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**DISTRICT II/IV**

March 24, 2015

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

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2014AP572-CR

State of Wisconsin v. James W. Barnes (L.C. # 2009CF918)

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

James Barnes appeals an amended judgment of conviction and an order denying his motion for sentence modification. Barnes argues on appeal that he was sentenced based on inaccurate information. 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 (2013-14).<sup>1</sup> We summarily affirm.

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

Barnes was convicted, after entry of a no contest plea, of robbery with use of force while armed, contrary to WIS. STAT. § 943.32(1)(a). The original judgment of conviction listed the crime as a Class C Felony. However, the judgment of conviction was amended to accurately reflect that Barnes had been found guilty of a Class E felony, not a Class C felony as had been originally charged. Barnes pursued postconviction relief and his counsel filed a no-merit report with this court. In an opinion dated June 6, 2012, we summarily affirmed the circuit court judgment, concluding that there would be no arguable merit to an appellate challenge to Barnes's plea.

Barnes then filed a motion for sentence modification, arguing that he was sentenced based on inaccurate information regarding the felony classification of the charge to which he pled. Barnes further argued that the circuit court relied upon an Illinois theft conviction from 1978, which he asserts was later invalidated, and which was improperly referenced in the presentence investigation report. The circuit court denied the motion, and Barnes now appeals.

A defendant has a constitutionally protected due process right to be sentenced based upon accurate information. *See U.S. v. Tucker*, 404 U.S. 443 (1972); WIS. CONST. art. I, § 8, cl. 1. However, a defendant moving for resentencing on the basis that the circuit court relied upon inaccurate information must establish both that there was information before the sentencing court that was inaccurate and that the circuit court actually relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

We turn first to Barnes's argument that the circuit court relied upon inaccurate information regarding his felony classification. We reject this argument as unsupported by the record. As the State points out, the plea hearing transcript demonstrates that the crime to which

Barnes pled was robbery with use of force while armed. *See* WIS. STAT. §§ 943.32(1)(a) and 939.63. The court confirmed with defense counsel that the offense was a Class E felony. A Class E felony carries maximum terms of ten years of initial confinement and five years of extended supervision. WIS. STAT. §§ 973.01(2)(b)5. and (d)4. The “while armed” penalty enhancement adds up to another five years of imprisonment. Section 939.63(1)(b). Both Barnes and the State, by their counsel, confirmed for the court at the plea hearing that Barnes faced a total maximum term of fifteen years of initial confinement and five years of extended supervision. Barnes fails to point to any facts in the record suggesting that the circuit court sentenced him based on a mistaken belief that he was convicted of a Class C felony.

We turn next to Barnes’s argument that the circuit court wrongly relied on a 1978 theft conviction in Illinois that he contends is invalid. The State responds that nothing in the record indicates that the court relied at sentencing upon the alleged Illinois conviction, or any other individual conviction. Rather, the State asserts that the court relied instead upon Barnes’s pattern of criminal behavior spanning thirty years, and that the court stated as much on the record. Barnes fails, in his reply brief, to refute this argument in any meaningful, coherent way, or to point to anything in the record indicating that the court relied on the Illinois conviction in deciding his sentence. Thus, we are satisfied that the circuit court properly denied Barnes’s motion for sentence modification.

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

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*