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November 16, 2017

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

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2017AP350-CR State of Wisconsin v. David Henry Barnes (L.C. # 2015CF2127)

Before Kloppenburg, Blanchard 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).**

David Henry Barnes appeals from a judgment of conviction and an order denying his postconviction motion. Barnes argues that the circuit court relied on inaccurate information when 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).[1] We affirm.

Barnes was charged with two counts of repeated sexual assault of the same child. According to the criminal complaint, Barnes sexually assaulted the daughter of his live-in girlfriend over a three year period, beginning when she was eleven years old. After his victim became pregnant, Barnes admitted to police that he had sexual intercourse with her, though he claimed it was just on one occasion, at her purported insistence. Barnes eventually agreed to a plea agreement in which the prosecutor amended the second count of repeated sexual assault to first-degree child sexual assault. Barnes pleaded guilty to count two as amended, and count one, repeated sexual assault, was dismissed but read in for sentencing purposes. The circuit court sentenced Barnes to thirty years of initial confinement and fifteen years of extended supervision.

Barnes subsequently filed a postconviction motion for resentencing on the ground that the sentencing court relied on inaccurate information. Specifically, during the sentencing hearing, the court incorrectly stated that Barnes had been convicted of repeated sexual assault. The circuit court denied this motion for sentence modification, concluding that the sentencing court[2] misspoke when it referred to the wrong offense, and that the full context showed that the court understood the charge to which Barnes pleaded guilty. The circuit court further determined that,

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

[2] Barnes was sentenced by Judge Timothy Dugan, but his postconviction motion was decided by Judge Jeffrey Wagner, who had succeeded Judge Dugan in this particular rotation. For clarity, we hereafter refer to Judge Dugan as "the sentencing court" and Judge Wagner as "the circuit court."

even if the sentencing court had erroneously believed that Barnes had been convicted of repeated sexual assault, any error was harmless.

A defendant has a due process right to be sentenced based on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a question of law which we review de novo. ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. A defendant is eligible for resentencing if: (1) information at the original sentencing was inaccurate; and (2) the circuit court actually relied on the inaccurate information. ***Tiepelman***, 291 Wis. 2d 179, ¶26. The defendant has the burden of proving both factors by clear and convincing evidence. ***Payette***, 313 Wis. 2d 39, ¶46. If a defendant makes both showings, then the defendant is entitled to resentencing unless the State can show that the error was harmless. ***Tiepelman***, 291 Wis. 2d 179, ¶26.

Barnes argues that there was inaccurate information at sentencing, because the sentencing court incorrectly stated that he had been convicted of repeated sexual assault. He contends that this incorrect statement evinced the court's belief that this was the charge to which he had pleaded guilty. This mistake in turn means that the circuit court must have erred in sentencing him.

In order to demonstrate that the sentencing court actually relied on inaccurate information, Barnes must show that the court made explicit reference or gave specific consideration to the inaccurate information, such that the inaccurate information formed part of the basis for the sentence. *See* ***State v. Travis***, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491. Barnes has identified one explicit reference to incorrect information. Our task is to review

the record to determine whether this incorrect information formed part of the basis for his sentence. *See* ***id.***, ¶31.

Here, the record does not clearly demonstrate that the sentencing court actually believed that Barnes had pleaded guilty to repeated sexual assault. The plea hearing, conducted thirty days earlier, shows that the sentencing court was aware that count two of the complaint had been amended to first-degree sexual assault. Although the court never explicitly identified the correct offense at the sentencing hearing, there is ample evidence in the record that the court remained aware that Barnes had pleaded guilty to first-degree sexual assault. For example, the sentencing court explicitly referred to the amended information at the outset of the sentencing hearing when it reviewed its notes of the plea. We therefore think it is unlikely that the sentencing court believed that Barnes had pleaded guilty to count two from the original complaint. Moreover, the State's argument at sentencing relied heavily on the fact that Barnes had only admitted one instance of sexual contact. Specifically the State argued that, because Barnes had admitted only the one sexual assault that could be proven by his victim's pregnancy, Barnes had failed to accept responsibility for his actions. The sentencing court drew on this argument later at the hearing, stating that Barnes would need extensive rehabilitation to address his failure to grasp how horrible his conduct was. This discussion further undermines the argument that the sentencing court believed that Barnes had pleaded guilty to the charge of repeated sexual assault.

Our conclusion that the sentencing court was aware of the correct offense is bolstered by the sentencing court's discussion of the penalty that Barnes was facing for his plea to count two of the amended complaint. Specifically, the court explained that count one of repeated sexual assault had been dismissed and read-in, and that this count carried a maximum penalty of sixty years including a mandatory minimum of twenty-five years initial confinement. The court then

explained that "count two that you pled to also carries with it a maximum period of imprisonment of 60 years, 40 years of initial confinement, 20 years of extended supervision." This information was correct, and it undermines any suggestion that incorrect information formed part of the basis for Barnes' sentence.

Barnes argues that this discussion of the penalty he was facing is not dispositive because it corresponds to the way the two counts of repeated sexual assault were charged in the initial complaint. Specifically, count two was not charged as an offense with a mandatory minimum penalty in the original complaint. Thus, Barnes contends that the sentencing court was "obviously" referring to the original count two when it discussed his offenses. We reject this argument because count two in the original complaint did not state the bifurcated portions of the maximum sentence that Barnes was facing. We therefore think it is more likely that the sentencing court was relying on the amended information, which contains a handwritten note with the bifurcated sentence.[3] The amended information correctly states that count two is first-degree sexual assault of a child.

Barnes also points to the sentencing court's comments about the serious nature of his offenses and argues that the court would not have made the same comments if it were aware that he had pleaded guilty to first-degree sexual assault, and not repeated sexual assault. This argument goes nowhere. First-degree sexual assault of a child is a serious offense, whether or not the conduct is repeated, especially given the aggravating factor of his victim's resulting

[3] In denying Barnes' postconviction motion, the circuit court noted that the sentencing court would have had the benefit of the plea questionnaire and waiver of rights form. This form also correctly stated the offense to which Barnes had pleaded, as well as the bifurcated portions of the maximum penalty.

pregnancy. Indeed, the State made precisely this argument at sentencing, stating that sexual assault of a child is a "very, very serious felony." Moreover, the fact that the sentencing court mentioned the repeated nature of his conduct does not help Barnes either, due to the read-in charge.[4] Because the plea deal allowed the sentencing court to consider one count of repeated sexual assault, the court was relying on relevant considerations and accurate information when it stated that Barnes repeatedly assaulted his young victim, that his offenses were serious, and that his offenses had a dramatic and grave impact on his victim and her family. *See* ***Travis***, 347 Wis. 2d 142, ¶80 (due process requires "a 'fair sentencing process' in which the sentencing 'court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information'" (quoted source omitted)). The sentencing court's discussion is wholly consistent with a correct belief that Barnes was being sentenced for a conviction on one count of first-degree sexual assault with a read-in charge of one count of repeated sexual assault. Likewise, nothing in this discussion compels the conclusion that the sentencing court was not aware of the offense to which Barnes pleaded guilty.

Thus, in view of the full record, the sentencing court's incorrect statement appears to us to be an isolated mistake. We therefore reject Barnes' argument that the sentencing court was

[4] In his reply brief, Barnes argues for the first time that the sentencing court may have erred in its consideration of the read-in charge of repeated sexual assault. *See* ***State v. Straszkowski***, 2008 WI 65, ¶92, 310 Wis. 2d 259, 750 N.W.2d 835 ("A circuit court should not deem a defendant's agreement to have a charge read in for consideration at sentencing and dismissed on the merits to be an admission of guilt of the read-in charge for purposes of sentencing."). He suggests that the sentencing court gave too much weight to this charge. We typically do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). Barnes suggests that this newly raised argument is merely responsive to the reasoning in the State's brief, which draws in part on the impact of the read-in charge. However, the circuit court also relied on the read-in charge when it denied the postconviction motion. Accordingly, we conclude that Barnes has forfeited any argument that the sentencing court erred with respect to the read-in charge.

not aware of the crime for which it was imposing sentence. This means that Barnes has not satisfied his burden of showing by clear and convincing evidence that the sentencing court relied on inaccurate information when sentencing him. *See* ***Payette***, 313 Wis. 2d 39, ¶46.

But even if Barnes had satisfied his burden, we conclude that any error was harmless. An error is harmless if the State can demonstrate that the same sentence would be imposed without the error. *See* ***Travis***, 347 Wis. 2d 142, ¶73. Here, when Barnes pleaded guilty to first-degree sexual assault, the circuit court informed him that count one, repeated sexual assault of a child, would be read in for sentencing purposes. Accordingly, the sentencing court properly considered the repeated nature of Barnes' offenses in determining the appropriate sentence. We are hard pressed to see any reasonable probability of a different outcome given the horrific nature of these offenses.

Nonetheless, Barnes argues that if inaccurate information formed part of the basis for sentencing, then it does not matter if the remaining information might have justified the same sentence. *See* ***id.***, ¶47. But a key distinction is that the inaccurate information in ***Travis*** was a mandatory minimum term of confinement that did not, in fact, apply to the defendant's offense. *See* ***id.***, ¶78. Our supreme court explained that this inaccurate information about the mandatory minimum threw off the sentencing framework and made it impossible for the court to properly exercise its discretion. *See* ***id.***, ¶80. In contrast, the record in this case shows that the sentencing court was aware that the charge to which Barnes pleaded guilty did not have a mandatory minimum penalty. The sentencing court also correctly stated the maximum penalty for Barnes' offense. Without any indication in the record that the sentencing court was relying on an incorrect penalty framework, we see no basis for concluding that the court did not properly exercise its discretion.

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*