

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP19-CR

Cir. Ct. No. 2011CF2863

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KELVIN D. KIRK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Kelvin D. Kirk appeals an order denying his motion for sentence modification. He argues: (1) that the circuit court sentenced him based on inaccurate information; (2) that he is entitled to sentence

modification based on a new factor; and (3) that the circuit court should have recused itself from deciding the postconviction motion. We affirm.

¶2 Kirk pled no contest to attempted first-degree intentional homicide, as an act of domestic abuse. He inflicted horrific injuries on the victim, with whom he was in a relationship, severing her jugular vein with a knife and cutting her neck from one ear to the other. He left her to die where he attacked her in the basement of their home, taking her car and credit cards.

¶3 Kirk argues that the circuit court sentenced him on the basis of inaccurate information because it was not aware that he had been formally diagnosed with a mental illness. He also contends that the court did not read the report of Dr. Susan Lisowski, a psychologist, who diagnosed him with post-traumatic stress disorder and a psychotic disorder, not otherwise specified.

¶4 “A defendant has a due process right to be sentenced based on accurate information.” *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted). “[A] defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information [when] sentencing.” *State v. Tiepelman*, 2006 WI 66, ¶17, 291 Wis. 2d 179, 717 N.W.2d 1 (citation omitted).

¶5 Kirk’s arguments are undercut by the record. The circuit court was aware that Kirk had been diagnosed with a mental illness. During the sentencing hearing, Kirk’s lawyer told the court that Kirk had been diagnosed with mental illness, and suggested that his extremely violent assault on the victim, with whom he had been living peacefully, was consistent with mental illness. In addition, both the prosecutor and defense counsel referred the court to information in the

record about Kirk's mental illness; the prosecutor pointed to the presentence investigation report, which discussed a diagnosis made when Kirk was in Mendota Mental Health Institute, a psychiatric hospital, and the defense directed the court's attention to the report by Dr. Lisowski, which the court then reviewed before continuing with the sentencing hearing. When explaining the reasons for its sentence, the court noted that Kirk had been diagnosed with anti-social personality disorder and malingering at Mendota and that he had a history of many different types of treatment over the years. After discussing the facts of the crime, Kirk's criminal history, and his drug abuse, the court concluded that Kirk had "treatment needs, mental health needs, and drug and alcohol needs." The sentencing transcript establishes that the court was well aware of both Kirk's mental illness and the report of Dr. Lisowski.

¶6 Beyond the substantiation the transcript provides, the circuit court provided additional detail in its order denying the postconviction motion. The court noted that there were multiple psychological reports in the record because Kirk's attorney had raised a competency issue and pointed out that the copy of the report provided to the court at sentencing "is replete with yellow highlighted passages and yellow highlighter notations in the margins," which were "the court's markings" from when it read the report before sentencing. The court further explained:

The court thoroughly reviewed the report *twice* in conjunction with all the other reports available at sentencing. The court makes every effort to make a record of all of the materials it reviewed prior to sentencing. While the court neglected to make a specific record regarding Dr. Lisowski's report, the court was referring to *all* of the sentencing materials, *including Dr. Lisowski's report*, when it stated, "And I have reviewed all of this material...."

The court was aware of the competing mental health diagnoses offered by Drs. Lisowski and Knudson prior to sentencing but did not find it necessary to reject one expert's opinion for the other. The court accepted that the defendant had "a history of a lot of different treatment" and that he "ha[d] a lot of treatment needs, and drug and alcohol needs." [Record citation omitted.] However, the court was not required to assign any particular weight to that factor or to expressly mention Dr. Knudson's or Dr. Lisowski's report during its sentencing decision.

Because the record establishes that the circuit court was aware of Kirk's mental illness and Dr. Lisowski's report, we reject Kirk's claim that the court sentenced him on the basis of inaccurate information.

¶7 Kirk next argues that he is entitled to sentence modification based on a "new factor." A "new factor" is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Kirk contends that Dr. Lisowski's report is a new factor because the circuit court did not read it before imposing sentence. As previously explained, the record belies this assertion. The circuit court reviewed the report *during* the sentencing proceeding and twice *before* sentencing. We reject this argument.

¶8 Finally, Kirk argues that the circuit court should have recused itself from deciding the postconviction motion because it relied on its own "knowledge of disputed facts" to decide the motion when it explained that it had reviewed Dr. Lisowski's report two times before the sentencing hearing. Kirk contends that the court acted, in essence, as a witness on the issue of whether it reviewed the report. *See* WIS. STAT. § 757.19 (2013-14). This argument is far-fetched. There is no legal principle that prohibits a circuit court from providing a more detailed

explanation of the reasons it imposed a sentence in an order denying a postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

