OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

July 21, 2017

To:

Hon. M. Joseph Donald
Circuit Court Judge
Children's Court Center
10201 W. Watertown Plank Rd.
Wauwatosa, WI 53226

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Carly Cusack
Asst. State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4116

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

2016AP1819-CR State of Wisconsin v. Romel L. Grant (L.C. # 2015CF2341)

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Before Brennan, P.J., Kessler and Dugan, JJ.

Romel L. Grant appeals from a judgment of the circuit court, entered upon his guilty plea, convicting him of one count of second-degree sexual assault of a child. Grant also appeals from that portion of an order denying the majority of his postconviction motion for resentencing or sentence modification. 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 (2015-16).[1] We summarily affirm the judgment and order.

In May 2015, Grant and Christopher Barr encountered the same runaway, thirteen-year-old A.S. Barr met her first; she told him she was seventeen, and he allowed her to stay with him for the night. While she was there, they had sexual intercourse. Barr made her leave his home the next morning when he left for work. When she returned that night, he would not let her stay because he had learned she was a runaway. A.S. then met Grant, who allowed her to stay at his house. A.S. said she told Grant she was seventeen; Grant claimed she told him she was eighteen. Grant provided alcohol and marijuana to A.S.; they also had sexual intercourse. The next day, when Grant left to attend a funeral, he locked A.S. inside his house.

After A.S. was located,[2] she identified Grant from a photo array. He and Barr were each charged with one count of second-degree sexual assault of a child. Barr's charge was plea-bargained down to three counts of fourth-degree sexual assault, each a Class A misdemeanor. *See* WIS. STAT. § 940.225(3m). On two of the counts, Barr received consecutive maximum nine-month jail sentences, imposed and stayed in favor of two years' probation. On the third count, Barr was sentenced to a consecutive eight months in jail.

Grant's case, handled by a different assistant district attorney, resulted in a plea bargain where, in exchange for Grant's guilty plea, the State would recommend a prison sentence with the length left to the court. At sentencing, Grant's attorney recommended "one year House of

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] It is unclear whether the police or her parents found her.

Corrections and probation. That is equitably in line with Mr. Barr." Grant's sentence, imposed by a different judge, was five years' initial confinement and five years' extended supervision.

Grant filed a postconviction motion for resentencing, claiming the circuit court based his sentence on inaccurate information; specifically, a brief comment by the circuit court at sentencing that "Mr. Barr essentially *was charged with* misdemeanor offenses and you sit here before this court with a Class C felony and there are only two classes of felony that are more serious." (Emphasis added.) Alternatively, Grant sought sentence modification, claiming the circuit court's erroneous statement was a new factor.

The circuit court denied the motion. It explained that it was "clearly aware that each of the defendants was originally charged with the same class C felony offense and simply misspoke when it stated that Barr was 'essentially *charged* with misdemeanor offenses.'" Thus, relief was not warranted on either ground. Grant appeals.

"A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether the defendant has been denied this right is an issue we review *de novo*. *See* ***id.*** A defendant seeking resentencing because of allegedly inaccurate information "must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." ***Id.***, ¶31. "Whether the court 'actually relied' on the incorrect information … [is] based on whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citation omitted). If the defendant meets this burden, the burden shifts to the State to show the error was harmless. *See* ***id.***, ¶31 The State can meet this burden "by demonstrating that the

sentencing court would have imposed the same sentence absent the error." ***State v. Travis***, 2013 WI 38, ¶73, 347 Wis. 2d 142, 832 N.W.2d 491.

We reject Grant's argument that the circuit court's statement warranted resentencing because of inaccurate information. While technically inaccurate because Barr was not originally charged with misdemeanors, "[i]naccurate information standing alone does not require resentencing. … [T]he Constitution does not ensure perfect accuracy." *See* ***United States ex rel. Villa v. Fairman***, 810 F.2d 715, 718 (7th Cir. 1987).

The circuit court's full comment, in wider context, was:

> And what I find particularly troubling, Mr. Grant, and although I understand the arguments that your counsel has made with respect to the co-actor, Mr. Barr, and what sentence he received, and although this court was not part of that determination and therefore I don't really know all of the factors that went into that recommendation, but I do know this, that Mr. Barr essentially was charged with misdemeanor offenses and you sit here before this court with a Class C felony and there are only two classes of felony that are more serious.

The circuit court is referring to Grant's request for sentencing parity with Barr, a request that only makes sense if it relies on the premise that the two defendants are similarly situated, and both the State and Grant's attorney had informed the court that Barr originally faced the same charge as Grant. It is evident, however, that with the comment above, the circuit court was simply observing that the two men were no longer similarly situated so as to justify Grant's request for roughly equivalent sentences. That is, the status of Barr's charges was not, as will be seen below, "'part of the basis for [Grant's] sentence.'" *See* ***Tiepelman***, 291 Wis. 2d 179, ¶14 (citation omitted).

We are also unpersuaded that the circuit court's misstatement constitutes a new factor. A new factor is a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. Inaccurate information used at sentencing may be a new factor if it was highly relevant to the imposition of the sentence and was relied upon by the circuit court. *See* ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37. Whatever difference existed between Grant and Barr, it was not highly relevant to the imposition of Grant's sentence: its relevance was limited to rejecting the call for sentencing parity with Barr.

However, even if the circuit court had relied on inaccurate information, the error was harmless, and even if the circuit court's misstatement constituted a new factor, the circuit court properly exercised its discretion to determine that sentence modification was not warranted.

Wisconsin recognizes the importance of individualized sentencing. ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. To that end, we expect sentencing courts to consider a variety of factors and objectives when exercising discretion to craft a sentence. *See, e.g.*, ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. Grant's sentence is adequately supported by the record and would clearly have been the same absent any

erroneous reference to the status of Barr's offenses. *See* ***Travis***, 347 Wis. 2d 142, ¶73; *see also* ***State v. Hall***, 2002 WI App 108, ¶6, 255 Wis. 2d 662, 648 N.W.2d 41.

The circuit court adequately explained its reasoning for Grant's sentence. Grant had a history of drug or alcohol issues that necessitated treatment. Grant had a lengthy, albeit mostly nonviolent, criminal history. The circuit court believed that Grant took A.S. in not because he was seeking to help her but because he believed he could get something—sex—from her. Grant's offense was aggravated because he had provided A.S. with drugs and alcohol and because he had confined her to his home. Grant also attempted several times to minimize his offense by professing he did not know A.S.'s age. Based on these factors, the circuit court imposed a sentence it designed to address Grant's treatment needs and to protect the public. The ten-year sentence imposed is well within the forty-year statutory maximum available by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order appealed from are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals