

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 2, 2012**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2010AP3138-CR**

**Cir. Ct. No. 2009CF47**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL J. WOJCZAK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Michael Wojczak appeals the circuit court judgment convicting him of intentionally causing great bodily harm to a child, contrary to WIS. STAT. § 948.03(2)(a) (2009-10),<sup>1</sup> and the order denying Wojczak’s motion for postconviction relief. Wojczak seeks resentencing, arguing that the circumstances surrounding his then-girlfriend’s (now-wife’s) pregnancy are a new factor that justifies resentencing. Alternatively, Wojczak argues that the sentencing court erroneously exercised its discretion and violated Wojczak’s due process rights because he had insufficient notice of and opportunity to address the significance of the pregnancy and because he was sentenced based on inaccurate information regarding the pregnancy. We agree with Wojczak that his right to due process was violated at sentencing because the sentencing court relied on inaccurate information. We reverse and remand for resentencing.

## BACKGROUND

¶2 Wojczak pled guilty to the count of intentionally causing great bodily harm to a child based on allegations that he seriously injured his three-week-old infant son by shaking and grabbing him as well as throwing him onto a bed. At sentencing, after the parties had made their sentencing arguments and recommendations, and after Wojczak had an opportunity to address the court personally, the court asked whether it was true that the child’s mother, Ashley Boring,<sup>2</sup> was again pregnant by Wojczak. Wojczak confirmed this was true.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>2</sup> Wojczak explains that he and Boring were married shortly before sentencing, and he implies that she changed her name, but he states that he refers to her by the name Boring in his briefing because that is the name that appears most often in the record. We will do the same.

¶3 Immediately after receiving that answer to its question, the court commenced its sentencing colloquy. Without referencing the pregnancy at first, the court made extensive remarks suggesting that it was difficult for the court to decide between a prison term and probation. The court expressed concern with the seriousness of the offense but found a number of mitigating factors, including expert testimony by a physician casting doubt on whether Wojczak's conduct caused all of his son's injuries; a psychiatric determination that Wojczak was willing to accept treatment and was a good candidate for treatment; the lack of services that would be available to Wojczak in prison; the absence of any evidence that Wojczak was a danger to the community at large; and Wojczak's lack of a prior criminal record.

¶4 At the conclusion of its colloquy, the court explained to Wojczak that the court might have been persuaded to impose probation but "then you did something that indicates you still don't get it. You impregnated her a second time." The court further stated:

The last thing you need in your life is another child. You didn't need the second blessing, if you will .... [H]ere you [did] it again. And that—that shows a level of irresponsibility that I simply cannot tolerate. That in my opinion requires that I conclude—that a prison sentence is an appropriate result in this case.

The court imposed a fifteen-year prison term, consisting of five years of initial confinement and ten years of extended supervision.

¶5 Wojczak moved for postconviction relief. The same judge who sentenced Wojczak presided over a hearing on the motion. Wojczak presented evidence that he and Boring were using condoms as birth control; that at one point a condom broke; that Boring promptly made an appointment with her physician

and obtained a prescription for Plan B in an attempt to prevent pregnancy; that Boring subsequently began using an oral contraceptive; that Boring used the medications according to instructions; and that Boring became pregnant nonetheless.

¶6 Wojczak argued that these newly explained circumstances surrounding a pregnancy that he actively sought to prevent constituted a new factor that justifies resentencing. He also argued that the sentencing court erroneously exercised its discretion and violated his due process rights because he had insufficient notice of and opportunity to address the significance of the pregnancy and because he was sentenced based on inaccurate information regarding the pregnancy.

¶7 In addressing Wojczak's motion, the court accepted as true the newly explained circumstances surrounding Boring's pregnancy, finding that "the evidence offered today is basically uncontradicted, and I accept it for what it is." The court stated, however, that "if I had that ... information at the time of sentencing, it would not have affected the court's view or decision of the case." The court further stated as follows:

I look at this more as an issue of to what extent should trial judges be second guessing themselves on outcomes in cases.

This was, in my mind, a very close case. And I considered, in weighing what I thought was relevant, what was proper to consider. I reached the results I did for the reasons stated at the time. I'm not persuaded that in effect I should second guess my decision and now reach a different result.

The court denied Wojczak's motion.

## DISCUSSION

¶8 Wojczak makes the same arguments for resentencing that he made to the postconviction court. For the following reasons, we agree with Wojczak that his due process rights were violated because the record demonstrates that he was sentenced based on inaccurate information, and we remand for resentencing on that basis. We need not address Wojczak’s new factor or other arguments.<sup>3</sup>

¶9 Criminal defendants have a due process “right to be sentenced on the basis of true and correct information.” *State v. Perez*, 170 Wis. 2d 130, 138, 487 N.W.2d 630 (Ct. App. 1992); *see also State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (due process right to sentencing based on “accurate” information); *State v. Skaff*, 152 Wis. 2d 48, 53, 447 N.W.2d 84 (Ct. App. 1989) (importance of sentencing based on “complete” information). Whether a defendant’s right to due process has been denied is a question of law that we review de novo. *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶10 Here, the State does not respond directly to Wojczak’s argument that his right to due process was violated at sentencing. We agree with Wojczak that the sentencing court’s statement at sentencing that it relied on Boring’s pregnancy to impose a prison term instead of using a probation disposition, based on an incorrect assumption about the circumstances surrounding the pregnancy, constituted reliance on inaccurate information. Although the fact of Boring’s pregnancy was true, the court drew a factual inference from the pregnancy that was not true, namely that Wojczak acted irresponsibly in impregnating Boring.

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<sup>3</sup> When a decision on an issue is dispositive, we need not reach other issues raised. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

The court then determined that Wojczak's irresponsibility "requires that I conclude ... that a prison sentence is an appropriate result in this case."

¶11 We note that the court did not suggest at sentencing that prison was necessary in order to insure that Wojczak would not share a household with or have direct access to another young child, in which case the court's factual assumption that Wojczak failed to take steps to prevent the pregnancy might not be considered relevant. Instead, the court at sentencing made clear its view that prison was necessary because the pregnancy resulted from conduct on Wojczak's part that represented "a level of irresponsibility that I simply cannot tolerate."<sup>4</sup>

¶12 Once it is established that a sentencing court relied on inaccurate information, the State has the burden to show that the error was harmless. *Id.*, ¶26. If the error was not harmless, the defendant is entitled to resentencing. *See id.*, ¶31.

¶13 The State does not make an argument expressly in terms of harmless error. Instead the State argues that Wojczak received a sufficient remedy at the postconviction hearing. We disagree.

¶14 The State relies on the postconviction court's statement that its decision would have been the same even if it had known, at the time of sentencing, the circumstances surrounding Boring's pregnancy. The State points out that a number of federal courts have held that, when the same judge presides at

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<sup>4</sup> Wojczak does not argue that the sentence he received implicates his right to choose whether to procreate. *See Eberhardy v. Circuit Court for Wood County*, 102 Wis. 2d 539, 561-62, 307 N.W.2d 881 (1981) (discussing the right). Accordingly, no issue in that regard is before us.

sentencing and postconviction, and the judge concludes that a sentence would be the same with corrected information, the defendant has received a sufficient resentencing remedy. See *Reynolds v. United States*, 528 F.2d 461, 461-63 (6th Cir. 1976); *Crovedi v. United States*, 517 F.2d 541, 546-47 (7th Cir. 1975); *McAnulty v. United States*, 469 F.2d 254, 255-56 (8th Cir. 1972).

¶15 However, we do not consider the federal cases dispositive. Under binding Wisconsin case law, a court must provide reasoning on the record for its sentencing decisions, and that reasoning must reflect a proper exercise of discretion. See, e.g., *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971) (“[T]here must be evidence that [sentencing] discretion was in fact exercised”; that discretion “contemplates a process of reasoning.... [that] depends on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.”).

¶16 The problem here is that we are unable to discern from the postconviction court’s reasoning whether it properly exercised its discretion to resentence or not resentence Wojczak in light of the correct and complete information about the circumstances of Boring’s pregnancy, which were circumstances that the sentencing court had identified as weighty.

¶17 First, we have difficulty discerning whether the postconviction court fully recognized and exercised its discretion to resentence Wojczak. Rather than provide reasoning why Wojczak’s sentence should or should not remain the same in light of any relevant factors, including the circumstances of the pregnancy, the court seemed to unduly limit its analysis. The court appears to have limited its analysis to the question whether it should “second guess” its original sentencing

decision, given its conclusion that it made a reasonable sentencing decision *at the time of sentencing* based on the information then known to it, even though the court acknowledged that information it had believed to be true and highly relevant at the time of sentencing was shown to have been inaccurate.

¶18 Second, even assuming that the postconviction court fully recognized and exercised its discretion to resentence Wojczak, we are unable to discern whether it did so reasonably. In particular, we are unable to reconcile two statements of the court: (1) the postconviction court’s statement that its decision would have been the same had it understood the circumstances surrounding the pregnancy, and (2) the court’s statement at sentencing that Wojczak’s “irresponsibility,” as demonstrated by Boring’s pregnancy, obligated the court to impose a prison sentence instead of probation. Our difficulty in reconciling these two statements is heightened by the postconviction court’s acknowledgment that “[t]his was, in my mind, a very close case,” along with the sentencing court’s thoughtful and thorough explanation as to why it viewed the case to be close at the time of sentencing. If there is a reasonable way to reconcile the court’s statements, it is not apparent to us from the postconviction court’s decision.

¶19 Finally, we address a forfeiture argument made by the State.<sup>5</sup> Specifically, the State argues that Wojczak or his attorney should have alerted the sentencing court to the circumstances surrounding the pregnancy when the

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<sup>5</sup> The State makes its forfeiture argument in the section of its brief addressing whether the circumstances of the pregnancy constitute a new factor, which requires that the parties “unknowingly overlooked” whatever information is alleged to constitute the new factor. See *State v. Ninham*, 2011 WI 33, ¶88, 333 Wis. 2d 335, 797 N.W.2d 451 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Although we need not reach the new factor question, we address the State’s forfeiture argument.



potential significance of this information became apparent at the conclusion of the sentencing colloquy. However, this court may decline to apply the forfeiture rule in the context of sentencing based on inaccurate information. See *State v. Groth*, 2002 WI App 299, ¶¶25-26, 258 Wis. 2d 889, 655 N.W.2d 163, *modified on other grounds by Tiepelman*, 291 Wis. 2d 179, ¶¶2, 31. We do so here based on the unique circumstances of this case. As previously indicated, the significance of Boring's pregnancy became apparent only after the parties had completed their sentencing arguments and recommendations, after Wojczak had his opportunity to personally address the court, and immediately prior to the court's pronouncement of sentence. We are not persuaded that, under these circumstances, and given all the other facts here, forfeiture is appropriate. We note that the State points to nothing in the record to suggest that, at the time of sentencing, Wojczak's attorney was aware of the circumstances surrounding Boring's pregnancy.

¶20 In sum, for the reasons stated, we reverse the judgment and postconviction order and remand for resentencing.

*By the Court.*—Judgment and order reversed and cause remanded.

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

