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DISTRICT III

November 21, 2023

To:

Hon. Mark J. McGinnis
Circuit Court Judge
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Electronic Notice

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
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Kelsey Jarecki Morin Loshaw
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1323-CR

State of Wisconsin v. Jacob Walter Nass (L. C. No. 2020CF718)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jacob Nass appeals from a judgment convicting him of repeated sexual assault of the same child and from an order denying his postconviction motion for resentencing. Nass contends that the circuit court relied upon inaccurate sentencing information when it deemed him to have “an extremely high risk” of re-offending and further commented that the presentence investigation report (PSI) “agree[d]” with that assessment. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. If a defendant can establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the court relied upon the misinformation in reaching its determination, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26. A defendant who has been sentenced on inaccurate information that cannot be shown to be harmless is entitled to be resentenced. *State v. Payette*, 2008 WI App 106, ¶¶45-46, 313 Wis. 2d 39, 756 N.W.2d 423.

This court will independently review a due process claim that a defendant has been sentenced based upon inaccurate information. *Tjepelman*, 291 Wis. 2d 179, ¶9. We do not deem information to be “inaccurate” merely because it was contested or incomplete. Rather, the defendant must demonstrate the information was “extensively and materially false.” *See State v. Travis*, 2013 WI 38, ¶18, 347 Wis. 2d 142, 832 N.W.2d 491. Actual reliance, in turn, requires a showing that the circuit court gave explicit attention or consideration to the information, such that it “formed part of the basis for the sentence.” *Tjepelman*, 291 Wis. 2d 179, ¶14 (citation omitted).

Here, Nass argues that the circuit court’s assessment that Nass posed a high risk of re-offending, and the court’s additional comment that the PSI “agree[d]” with the court’s

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

assessment, were inaccurate because the court's assessment contradicted the results of two actuarial risk assessments cited in the PSI and instead relied upon the court's own "unsupported beliefs." Specifically, Nass's score on the Static-99R indicated that his risk of sexually re-offending was below average, while the COMPAS² tool classified Nass as posing a low risk of both violent and general recidivism. In addition, at a hearing on Nass's postconviction motion, a clinical and forensic psychologist opined that Nass had a 5.3% risk to re-offend within a period of five years, which placed him in a low-risk category.

As the circuit court correctly observed at the postconviction hearing, however, the court was not required to accept the actuarial risk assessments when making its own evaluation of Nass's risk to re-offend. Rather, the court had discretion to determine what, if any, weight to give to them. *See State v. Samsa*, 2015 WI App 6, ¶13, 359 Wis. 2d 580, 859 N.W.2d 149 (a court is free to reject a risk assessment in whole or in part). Moreover, the Wisconsin Supreme Court has explicitly cautioned that courts should be "aware of the limitations of risk assessment tools" and the danger that they may "incorrectly flag[] [certain defendants] as low risk." *State v. Loomis*, 2016 WI 68, ¶¶43, 63, 371 Wis. 2d 235, 881 N.W.2d 749.

Here, there were several factors discussed at the postconviction hearing that could limit the relevance of the actuarial risk assessments cited in the PSI to the facts of this case. For instance, the Static-99R treats the charge of repeated sexual assault as a single offense and, thus, it does not take into account any of the incidents underlying the charge over a two-year period as

² COMPAS stands for Correctional Offender Management Profiling for Alternative Sanctions.

past offenses. In addition, the Static-99R does not consider that Nass lived with an adult in order to groom a child, suggesting a higher risk than someone who is living alone.

In any event, the circuit court explained at the postconviction hearing that it was aware of the actuarial risk assessments at the time of sentencing, but it drew a different conclusion based upon other information contained in the PSI, as well as Nass's own acknowledgement of the number of assaults he had committed on the victim. It was this other information to which the court was referring when it stated the PSI "agree[d]" with the court's own risk assessment. In particular, the court cited the following factors as supporting its conclusion that Nass posed a continuing high risk of re-offense: the age of the victim (being between ten and twelve years old) over the course of the charged conduct; the controlling nature of Nass's relationship with the victim; the sheer number of assaults; the fact that some of the assaults included unprotected sexual intercourse; the fact that Nass could not control his behavior even after a pregnancy scare; Nass's provision of illegal drugs to the minor victim; and his use of violence. As the State points out, the PSI also included its author's opinion that Nass showed no remorse for his actions and that "[u]ntil [Nass] can internalize the severe nature of his actions and the ongoing damage he has caused," he is "a danger to the community." Finally, the court noted that the psychologist's testimony at the postconviction hearing did not change the court's view as to Nass's risk level.

In sum, Nass failed to demonstrate, by clear and convincing evidence, that the circuit court relied upon inaccurate information. To the contrary, the record shows that the court decided not to give weight to the actuarial risk assessments and instead formed its own opinion as to Nass's risk to re-offend based upon information contained in the PSI and Nass's own statements regarding his conduct—as it was entitled to do. Although the court could have more clearly articulated its thought process for rejecting the actuarial instruments at the sentencing

hearing, it is plain from the court's comments at the postconviction hearing that the court's decision was properly based upon the evidence before it. The fact that alternate inferences could have been drawn as to Nass's risk level does not render the court's conclusion "inaccurate."

Therefore,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals