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DISTRICT II

February 20, 2019

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

2018AP1066-CR State of Wisconsin v. Richard J. Gravelle (L.C. #2017CF113)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Richard J. Gravelle, pro se, appeals from the circuit court's judgment of conviction and order denying his postconviction motion. 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 (2017-18).[1] We affirm.

In 2017, Gravelle pled guilty to one count of operating a motor vehicle while intoxicated (OWI), sixth offense, WIS. STAT. § 346.63(1)(a). The circuit court sentenced him to four years of initial confinement and four years of extended supervision and imposed a fine. The court also determined Gravelle ineligible to participate in the Substance Abuse/Earned Release Program (SAP). Gravelle moved for postconviction relief, seeking resentencing due to the circuit court's reliance on inaccurate information or sentence modification due to a new sentencing factor. The circuit court denied his motion.

On appeal, Gravelle renews his postconviction arguments as to inaccurate information and a new sentencing factor. He also argues that the circuit court erroneously exercised its sentencing discretion by misapplying sentencing factors.

Whether a defendant has been denied the due process right to be sentenced upon accurate information is a constitutional issue that we review de novo. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" ***Id.***, ¶26 (citation omitted); *see also* ***State v. Harris***, 2010 WI 79, ¶33 n.10, 326 Wis. 2d 685, 786 N.W.2d 409 ("Proving inaccurate information is a threshold question—you cannot show actual reliance on inaccurate information if the information is accurate."). If actual

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

reliance on inaccurate information is shown, the State must prove the error was harmless. ***Tiepelman***, 291 Wis. 2d 179, ¶26.

Inaccurate information is that which is "materially false." ***Id.***, ¶10 (quoting ***Townsend v. Burke***, 334 U.S. 736, 741 (1948)). To assess the circuit court's reliance on such information, we consider whether the court gave explicit attention to the information and whether that information "formed part of the basis for the sentence." ***State v. Alexander***, 2015 WI 6, ¶30, 360 Wis. 2d 292, 858 N.W.2d 662 (citation omitted) (noting that we may also consider the postconviction court's remarks on the matter).

Gravelle asserts the circuit court relied on the following information, all of which he calls inaccurate: (1) that his prior alcohol treatment efforts were involuntary, (2) that those efforts were unsuccessful, and (3) that he posed a danger to the public given his prior criminal record.

As to his first claim, the court-ordered presentence investigation (PSI) noted that Gravelle had received alcohol treatment during prior periods of incarceration and supervision. The PSI stated that, among these efforts, Gravelle checked into a voluntary inpatient treatment program and enrolled in a residential treatment program while incarcerated. The State and the PSI writer both opined at sentencing that Gravelle's participation in the prior treatment was likely a condition of his supervision. The State's comment arose while addressing Gravelle's danger to the public: "And despite the fact that he has had [alcohol] treatment while he's been on supervision, and [I would] note that it appears he's only had treatment when he [wa]s on supervision and *probably* as a direct result of his supervision, he continues to drink and drive." (Emphasis added.) Later, in response to the circuit court's question on how Gravelle's prior treatment should be considered, the PSI writer stated,

> I think it's just a factor. It's there. We looked at the fact he did involve himself in treatment, but he also appeared to be on supervision during the times that he was in treatment. So was it voluntary? *I don't know*. But I would *assume*, based on his activity and offenses, his agent mandated him to do those programs.

(Emphasis added.)

Gravelle contends that these statements put forth inaccurate and false information as to the voluntariness of his participation in prior treatment. Yet, neither statement offers anything other than a subjective opinion, and nothing in the record shows that these stated presumptions altered the accuracy of any information before the circuit court. Moreover, the record does not suggest that the court even relied on these inferences. Rather, its decision is clearly couched in the gravity of the instant offense within the broader context of Gravelle's history of repeated OWIs and other criminal behavior. The only time the court addressed Gravelle's prior treatment at sentencing was during its discussion of his SAP eligibility when it noted that, notwithstanding such treatment, he had committed another OWI. As the circuit court concluded in denying Gravelle's postconviction motion, "[w]hat mattered to the [sentencing] court was not whether the treatment was voluntary or involuntary, but the fact that the treatment had been unsuccessful in preventing Gravelle from committing his sixth OWI offense."

As to Gravelle's other two claims—the effectiveness of his prior treatment and his danger to the public—we see no inaccuracy in the information at stake. The PSI detailed Gravelle's prior treatment efforts and his lengthy criminal record. Aside from some minor corrections, Gravelle confirmed that this information was accurate. His posthoc disagreement with the court's assessment of those facts does not render them inaccurate. In total, we conclude that the circuit court did not rely on inaccurate information at sentencing.

Gravelle's next argument is that he is entitled to sentence modification based on a new sentencing factor. In his postconviction motion, Gravelle asserted that correction of the allegedly inaccurate information would enable the circuit court to determine whether there was a new factor justifying sentence modification. He appears to make the same assertion on appeal. The circuit court found no new factor existed, and we agree. *See* ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828 (whether a new factor exists is a question of law).

Finally, Gravelle contends that the circuit court erred in imposing his sentence by giving too much weight to improper sentencing factors and relying on irrelevant ones.[2] Gravelle concludes that because of these errors "a huge chunk of incarceration and confinement was imposed based upon the fact that [he] is an alcoholic." We find no merit to Gravelle's contention or conclusion.

In determining an appropriate sentence, the sentencing court has broad discretion to consider and weigh relevant sentencing factors. ***Harris***, 326 Wis. 2d 685, ¶30. The court need not address all relevant sentencing factors on the record, but must identify those most relevant and explain how the sentence imposed furthers its sentencing objectives. ***Id.***, ¶¶28-29. Our review of a sentencing decision is limited to determining whether the sentence is based on or in actual reliance on clearly irrelevant or improper factors. ***Id.***, ¶30.

[2] The State argues that Gravelle forfeited this challenge by not raising it in his postconviction motion. While recognizing the values protected by the forfeiture rule, we decline to apply the rule here and will instead consider the merits of the issue. *See* ***State v. Beamon***, 2013 WI 47, ¶49, 347 Wis. 2d 559, 830 N.W.2d 681 (noting the forfeiture rule is one of "administration and not of power" (citation omitted)).

In sentencing Gravelle, the circuit court expressly identified and considered the three primary sentencing factors: the gravity of his offense as a sixth OWI involving a high blood alcohol concentration (.257); the need to protect the public in light of his shown propensity to endanger others; and his character and rehabilitative needs, which involved positives of his being educated, employable, and openly accepting of responsibility, but also his continued willingness to drink and drive. *See* ***id.***, ¶28. The court added that it found Gravelle's criminal record, which included multiple non-OWI offenses, to be "very troubling." Noting that public safety was its overriding concern, the court imposed a punishment within the applicable statutory range. WIS. STAT. § 939.50(3)(g). It then expressly addressed but declined to find Gravelle eligible for SAP participation due to the seriousness of his offense. In total, Gravelle's sentence was based on proper consideration of appropriate factors that were adequately set forth in the record. Accordingly, we see no error in the circuit court's discretionary sentencing decision.

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