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DISTRICT II

April 11, 2018

To:

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

2017AP1157-CR

State of Wisconsin v. Thomas C. Burton, Sr. (L.C. #2014CF1322)

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

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).

Thomas Burton, Sr., appeals from a judgment convicting him of being a felon in possession of a firearm and from a circuit court order denying his motion seeking resentencing because the circuit court allegedly relied upon inaccurate information at sentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. WIS. STAT. RULE 809.21 (2015-16).¹ We affirm because the record does not support Burton's challenge to his sentence.

Burton pled guilty to being a felon in possession of a firearm. During its remarks at the sentencing hearing, the circuit court noted that Burton faced a pending charge of manufacturing or delivering cocaine. Shortly thereafter and as it discussed Burton's apparent involvement in drug dealing, the circuit court mistakenly described the pending charge as involving heroin. Burton did not object or otherwise seek to correct the circuit court's misstatement.

Postconviction, Burton argued that he was sentenced based on the circuit court's erroneous description of the pending drug charge as involving heroin. The circuit court disagreed and declined to resentence Burton. The court noted that in sentencing Burton, it had considered Burton's prior criminal conduct including multiple prior offenses of felon in possession of a firearm and his history of violence with firearms. The court noted that it correctly described the pending drug charge shortly before mistakenly describing that charge. Burton appeals.

Preliminarily, we note that Burton did not object to the circuit court's mistaken reference to the pending drug charge as involving heroin. Even if Burton had objected, we would affirm the circuit court's postconviction determination that he was not sentenced based on inaccurate information.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To obtain resentencing, a

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

defendant must establish that the information was inaccurate and the sentencing court actually relied upon the inaccurate information at sentencing. *Id.*, ¶28. Whether a due process violation has occurred presents a question of law that we decide independently of the circuit court. *Id.*, ¶9.

The sentencing transcript makes clear that the circuit court reviewed and closely considered Burton's lengthy history of criminal conduct. The court spent multiple transcript pages reviewing Burton's personal history and prior experience with violent and other criminal conduct. It was in this context that the circuit court first mentioned the pending cocaine charge and shortly thereafter referred to the same charge as involving heroin. The record does not substantiate that at sentencing the circuit court relied upon inaccurate information about Burton's pending drug charge. The court's misstatement does not detract from the court's focus at sentencing.

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.

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

Sheila T. Reiff
Clerk of Court of Appeals