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DISTRICT II

September 11, 2019

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

2018AP1406-CR State of Wisconsin v. Marcus D. Buford (L.C. #2016CF126)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Marcus Buford appeals from judgments convicting him of misdemeanor disorderly conduct (domestic abuse), violating a no contact order, resisting an officer, and fleeing/eluding an officer, all as a repeat offender, and from an order denying his postconviction motions. 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 agree with Buford that he was sentenced based on inaccurate information. For that reason, we reverse with directions that Buford be resentenced.

At Buford’s June 2016 sentencing, the circuit court considered the severity of the crimes, Buford’s character, and whether he posed a danger to the public. To buttress its view that Buford was dangerous to his companion, the children in her household, and to the public, the circuit court relied upon information it claimed derived from the Fourth National Incidence Study of Child Abuse and Neglect (NIS-4, Report to Congress, U.S. Dept. of Health and Human Services, Jan. 15, 2010) (hereafter the NIS-4). At sentencing the circuit court stated the following:

[W]hat is really frightening to me is that you are living with five or six children; apparently, five of whom are not yours, and actually, the “Fourth National Incidence Study of Child Abuse and Neglect” from the U.S. Department of Health and Human Services, this is the period of 2009 to 2010 ... reported that children who live with a biological parent and the parent’s live-in partner—and that’s this situation—have an incidence of sexual assault which is 19.8 times higher than of a child living with married biological parents....”

Placing significant weight on the foregoing consideration, the circuit court imposed eighteen months of initial confinement and two years of extended supervision for fleeing/eluding an officer and withheld sentence and imposed two years of probation as to all other counts. The circuit court considered Buford’s prior offenses, which it described as a “really ... ugly criminal history,” including sexual assault of a sixteen-year-old child. The court also considered that Buford was not supporting his children and evaluated his character in the context of his

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

relationships with women and the imminent risk he posed to his companion's children. When fashioning conditions of probation, the circuit court again deemed Buford a risk to nonbiological children and required that he not reside in any place in which minor children or women reside unless the circuit court approved such a living situation.

Postconviction, Buford argued *inter alia* that he was sentenced based on inaccurate information because the NIS-4 upon which the circuit court relied did not contain the information cited by the circuit court: children with a live-in partner “have an incidence of sexual assault which is 19.8 times higher than of a child living with married biological parents” (hereafter the “19.8 analysis”). Buford argued that the circuit court explicitly and repetitively referred to the 19.8 analysis during its sentencing rationale and relied upon the analysis at sentencing.

The circuit court denied Buford's postconviction motion without a hearing. In a memorandum decision, the circuit court reaffirmed its belief in the accuracy of the 19.8 analysis. The circuit court described the studies upon which it relied as tools that should be used in “risk assessment of future criminality.” The court cited these studies and criticized COMPAS² for “ignor[ing] readily available data [in the studies upon which the circuit court relied] which collects the incidence of violence *and* against women and children.” The circuit court again affirmed the accuracy and relevancy of the 19.8 analysis.

² COMPAS stands for the Correctional Offender Management Profiling for Alternative Sanctions and is a risk assessment tool used in sentencing.

Buford filed a supplemental postconviction motion focusing on the circuit court's reliance upon the 19.8 analysis. Buford argued that the NIS-4 does not contain this information and was not designed to be predictive of risk in criminal cases. The circuit court heard argument on the motion and denied it. During the hearing, the circuit court again asserted the accuracy and relevancy of the 19.8 analysis.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To obtain resentencing, a defendant must establish by clear and convincing evidence that the information was inaccurate and the court actually relied upon it. *Id.*, ¶28. Whether the circuit court relied upon inaccurate information at sentencing presents a question of law we decide independently of the circuit court. *See id.*, ¶9. When the defendant meets his or her burden to show that the circuit court relied upon inaccurate information at sentencing, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26. The State can meet its burden to show harmless error by showing that the sentencing court would have imposed the same sentence absent the error. *State v. Travis*, 2013 WI 38, ¶73, 347 Wis. 2d 142, 832 N.W.2d 491. The focus is on the sentencing transcript, not the postconviction motion hearing or speculation about what the circuit court would do at resentencing. *Id.*

Buford argues that the circuit court relied upon inaccurate information at sentencing. The State concedes that the 19.8 analysis does not appear in the studies relied upon by the circuit court, and the State does not argue on appeal that the 19.8 analysis is accurate. Accordingly, we deem it conceded that the 19.8 analysis was inaccurate information, and we turn to whether the circuit court relied upon this inaccurate information at sentencing. The State argues that even if

the circuit court relied upon this inaccurate information, such reliance was harmless because the court would have imposed the same sentence without this information. *See id.*

The record confirms that the circuit court repeatedly and explicitly referred to the NIS-4 and the 19.8 analysis as it assessed Buford's character and addressed whether Buford posed a danger to the public. The circuit court assessed Buford's risk to the public largely based on a study that does not state the fact upon which the circuit court relied. The circuit court placed great weight on the 19.8 analysis in its sentencing rationale and, on more than one occasion, restated the accuracy and relevancy of this fact to the sentence. We agree with Buford that the circuit court's reliance on the 19.8 analysis "permeated the court's decision making impacting both the length of the sentence given as well as the types of conditions of supervision imposed." *See id.*, ¶¶85-86. Given the pervasiveness of the circuit court's reference to and reliance upon the 19.8 analysis, we conclude that the circuit court relied upon inaccurate information.

Based on this record, it is not clear beyond a reasonable doubt that the circuit court would have imposed the same sentence without this inaccurate information. *Id.*, ¶86. Therefore, the State has not met its burden to show that the error was harmless, and *resentencing* must occur.

We reverse and remand for an exercise of sentencing discretion that yields a sentence based on accurate information.³

Upon the foregoing reasons,

³ Because Buford will be resentenced, we do not address his challenges to the conditions of probation to which he also objects.

IT IS ORDERED that the judgments and order of the circuit court are summarily reversed 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