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February 17, 2015

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

2014AP377-CR

State of Wisconsin v. Evelyn M. Brown (L.C. # 2012CF3549)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Evelynn Brown appeals a judgment convicting her of operating while intoxicated, as a ninth offense, with a passenger in the vehicle under the age of sixteen, as well as an order denying her postconviction motion for resentencing. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)6. and (2)(f)2. (2013-14).¹ On appeal, Brown argues that she is entitled to resentencing because she was sentenced based upon inaccurate information. Based upon our

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The circuit court sentenced Brown to the maximum possible sentence for her offense, consisting of ten years of initial confinement and ten years of extended supervision. *See* WIS. STAT. §§ 346.65(2)(am)6. and (2)(f)2. Brown argues that she is entitled to resentencing because the circuit court relied, when imposing the maximum sentence, on a mistaken belief that the Department of Corrections (DOC) did not possess the means to provide intensive, daily monitoring as a means of supervision, and that the DOC would not perform such monitoring if the court ordered it as a condition of supervision. The State argues, however, that Brown has not established that the circuit court's information about monitoring was inaccurate. Although Brown relies upon several DOC documents to support her assertion that intensive, daily monitoring was available, the State asserts that none of these documents demonstrate that the type of monitoring the court sought for Brown was available *to her*.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 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.

Here, Brown has failed to show by clear and convincing evidence that the information presented at sentencing was inaccurate as applied to her situation. One of the documents Brown relies upon to support her argument is a document containing the departmental policies and guidelines addressing the implementation of 2009 Wis. Act 100. These policies provide the

DOC with a specific appropriation for enhanced monitoring of second and third time OWI offenders. Brown fails to establish that, as a ninth time OWI offender, she would be eligible for this program.

Another document Brown relies upon describes “enhanced Supervision” for persons with multiple OWI convictions that includes “[w]eekly face-to-face contacts” with the offender. However, weekly contact does not rise to the level of the “daily testing” that the court believed was needed “seven days a week” to keep Brown from drinking and reoffending.

Brown also references a document that describes the electronic monitoring program (EMP), which involves placing a bracelet on an offender’s ankle and a monitoring unit in the offender’s residence. The EMP provides, on a limited basis, remote alcohol sensors that can detect alcohol usage. However, the document states that the EMP equipment is issued by order of priority to certain individuals. As a person on extended supervision, Brown would stand third in line, behind Chapter 980 offenders and assaultive mandatory release parolees in terms of priority. Thus, Brown has not established that the court was mistaken in its belief that daily, intensive monitoring was “unrealistic” in Brown’s case.

Because Brown has not established by clear and convincing evidence that the information the circuit court relied upon at sentencing was inaccurate as applied to the facts of her case, we conclude that she is not entitled to resentencing.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals