COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1826-CR **Cir. Ct. No. 2010CF92**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS J. RICHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Lundsten, JJ.

¶1 PER CURIAM. Douglas Richer pleaded no contest to two counts of delivery of a prescription drug without a prescription, contrary to WIS. STAT.

§ 450.11.[1] Count 1 included a repeater enhancer, whereas the enhancer in Count 2 was dropped pursuant to a plea agreement. Richer was convicted on both counts and sentenced to sixty days' jail on the first count. On the second, the court withheld sentence and placed Richer on probation, which was subsequently revoked. Richer was ultimately sentenced to three years' initial confinement and three years' extended supervision on the second count.

¶2 Richer appeals the judgment of conviction on Count 2, and an order denying his post-conviction motion. He claims the court failed to demonstrate sufficient knowledge of his previous sentencing and to explain the disparity between his sentences on the two counts. Richer also contends the sentencing court considered inaccurate information. For the reasons set forth below, we reject these arguments and affirm.

BACKGROUND

¶3 Richer was charged in February 2010 with three counts of dispensing a prescribed drug, Seroquel, without a prescription, all as a repeater. The base offense is a Class H felony, punishable by up to six years' imprisonment. *See* WIS. STAT. §§ 450.11(9)(b); 939.50. The complaint alleged that Richer, while incarcerated, had sold another inmate three Seroquel tablets prescribed for Richer.

¶4 Richer entered into a plea agreement with the State. In exchange for his no contest pleas to two counts of dispensing a prescribed drug without a

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

prescription, the first with a repeater enhancer, the State agreed to dismiss the remaining charge and recommend a sixty-day jail term on Count 1, and a withheld sentence with thirty months' probation on Count 2. Richer's pleas were accepted and Judge Benjamin Proctor immediately proceeded to sentencing and imposed a sentence consistent with the recommendation. Because Richer was entitled to more than sixty days' sentence credit, he was effectively given time served.

¶5 Richer's probation was revoked in early 2012 based on numerous violations, including operating a motor vehicle after revocation and consuming alcohol. Richer, pro se, did not contest his revocation. Because Judge Proctor had retired, sentencing was scheduled before Judge Jon Theisen. The court received a revocation packet from the Department of Corrections. Richer pointed out he had not seen that packet, but stated the "only … document out of that packet that I would need to access … would be the recommendation worksheet." After a discussion, the court proceeded to consider a post-revocation sentence.

¶6 Citing Richer's lengthy criminal history, the State recommended the maximum sentence on Count 2, consisting of three years' initial confinement followed by three years' extended supervision. During Richer's allocution, the sentencing court, sua sponte, reviewed Richer's CCAP history. It noted sixty-two entries, some of which it acknowledged were duplicative or non-criminal. The court ultimately adopted the State's recommendation and sentenced Richer to six years' imprisonment.

¶7 Richer, represented by counsel, filed a post-conviction motion for resentencing. He argued the sentencing court did not demonstrate sufficient knowledge of the original sentencing hearing. Richer also challenged the court's exercise of sentencing discretion, observing he received a more serious sentence

for the charge without the repeater enhancer. Finally, Richer argued he had been sentenced based on inaccurate information contained in the CCAP records and probation revocation packet.

¶8 The court rejected Richer's arguments and denied the motion. The court disagreed it had failed to demonstrate sufficient knowledge of the previous sentencing, noting it had "considered a vast array of information, familiarized itself with the prior sentencing," and evaluated Richer's post-conviction conduct. The court rejected Richer's sentencing disparity argument, noting that Richer's probation failure was significant information not known at the time of his sentencing on Count 1. Finally, it concluded it had not relied on any supposedly inaccurate information. The court stated it had used the CCAP records only to confirm that Richer had a lengthy criminal history, which was undisputed. Further, the court had not "hung its hat on" any alleged inaccurate information in the revocation packet.

DISCUSSION

¶9 Richer renews his post-conviction motion arguments on appeal. First, he claims the sentencing court failed to display sufficient knowledge of Richer's previous sentencing. Second, Richer contends the sentencing court did not adequately explain the disparity between his sentences on Counts 1 and 2. Finally, Richer claims he was sentenced on inaccurate information, specifically the CCAP records and the contents of the probation revocation packet. We address and reject these arguments in turn.

1. Sufficient knowledge of the original sentencing hearing

¶10 Richer first argues the sentencing court was required, but failed, to demonstrate sufficient awareness of the information from his previous sentencing on Count 1. Richer relies primarily on ***State v. Reynolds***, 2002 WI App 15, 249 Wis. 2d 798, 643 N.W.2d 165, and buttresses his argument with citations to ***State v. Brown***, 2006 WI 131, 298 Wis. 2d 37, 725 N.W.2d 262, and ***State v. Walker***, 2008 WI 34, 308 Wis. 2d 666, 747 N.W.2d 673, both of which are re-confinement cases after extended supervision.

¶11 We observe at the outset that the State does not respond to or cite the authorities Richer invokes. Rather, the State argues in a conclusory manner that Richer "offers no controlling authority for the legal/procedural requirement he advances: that the judge at a post-revocation sentencing must display a particular defined level of knowledge of the prior sentencing." However, Richer's theory on appeal is adequately developed, and while the authority he cites may not be directly on point, we believe it was sufficiently analogous to warrant some degree of analysis from the State.

¶12 In any event, we conclude ***Reynolds*** is distinguishable. In ***Reynolds***, 249 Wis. 2d 798, ¶¶9-10, 14, we held that when a sentencing after revocation is held before a judge who did not preside over the original sentencing, the new sentencing judge should be "informed of the trial record" and of the previous judge's assessment of the severity of the crime, particularly in cases involving trials. However, it is true we did not identify a specific threshold of knowledge by which to gauge the sentencing court's awareness of the case's history. As our supreme court later indicated, the most that can be said of ***Reynolds*** is that a review of the original sentencing transcript in that case was "'essential to a fair

sentencing after revocation."' ***Walker***, 308 Wis. 2d 666, ¶26 (quoting ***Reynolds***, 249 Wis. 2d 798, ¶11).

¶13 Here, the earlier sentencing transcript would not have revealed any pertinent information. The first sentencing court proceeded directly to sentencing after accepting Richer's plea, adopting the parties' recommendation in toto and with virtually no analysis. Richer faults the second sentencing court for failing to make note of the previous court's comments, but there were no comments of substance to note. Richer's sentencing after revocation was orders of magnitude more detailed than his first sentencing. The court reviewed the judgment of conviction and the factual basis for the offense. Accordingly, we conclude ***Reynolds*** is of no help to Richer.

2. Failure to explain sentencing disparity

¶14 In a related argument, Richer objects to the disparity between the sentences he received on Counts 1 and 2. He contends the second sentencing court erroneously exercised its sentencing discretion "because it imposed a more serious sentence for the charge with a lesser penalty."[2] Richer finds this result counterintuitive because Count 1, for which Richer was sentenced to sixty days' jail, included a repeater penalty enhancer.

¶15 This argument is a nonstarter. As we have indicated, sentencing on Count 1 took place immediately after the plea, tracked the parties' recommendation, and—because the sentence effectively amounted to time

[2] Richer uses the phrase "abuse of discretion." We have not used that standard since 1992, when our supreme court replaced that phrase with "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

served—was rendered without any meaningful analysis about offense severity by the court. The repeater enhancer attached to Count 1 was entirely a product of the parties' negotiated plea agreement, and the reason for dismissing it on Count 2 is not apparent from the record. Thus, we cannot ascribe any significance to the fact that Count 1 was technically a "worse" crime.

