencing was based on inaccurate information, the defendant must establish that the information before the sentencing court was inaccurate, and that the sentencing court actually relied on that inaccurate information. *See* ***id.***,

[1] *See* WIS. STAT. §§ 346.67(1) & 346.74(5)(c) (2003-04).

¶31. Proving that inaccurate information existed is a threshold question: one cannot show actual reliance on inaccurate information if the information was accurate. *See* ***State v. Harris***, 2010 WI 79, ¶33 n.10, 326 Wis. 2d 685, 786 N.W.2d 409.

¶5 Vanderhoef's first three complaints relate to purported inaccuracies at the *original* sentencing hearing. He complains that: the sentencing court erroneously assumed he had cocaine in his system at the time of the hit-and-run; his criminal record was misstated at the original hearing; and the sentencing court incorrectly assumed he was wanted on a warrant at the time of the hit-and-run.

¶6 Vanderhoef's first problem is that this is an appeal from a reconfinement order. The original judgment of conviction—and, therefore, the original sentencing—is not before us for review. *See* ***State v. Drake***, 184 Wis. 2d 396, 399-400, 515 N.W.2d 923 (Ct. App. 1994). Vanderhoef's second problem is that even assuming he has identified inaccurate information available to the reconfinement court, he does not show, by clear and convincing evidence, any actual reliance by the reconfinement court on the alleged inaccurate information. *See* ***Harris***, 326 Wis. 2d 685, ¶34; *see also* ***Tiepelman***, 291 Wis. 2d 179, ¶14 (actual reliance based on explicit attention to or specific consideration of misinformation). In fact, Vanderhoef admits that it is "impossible to know how much reliance was placed on any single factor."[2] We therefore conclude that Vanderhoef has not fulfilled his burden and that no due process violation has occurred with respect to the first three claimed instances of error.

[2] Arguably, we do know: the reconfinement court expressly disavowed any reliance on these pieces of inaccurate information, and Vanderhoef identifies no evidence to the contrary.

¶7 Vanderhoef has two other complaints of inaccurate information. The first is that the reconfinement court relied on erroneous statements about the current state of the victim's injuries. The hit-and-run accident pinned his victim to a loading dock, resulting in two broken legs with crushed bones protruding from the skin. The sentencing court had relied heavily on the victim's injuries. The court memo prepared for the sentencing-after-revocation hearing indicated that the victim was left without the use of his legs and was paralyzed. Vanderhoef complains there is no indication that the victim currently suffers the same injuries that he did at the time of the original sentencing.

¶8 As the reconfinement court explained, however, Vanderhoef cannot show the information in the court memorandum was inaccurate because Vanderhoef himself has no knowledge of the victim's status. Further, in rejecting the reconsideration motion, the reconfinement court explained that it had based the severity of Vanderhoef's hit-and-run accident on, and relied only on, the victim's condition "at the time of the incident." Vanderhoef acknowledges this explanation, but complains that the information was out-of-date. However, the reconfinement court's reliance on the victim's original condition, to evaluate the severity of the original offense, is not error: we expect reconfinement courts will consider the severity of the original offense when determining a proper reconfinement sentence. *See* ***State v. Brown***, 2006 WI 131, ¶34, 298 Wis. 2d 37, 725 N.W.2d 262. Vanderhoef does not dispute the description of the victim's injuries following the hit-and-run. We therefore conclude that no inaccurate information was relied upon regarding the victim's condition at the sentencing-after-revocation hearing.

¶9 Vanderhoef's final complaint is that the reconfinement court erred when it stated that alcohol, rather than cocaine, led to revocation of his extended supervision. The reconfinement court acknowledged this was error, but explained:

> The court misspoke due to the nature of the pending offense (OWI 5th); however, the misstatement is insignificant because the defendant was, in fact, operating a motor vehicle while intoxicated (cocaine use), and the correction is so minimal that it does not affect or alter the court's overall assessment of the defendant's behavior and its goals of reconfining him for the longest period possible for both rehabilitation purposes and for protection of the community.

Our review of the reconfinement record convinces us that to the extent the reconfinement court relied on alcohol rather than cocaine as the intoxicant, any error is harmless. *See* ***Harris***, 326 Wis. 2d 685, ¶32.

¶10 When Vanderhoef was sentenced for the hit-and-run, he was also sentenced for his fourth operating-while-intoxicated conviction, which had been consolidated with the hit-and-run offense. The original sentencing objective was for Vanderhoef to get drug treatment and rehabilitation in a confined setting, because he was clearly not successful at being treated in a non-confined setting. The reconfinement court found it "mindboggling" that Vanderhoef continued to make the bad choices that put him in this predicament yet again. It concluded that the community deserved to be protected while Vanderhoef had another attempt at treatment. Further, because the first three years of confinement had not worked, the reconfinement court determined that Vanderhoef would try another three. Regardless of whether Vanderhoef's supervision was revoked because of alcohol or cocaine, the reconfinement court's point, and reasoning, are the same. Any

reliance on the inaccurate intoxicant was, therefore harmless. Vanderhoef is not entitled to resentencing.[3]

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[3] As an alternate argument, Vanderhoef claims reconfinement counsel was ineffective for not pointing out all the inaccuracies, and he requests that we remand the matter for a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). As noted, Vanderhoef has not shown the first three pieces of allegedly inaccurate information were relied upon, even if inaccurate and properly before this court; the fourth alleged error was actually a proper consideration; and the fifth alleged error was harmless. There is no basis for claiming ineffective assistance of reconfinement counsel.