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DISTRICT II

July 16, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2875-CR

State of Wisconsin v. Walter C. Sparks (L.C. #2012CF90)

Before Brown, C.J., Reilly and Gundrum, JJ.

Walter C. Sparks appeals a judgment convicting him of third-degree sexual assault and an order denying his postconviction motion requesting resentencing on grounds that he was sentenced in reliance on inaccurate information. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgment and order.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Sparks, a driver for Atlas Cab Company, was accused of sexually assaulting an intoxicated patron after driving her home from a bar. Sparks first claimed he did not recall the woman or her address because the night was very busy, but that his log would reflect if he had driven her. Sparks's driver log did not list the transport. Sparks later modified his story and said he now recalled the woman because she had made sexually explicit comments during the ride home, told him to come into her house while she got fare money, then suddenly stripped, and, over his repeated protests, performed fellatio on him. When asked to provide a DNA sample, Sparks conceded that he did attempt intercourse with her but could not maintain an erection, although he may have ejaculated. Sparks insisted the woman was the instigator. The State charged him with second-degree sexual assault.

Sparks pled no contest to the reduced charge. The court rejected the parties' recommendation of probation and conditional jail time and sentenced him to two years' initial confinement and three years' extended supervision. The court found that Sparks's decision to take advantage of an extremely intoxicated person who was entrusted to him to get her home safely made this a "pretty serious offense," one made worse because he tried to cover it up by not recording the run in his log. Sparks disputed any kind of cover-up.

Postconviction, Sparks moved for resentencing. He contended he was sentenced on the basis of inaccurate information, specifically, that he had attempted to conceal having transported the victim. Sparks supplied an affidavit averring that, as he had worked both as dispatcher and driver on the date in question, he had prepared two logs: a dispatch log, showing all drivers' calls, and a driver log, showing only his. The copy of the purported dispatch log attached as an exhibit listed the victim's address and the fare collected.

Sparks testified at the motion hearing that the failure to enter the trip on both logs was an oversight, that he had put the two logs and the fare money in Atlas Cab's dropbox at the end of his shift, and that police had seen both logs but "for whatever reason" took only his driver's log. Defense counsel told the court that, after sentencing, Sparks's wife got the original dispatch log from the owner of Atlas Cab, made a copy and returned the original to Atlas. No one—not his wife or trial counsel or anyone from Atlas Cab—submitted an affidavit or testified on Sparks's behalf. Unconvinced of the newly presented log's authenticity and of Sparks's veracity at the hearing, the court denied the motion. Sparks appeals.

A defendant has a constitutionally protected due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. The defendant must prove both that the information was inaccurate and that the sentencing court actually relied on it. *Id.*, ¶28. The threshold question is whether the information is inaccurate; "you cannot show actual reliance on inaccurate information if the information is accurate." *State v. Harris*, 2010 WI 79, ¶33 n.10, 326 Wis. 2d 685, 786 N.W.2d 409. We review this issue de novo. *Tiepelman*, 291 Wis. 2d 179, ¶9.

The alleged dispatch log Sparks produced does not establish that his driver log is inaccurate. The trial court questioned the new log's validity due to Sparks's "rather odd explanation" about obtaining, copying, and returning the original log instead of having someone from Atlas Cab vouch for the document's authenticity, and because his demeanor and body language while testifying indicated that he was "not being entirely truthful here today." The court appeared to view the purported dispatch log as simply another version of an ever-shifting story and to infer that Sparks intentionally did not log the run and only later prepared the dispatch log to avoid punishment. While not the only inference that could be drawn, it is a

reasonable one and we are bound to accept it. *See State v. Searcy*, 2006 WI App 8, ¶35, 288 Wis. 2d 804, 709 N.W.2d 497 (2005). The court deemed the driver log more credible. It is for the trier of fact to decide which evidence is credible and which is not, and how to resolve conflicts in the evidence. *See State v. Pankow*, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). That credibility determination is not “inaccurate information” simply because Sparks disagrees with it.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals