

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP698-CR

Cir. Ct. No. 2010CF3619

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LISIMBA LITEEF LOVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and ELLEN R. BROSTROM, Judges. *Affirmed.*

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

¶1 PER CURIAM. Lisimba Liteef Love appeals a judgment convicting him of felony murder, as a party to a crime, with attempted armed robbery as the predicate offense. He also appeals an order denying his

postconviction motion. Love argues that the circuit court sentenced him on the basis of inaccurate information and misused its sentencing discretion in imposing conditions of extended supervision. We affirm.¹

¶2 Love shot and killed Darius Souter while attempting to rob him. At the time Love committed the crime, he was fifteen years old. Love was charged as an adult with first-degree reckless homicide. He sought reverse waiver to juvenile court, but the circuit court denied his motion. Pursuant to a plea agreement, Love pled guilty to a reduced charge of felony murder. The circuit court sentenced Love to twenty-nine years in prison, with twenty-two years of initial confinement and seven years of extended supervision. As a condition of extended supervision, the circuit court ordered that Love be assessed to determine whether he needed treatment for substance abuse and ordered that Love maintain absolute sobriety. Love moved for postconviction relief, challenging the sentence imposed by the circuit court. The circuit court denied the motion.

¶3 Love first argues that the circuit court sentenced him on the basis of inaccurate information. “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant must show “that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information.” *Id.*, ¶31. Whether a defendant has been denied his or her due process right to be sentenced on the basis

¹ The Honorable Dennis R. Cimpl entered the judgment of conviction. The Honorable Ellen R. Brostrom entered the order denying postconviction relief.

of accurate information is a question of law that we review independently of the circuit court. *Id.*, ¶9.

¶4 Love contends that the circuit court was incorrect when it said that the physical evidence was inconsistent with Love's contention that the gun fired accidentally when he and Souter were struggling over it during the robbery. The circuit court apparently reached this conclusion because the autopsy report said that there was no stippling—residue marks left when a gun is discharged—on Souter's body. Love submits a report from Dr. Shaku Teas, M.D., a forensic pathologist, that states that the barrel of the gun could have been in close proximity to Souter when it was discharged, and thus consistent with Love's version of events, even if there was no stippling on Souter's body.

¶5 During the sentencing hearing, the circuit court asked Love about what happened when the gun fired:

THE COURT: What happened?

THE DEFENDANT: We were struggling over the gun and it went off.

THE COURT: How were you struggling?

THE DEFENDANT: When he was in the car he grabbed it with his hands and wouldn't let go and the trigger went off.

THE COURT: The evidence says it wasn't that way.

THE DEFENDANT: Excuse me?

THE COURT: The evidence from the autopsy says it wasn't that way.

THE DEFENDANT: That is what happened.

THE COURT: All right. I don't believe that, I think the gun went off, I don't think you intended to shoot him, it isn't an intentional homicide; but I think the gun went off because you panicked being a 15 year old kid.

THE DEFENDANT: That is correct too, I did panic.

¶6 The circuit court’s conclusion that Love’s story was not consistent with the physical evidence was not “inaccurate” in the sense that the circuit court’s conclusion was wrong. Teas’s report said that no conclusion could be definitively drawn about the distance of the gun from the victim, and thus the plausibility of Love’s version of events, based on the absence of stippling marks on Souter. Therefore, whether there was a struggle over the gun was open to interpretation. Moreover, although the circuit court stated that it did not believe Love’s assertion that the gun went off during a struggle over the weapon, it also unequivocally stated that it believed that the shooting had *not* been intentional. Because the information in Teas’s report does not show the circuit court’s conclusion was factually incorrect, and the circuit court believed Love’s assertion that the shooting was not intentional, we reject Love’s argument.

¶7 Love next contends that the circuit court relied on a mistaken belief in sentencing him that adolescents with high intelligence are more mature than other adolescents of the same age. Love points to research from Dr. Frances Jensen, a neurologist at Harvard Medical School and Children’s Hospital in Boston, that shows that although a teenager may be intellectually gifted in terms of academic ability and test scores, the areas of the brain responsible for controlling insight and good judgment are not mature and lag behind a teenager’s intellectual abilities.

¶8 Although Love presents his argument as a claim that the circuit court relied on inaccurate information, he is really challenging the circuit court’s *opinion* that he was more mature than other people his age in some respects. In its sentencing remarks, the circuit court said:

I don't see many people in this court that want to be a heart surgeon, who [are] in the tenth grade in a suburban high school, getting good grades and reading at a twelfth grade level already, who [are] now disappointed in the education they give to kids out in the juvenile center and the jail because it is beyond him, it is remedial for him.

I don't get many kids like you. That is the real tragedy. As you and I were talking I could tell, you are a pretty intelligent kid, you could have been something.

...

You are a 15 year old kid but not a typical 15 year old kid.... I am aware of the studies out there about brain development and young children under age 18 and how it takes up to age 20 to fully develop. This kid was ahead of the curve.

¶9 The circuit court's sentencing comments as a whole show that it believed Love was more mature in some ways due to his academic achievement and intelligence, characteristics that will serve him well in the long run, but the circuit court was also aware that juvenile brain development is incomplete and that Love likely shot the victim in a panic due in part to his immaturity. Nothing in the circuit court's remarks suggest that it was holding Love to a higher standard than a typical fifteen-year-old by expecting him to exercise better judgment based on his academic and intellectual strengths. We reject this argument.

¶10 Finally, Love argues that the circuit court misused its discretion in ordering him to be assessed to determine if he had any alcohol or drug treatment needs and in ordering him to maintain absolute sobriety as a condition of his extended supervision. A sentencing court may impose conditions of extended supervision on a defendant as long as the conditions are reasonable and

appropriate. See WIS. STAT. § 973.01(5) (2011-12),² and *State v. Galvan*, 2007 WI App 173, ¶8, 304 Wis. 2d 466, 736 N.W.2d 890. A condition of extended supervision should “protect society and potential victims from future wrongdoing” and help to rehabilitate the defendant. *State v. Koenig*, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499 (citation omitted). “A condition reasonably relates to the goal of rehabilitation when it assists the offender in conforming his or her behavior to the law.” *State v. Fisher*, 2005 WI App 175, ¶17, 285 Wis. 2d 433, 702 N.W.2d 56.

¶11 The circuit court’s conditions that Love undergo an alcohol and drug abuse assessment and maintain sobriety are reasonably related to the goal of assisting him in conforming his behavior to the law. Drinking alcohol is known to be related to poor decision making and may impede an offender’s ability to follow the rules of supervision and refrain from illegal activity. Therefore, requiring an alcohol and drug abuse assessment and prohibiting a defendant from using alcohol are reasonable and appropriate conditions of extended supervision, even if a defendant has not previously demonstrated that he or she has a problem with substance abuse. We reject Love’s challenge to these conditions of extended supervision.

By the Court.—Judgment and order affirmed.

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

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

