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DISTRICT II

April 10, 2019

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

2018AP1081

State of Wisconsin v. John M. Graf (L.C. #2017CF62)

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).

John M. Graf seeks 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 (2017-18).¹ We affirm the circuit court’s order denying Graf’s motion for resentencing.

Graf pled guilty to two counts of sexual intercourse with a child age sixteen or older, WIS. STAT. § 948.09, and one count of child enticement, WIS. STAT. § 948.07(3). As part of the plea agreement, the State adhered to the sentencing recommendation set forth in the presentence investigation report (PSI), which recommended nine months in jail on each of the sexual intercourse with a child charges and three years’ initial confinement and three years’ extended supervision on the child enticement charge to be served concurrently. The court imposed a sentence of nine months in jail on each of the sexual intercourse with a child counts and three years’ initial confinement followed by seven years’ extended supervision on the child enticement count, all running concurrent.

Graf argues that the court relied on inaccurate information at sentencing. First, Graf claims that the court relied on information from the PSI that he had two children near in age to the victim, which Graf claims is inaccurate as the children “were not his.” Second, Graf argues that the court considered him a “dangerous man” due to a probation violation in 2011 that Graf claims to be inaccurate as it had no “relevance” to this case and there was nothing “inappropriate” between Graf and the minors in that violation.

Whether a defendant has been sentenced according to inaccurate information and therefore denied due process presents a constitutional question we review independently. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant must show:

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

(1) that there was inaccurate information and (2) that the court relied on the inaccurate information. *Id.*, ¶31. The defendant has the burden to establish by clear and convincing evidence that the court actually relied on the inaccurate information. *State v. Travis*, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491.

We agree with the circuit court that Graf has not shown that any inaccurate information was before the court at sentencing. While Graf claims that he “was never adjudicated as the father” of the children in Arizona, he has never denied that he is their father; hence, it was not error for the court to comment during sentencing that Graf was sexually assaulting a child roughly the same age of his own children. Likewise, the court’s reference to Graf drinking while on probation in 2011 in the company of minor children as being a concern to the court was not shown by Graf to be untrue. Graf’s only argument is that the incident did not have “relevance” to this case. Graf’s argument does not attack the truth of the information, it attacks the weight the court placed on that information.

We also agree with the State’s forfeiture argument that Graf was aware of the above issues at the time of sentencing as the information was in the PSI report. Graf acknowledged at sentencing that he had reviewed the PSI report, and his trial counsel even identified several factual assertions that Graf disputed, neither of which concerned the two issues raised in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that order of the circuit court is 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