

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2058-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVIN L. T.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Marvin L.T. appeals the judgment convicting him of incest with a child and the order denying him postconviction relief. He claims the trial court sentenced him on the basis of inaccurate information. However, we conclude that Marvin has failed to show that the information relied upon by the trial court was inaccurate. Accordingly, we affirm.

BACKGROUND

A high school student reported to a guidance counselor that her friend, Bessie, had told her that she was pregnant with her father's child, and that her father had been sexually assaulting her and two of her sisters for years. Bessie's sister also said that she had been told by other family members that their father had impregnated Bessie. When questioned, Bessie gave several different explanations for her impregnation. Multiple paternity tests, however, showed greater than a ninety-nine percent probability that Bessie's father, Marvin, was the father of her child. Tests also excluded another man as the father. Based on the results of the paternity tests, Marvin was charged with and eventually pled guilty to one count of incest with a child, contrary to § 948.06(1), STATS. In exchange for the plea, the State agreed not to recommend more than eight years imprisonment.

The presentence investigation report (PSI) by the Department of Probation and Parole summarized interviews with a number of family members. Bessie said that she had "helped herself" one night after her father had passed out from drinking, and that it was an isolated incident. Marvin claimed that he had no recollection of the sexual encounter which resulted in Bessie's pregnancy, and denied any other incestuous relations. Marvin's wife, Diane, also denied that any incest had occurred and blamed Bessie for Marvin's arrest. Diane's son, Jonathan, from a previous marriage and Diane's sisters told the probation agent that Marvin had been physically and verbally abusive to the entire family for years and that Marvin had said he intended to avoid serving time by having Bessie say that she had initiated intercourse with him while he was unconscious. One of Diane's sisters said she also suspected that Marvin had molested Jonathan when he was a child, although Jonathan denied it.

Marvin introduced an alternate report prepared by his expert, based upon Bessie's story that she had initiated sexual intercourse with her father while he was unconscious. The report discussed Marvin's abusive childhood and his traumatic experiences in Vietnam and in a prisoner of war camp in Laos. Although noting that Marvin's stepson Jonathan exhibited symptoms consistent with physical abuse, the defense expert concluded that there was no evidence to substantiate the allegations of additional sexual encounters between Marvin and any of the children.

The trial court found Bessie's story that she had "helped herself" while her father was unconscious to be incredible, and it sentenced Marvin to eight years imprisonment in accordance with the State's recommendation. Marvin moved for a modification of sentence on the grounds that the trial court had relied on inaccurate information in violation of his due process rights. The trial court denied Marvin's postconviction motion and this appeal followed.

STANDARD OF REVIEW

"[A] defendant carries the burden to prove by clear and convincing evidence that there was a due process violation in the sentencing process." *State v. Littrup*, 164 Wis.2d 120, 124, 473 N.W.2d 164, 165 (Ct. App. 1991). This court will independently determine whether a defendant has established a constitutional violation. *Id.* at 126, 473 N.W.2d at 166.

DISCUSSION

A defendant has a due process right “to be sentenced on the basis of true and correct information” relating to “the offense and the circumstances of its commission, and the defendant’s personality, social circumstances and general pattern of behavior.” *State v. Perez*, 170 Wis.2d 130, 138, 140, 487 N.W.2d 630, 633 (Ct. App. 1992) (internal citations omitted). The PSI is the trial court’s principal source of this information. *Id.* at 140, 487 N.W.2d at 634. Accordingly, appropriate measures must be taken to safeguard the accuracy and reliability of the information contained in it. The PSI must be prepared by a probation or a parole agent, who is a judicial officer independent of either the defense or the prosecution. *Id.* at 140-41, 487 N.W.2d at 634. A defendant and defense counsel must be given an opportunity to examine the PSI and to refute what they allege is inaccurate information contained within it. They also must be allowed to present any additional information which they believe is relevant to sentencing. *Id.* at 141-42, 487 N.W.2d at 634.

The record does not show that Marvin was denied any of these procedural safeguards. To the contrary, he took advantage of his opportunity to refute information in the PSI and he presented additional information for the trial court to consider. Nonetheless, he maintains that he was denied due process because of suggestions that he may have engaged in other acts of incest with his children and pressured Bessie to recant and fabricate how the intercourse occurred.

To establish a due process violation based solely on inaccurate sentencing information, a defendant must show not only that some of the information contained in the PSI was inaccurate, but also that the trial court relied on the inaccurate information. *State v. Johnson*, 158 Wis.2d 458, 468, 463

N.W.2d 352, 357 (Ct. App. 1990). We agree with the trial court's conclusion that Marvin failed to meet this burden by clear and convincing evidence.

First, the information before the trial court relating to ongoing incestuous activity between Marvin and his children included, not only the suspicions relayed to both presentence investigators by Marvin's sister-in-law, but also Bessie's statement to her school friend that her father had been molesting her and her sisters for years. Although Marvin concedes that the trial court could properly consider this evidence, see *State v. Mosely*, 201 Wis.2d 36, 45, 547 N.W.2d 806, 810 (Ct. App. 1996) (holding the trial court may consider hearsay at sentencing), he refuses to acknowledge that the trial court could place greater weight on Bessie's reported confidence to a friend than on the account she gave to authorities when her father was facing conviction and time in prison for incest and her mother was blaming her for breaking up the family. The school friend's report of what Bessie had told her was reliable because it was corroborated by the paternity tests showing that Marvin was probably the father of Bessie's child.

Furthermore, there is nothing in the record which shows that the trial court sentenced Marvin based on a pattern of incestuous conduct rather than on the single incident for which he was convicted. The trial court reasoned that it could not condone a father having intercourse with his daughter, and observed that "anything short of [imprisonment] would unduly depreciate the seriousness of the offense." The court also noted the aggravated impact on the victim caused by bearing her father's child and Marvin's continuing refusal to accept responsibility for his conduct. The court did not mention any of the other children, or any other alleged incidents.

The trial court did take into consideration the fact that Marvin had pressured his daughter to say that she had initiated the sexual contact while he was unconscious. Again, however, Marvin has failed to show that that information was inaccurate. Two different people told investigators that Marvin had stated that he planned to avoid prison by having Bessie say she initiated the sexual contact, and Bessie did in fact come up with an incredible story to explain the incest two days before Marvin's trial was scheduled. Bessie's aunt said that Marvin had complete control over Diane's life and that Jonathan was afraid of Marvin and what he might do. The investigator herself observed fear in Bessie's eyes when she interviewed her. In addition, the prosecutor informed the court at sentencing that Marvin had been living in the same house with the victim throughout the pendency of the case, despite a no-contact condition of his bail. In light of all the evidence before the trial court, Marvin has failed to carry his burden of proof to show that due process violation occurred.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