¶16 More importantly, a sentencing court has an obligation, at a revocation sentencing, to consider all relevant information about a defendant, including information about events and circumstances that occurred after the initial sentencing. ***Reynolds***, 249 Wis. 2d 798, ¶13. "It certainly is clear, therefore, that in sentencing after revocation, a court may determine that conduct following the first sentencing hearing casts a defendant in a very different light." ***Id.***

¶17 We agree with the circuit court's analysis at the post-conviction hearing:

> This is not a clearly erroneous use of discretion. The defendant was given one sentence by Judge Proctor on one day and at the same time was placed on probation. The hope, as I stated before, was that the defendant would be successful on probation. Probation is often, and in this instance, a … means by which the defendant accomplishes rehabilitation. Having failed the probation, the factor of rehabilitation had been diminished by the defendant and at the same time the factor of need to punish is enhanced. For these reasons, that might be the rationale that was employed in the sentencing.

¶18 The sentencing transcript reflects that, indeed, the court considered the proper factors and emphasized the seriousness of the offense. The court observed that Richer engaged in "extremely dangerous behavior" because Richer's medication was prescribed for his benefit and Richer had no idea what complications could arise if another person were to take it. The court continued

that despite "very high" rehabilitative needs, Richer had "turned your nose somewhat at the opportunity which probation had given you." Because Richer had a lengthy criminal history and had committed the criminal act in a controlled jail setting, the court determined that the need to protect the public warranted an extensive period of confinement. The court did not erroneously exercise its sentencing discretion.

3. Sentencing based on inaccurate information

¶19 A defendant has a due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶10, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who requests resentencing due to the court's use of inaccurate information at the sentencing hearing must show, by clear and convincing evidence, both that the information was inaccurate and that the court actually relied on the inaccurate information. ***Id.***, ¶26. Once actual reliance on inaccurate information is shown, the burden shifts to the state to prove the error was harmless. ***Id.*** Whether a defendant has been denied due process is a constitutional issue we decide de novo. ***State v. Travis***, 2013 WI 38, ¶20, 347 Wis. 2d 142, 832 N.W.2d 491.

¶20 Richer claims the court relied on inaccurate CCAP records. To confirm the State's argument that Richer had a "lengthy, lengthy criminal record," the sentencing court engaged in a sua sponte review of Richer's CCAP record. The search revealed sixty-two entries, dating back to 1986 with Richer's first conviction for burglary. When questioned, Richer explained he "grew up in the system" since he was twelve. The court then confirmed several individual criminal entries did pertain to Richer before moving on to consider the severity of Richer's present offense.

¶21 Richer claims only about twenty of the sixty-two entries were prior criminal convictions. He faults the court for failing to examine the records to "see which cases actually involved criminal convictions versus cases that were dismissed." In Richer's view, the court relied on the inaccurate information that Richer was involved in sixty-two prior criminal cases at sentencing.

¶22 We conclude the court did not sentence Richer based on inaccurate CCAP records. As the court observed during the post-conviction hearing, it reviewed CCAP solely to test the veracity of the State's claim that Richer had a lengthy criminal record. The specific number was unimportant, and Richer does not dispute he has an extensive criminal history.

¶23 Moreover, the record is clear the sentencing court did not believe Richer had sixty-two prior convictions. The court acknowledged at sentencing not all the entries were individual, criminal offenses, and some entries were duplicative. The important thing was that Richer had been involved with the criminal justice system as early as 1986. Thus, Richer has failed to show both that the information was inaccurate and that the court relied upon it.

¶24 Richer also contends the revocation packet contained seven inaccurate statements. Based upon our independent review of the record, we have confirmed that six of these seven statements were not addressed in any way by the sentencing court. Reliance "turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" ***Travis***, 347 Wis. 2d 142, ¶28 (quoted source omitted). Richer has failed to demonstrate the sentencing court actually relied on those six alleged inaccuracies. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶31.

¶25 The sentencing court did, however, address Richer's rehabilitative needs. It stated that based on its review of the revocation packet and other information, it appeared Richer had "rejected treatment and rejected programming." Richer responds that he actually completed substance abuse and relapse prevention programs. However, Richer concedes he was terminated from a third program and was not given (and apparently did not pursue) a date to report for a fourth. Based on Richer's concession, we cannot conclude the information was inaccurate. And even if it was, the sentencing court's slight reference was harmless error in the context of the entire sentencing.

By the Court.—Judgment and order affirmed.

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