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**DISTRICT I/IV**

September 26, 2017

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

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2016AP2462-CR

State of Wisconsin v. Isiah Deshawn Thomas  
(L.C. # 2014CF4083)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

**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).**

Isiah Thomas appeals a judgment of conviction for two counts of armed robbery as well as a circuit court order denying postconviction relief. Thomas argues that the circuit court relied on inaccurate information in sentencing him and that he is therefore entitled to 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. RULE 809.21 (2015-16).<sup>1</sup> We reject Thomas's arguments and affirm.

Thomas and several associates were involved in several carjackings across Milwaukee. As a result, Thomas was charged with four counts of armed robbery and three counts of operating a vehicle without the owner's consent. Thomas pleaded guilty to two counts of armed robbery and was sentenced to eleven years (seven years initial confinement and four years extended supervision) in the Wisconsin prison system on each count, to be served consecutively. At sentencing, the circuit court referred to Thomas as the leader of a group responsible for a total of twenty-seven carjackings, describing him as "the glue that held [the] groups together." The court considered the impact the carjackings had on Thomas's specific victims as well as the entire city. The circuit court spoke at length about how past efforts to rehabilitate Thomas had failed. The court also discussed the seriousness of Thomas's offenses. While noting that Thomas and his associates were responsible for twenty-seven carjackings, the court mentioned a specific incident in which members of the group celebrated a carjacking at Denny's before leading police on a chase through the city.

Thomas filed a postconviction motion arguing that the circuit court relied on inaccurate information when sentencing him. Specifically, Thomas argues that there is nothing in the record to support the court's suggestion that he was involved in a celebration at Denny's. He therefore argues that he is entitled to resentencing.

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

A defendant is entitled to resentencing if: (1) information at the original sentencing was inaccurate and (2) the circuit court relied on the inaccurate information. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Thomas has the burden of proving both factors by clear and convincing evidence. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

Thomas has not come close to meeting his burden on either factor. Regarding whether the circuit court's mention of a celebration at Denny's was accurate, Thomas argues that there is nothing in the discovery record provided to his attorney that references any celebration. However, the problem for Thomas is that he must present clear and convincing evidence that the information was inaccurate. *See id.*, ¶46. The fact that the celebration was not mentioned in the discovery record is not, in itself, clear and convincing evidence that the celebration did not occur.

More importantly, even a clear showing that the information was inaccurate would not help Thomas, because Thomas has not demonstrated that the circuit court relied on the Denny's celebration when it sentenced Thomas. In denying the postconviction motion, the circuit court explained that it did not rely on this information when it sentenced Thomas but instead based Thomas's sentence on his extensive criminal background, the serious nature of his offenses, his leadership role, and the impact on the victims. The court further explained that the crux of its reference to the Denny's celebration was the dangerous high speed chase that followed the visit to Denny's.

Our independent review of the record supports the circuit court's assertion that it did not rely on the information about the Denny's celebration. *See State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491 ("A circuit court's after-the-fact assertion of non-reliance" is not

dispositive, so we independently examine the record to determine whether the circuit court actually relied on the inaccurate information). As explained above, the court addressed the various sentencing factors in detail at sentencing. At one point during the hearing, Thomas objected to one aspect of his past rehabilitation as inaccurate, which gave the court a chance to correct any misperception.<sup>2</sup> Thomas does not argue that there was any other inaccurate information in the circuit court’s lengthy discussion of the various sentencing factors.

Instead, Thomas argues in conclusory fashion that celebrating a carjacking at Denny’s would tend to reflect poorly on his character, and therefore would be an aggravating factor that must have affected the court’s overall sentence. But nothing else in the sentencing transcript supports this argument, which seems to us to ascribe far too much significance to an isolated remark. Thomas contends that there is no other reason why the court would have mentioned the Denny’s celebration, but we disagree. The court was focused on a dangerous high speed chase that it had addressed just a week earlier when sentencing one of Thomas’s codefendants. Thomas admits that he was present in the vehicle for the chase, which originated near a Denny’s. The significance of whether Thomas was inside Denny’s prior to the dangerous high speed chase pales in comparison to the fact that he was in the vehicle during the chase. The court’s comments at sentencing confirm that the chase was the key aspect of the incident, as the court expressly stated that it had “made a big deal out of the chase that [the codefendant] led

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<sup>2</sup> The State points out that Thomas could have similarly objected to the reference to the celebration at Denny’s if he believed it was inaccurate. On that basis, the State argues that Thomas has forfeited his claim. See *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (“mere failure to object constitutes a forfeiture of the right on appellate review”). Assuming without deciding that the failure to object constitutes forfeiture, Thomas argues that we should address the merits of his claim notwithstanding the potential forfeiture. See *State v. Beamon*, 2013 WI 47, ¶49, 347 Wis. 2d 559, 830 N.W.2d 681 (forfeiture is a rule of “administration and not of power”). We exercise our discretion and address the merits of his claim.

everybody on.” In contrast, there is nothing in the record to suggest that the court similarly considered the Denny’s celebration to be “a big deal.”

In sum, even if the circuit court inaccurately stated that Thomas participated in a celebration at Denny’s, the court’s in-depth consideration of other, accurate sentencing factors convinces us that the circuit court did not rely on this celebration when it sentenced him. *See State v. Lechner*, 217 Wis. 2d 392, 421-23, 576 N.W.2d 912 (1998) (defendant was not entitled to resentencing where circuit court’s references to inaccurate information were insignificant in light of its in-depth consideration of proper sentencing factors).

Because Thomas has not met his burden of showing clear and convincing evidence that the circuit court relied on inaccurate information when sentencing him, we affirm the circuit court’s decision denying his motion for postconviction relief.

Upon the foregoing reasons,

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

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

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