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**DISTRICT II**

February 8, 2017

To:

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

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2016AP602-CR

State of Wisconsin v. Marquetta L. Parker (L.C. #2014CF1111)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Marquetta L. Parker appeals a judgment of conviction for misappropriating identification to obtain money, contrary to WIS. STAT. 943.201(2)(a) (2015-16),<sup>1</sup> and an order denying her postconviction motion for resentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21. Parker argues that she deserves resentencing as the circuit court sentenced her based on inaccurate information in violation of her due process rights. *See State v. Tiepelman*, 2006

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. We affirm Parker’s conviction as the court’s reliance on inaccurate information was harmless error.

Parker was charged in a criminal complaint with one count of misappropriating identification to obtain money (identity theft) and one count of fraudulent use of a credit card, both as a repeater. Parker pled no contest to a single felony charge of identity theft, and in exchange, the State agreed to dismiss and read in the second count and strike the repeater enhancer. The State also agreed to dismiss and read in an escape charge in a separate case that arose from Parker cutting off her house-arrest ankle monitor and absconding to Ohio. The presentence investigation report (PSI) indicated that Parker had fourteen prior adult convictions and four or five juvenile adjudications, for a total of either eighteen or nineteen convictions.

The sentencing hearing began poorly when the court incorrectly stated that Parker was being sentenced on felony identity theft and felony escape. The court was promptly corrected that Parker was before the court for sentencing on a single count of identity theft with the other matters being read-ins. The court then stated, “By my total count you have 20 prior convictions” and noted that Parker was being sentenced on her twenty-first and twenty-second convictions. The court was clearly wrong on these facts. Throughout the hearing, the court referenced Parker’s criminal history and criminal convictions multiple times, noting that Parker’s record was the primary “aggravating circumstance[.]” The court sentenced Parker to three years’ initial confinement and three years’ extended supervision.

A defendant has a due process right to be sentenced upon accurate information. *Id.*, ¶9. In order for Parker to prevail on her resentencing request, she “must show both that the information was inaccurate and that the court actually relied on the inaccurate information.” *See*

*id.*, ¶26 (citations omitted). Once actual reliance has been established, the burden shifts to the State to establish that the error was harmless. *Id.*, ¶¶26, 31.

We agree that Parker met her burden to show that the circuit court relied on inaccurate information at sentencing. The sentencing court initially thought Parker had pled to two felonies, when in fact she had pled to one, and inaccurately referred to the number of Parker's prior convictions. We conclude that the court gave "explicit attention" or "specific consideration" to inaccurate information in a way that the misinformation "formed part of the basis for the sentence." *State v. Travis*, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491; *Tiepelman*, 291 Wis. 2d 179, ¶14 (citation omitted).

Nevertheless, we conclude that the error was harmless beyond a reasonable doubt. In determining whether the circuit court's error was harmless, the State must demonstrate "that the error did not affect the circuit court's selection of sentence; that there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." *Travis*, 347 Wis. 2d 142, ¶86. The circuit court concluded at the postconviction motion hearing that "[w]hether the exact number of prior convictions was 18, 19, 20, 21 or 22 is an academic exercise that does not affect the Court's ultimate opinion." We are not bound by a circuit court's "retrospective review of its sentencing decision." *Id.*, ¶77.

We acknowledge, however, that the court was clearly swayed by the quantity of prior convictions as well as the dismissed, but read-in, escape charge. The court noted Parker's history of "a series of criminal acts over many years," rather than the specific number of convictions or adjudications. The court's incorrect reference to Parker's "22nd ... conviction,"

the dismissed escape charge, as a factor at sentencing was harmless as a court is allowed to rely on read-in charges. *See Embry v. State*, 46 Wis. 2d 151, 158, 174 N.W.2d 521 (1970). The court also relied on other applicable factors, including protection of the public, expressing concern that Parker continued “to victimize people in our community” and that “nothing seems to deter [Parker] in [her] behavior.” Based on a review of the record, we are satisfied that the same sentence would have been imposed absent the error.

We caution, however, that this is not the first time Judge Piontek has erred at sentencing. *See State v. Enriquez*, No. 2015AP1850, unpublished slip op (WI App July 27, 2016). With the enactment of truth in sentencing, it has become increasingly necessary for judges to rely on information provided by others to create a complete and accurate picture at the time of sentencing. *See Travis*, 347 Wis. 2d 142, ¶81. We advise the circuit court that it must carefully prepare for sentencing and thoroughly review all court documents in preparation for sentencing hearings to ensure that a defendant is sentenced on accurate information and that the public has confidence in our judiciary.

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.

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