COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2015-CR **Cir. Ct. No. 2012CF3644**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QURAN R. HEREFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER and TIMOTHY M. WITKOWIAK, Judges. *Affirmed*.

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

¶1 PER CURIAM. Quran R. Hereford appeals from a judgment of conviction, entered upon his guilty plea, on one count of burglary as party to a crime. Hereford also appeals from an order denying his postconviction motion for

resentencing. Hereford contends that the State breached the plea agreement, that a new factor warranted sentence modification, and that the circuit court sentenced him on inaccurate information. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Hereford, Lamark Hubanks, and Damian Smith were riding in a stolen vehicle. Hubanks and Smith discussed burglarizing a home, so they parked outside a house and went inside. When they came out of the house with stolen items, Hereford drove the vehicle away from the residence. Later, when he was fleeing on foot and being pursued by police, Hereford attempted to discard a loaded gun he was carrying. The gun discharged but no one was injured.

¶3 Following his arrest, Hereford confessed to driving a stolen vehicle and to the series of events leading up to and including the burglary. Hereford also took police to where he left his gun. He was charged with one count of burglary as party to a crime and one count of operating a motor vehicle without the owner's consent.

¶4 In exchange for Hereford's guilty plea to the burglary, the State agreed to dismiss and read in the other charge and a misdemeanor charge in Milwaukee County Circuit Court case No. 2012CM746, and to recommend a sentence of four years' initial confinement and three years' extended supervision. In addition, if Hereford testified against Hubanks, or stood willing to do so, the State would consider this willingness to be a mitigating factor at sentencing. The circuit court accepted Hereford's guilty plea and, ultimately, sentenced him to four years' initial confinement and three years' extended supervision.

¶5 Hereford moved for resentencing "based on the sloppy nature of the original sentencing hearing, the inaccurate information presented at the original sentencing hearing and the new factor involving Hereford's mental health issues." The circuit court denied the motion without a hearing.[1] Hereford appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶6 On appeal, Hereford first argues that he was entitled to resentencing because "[t]he State did not properly honor the plea agreement."[2] A defendant has a constitutional right to enforcement of a negotiated plea agreement. *See* ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. However, not all breaches are actionable; only a material and substantial breach merits a remedy. *See* ***id.***, ¶38. "A breach is material and substantial when it 'defeats the benefit for which the accused bargained.'" ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220 (citation omitted). The circuit court's determination of historical facts regarding the terms of a plea agreement and the facts of the alleged breach are reviewed for clear error, but whether the State's conduct constituted a material and substantial breach is a question of law. *See* ***id.***

¶7 The State began its sentencing remarks by reciting the terms of the plea agreement, but excluded the concession it was supposed to make if Hereford

[1] The Honorable David A. Hansher accepted Hereford's plea and imposed sentence. The Honorable Timothy M. Witkowiak denied the postconviction motion.

[2] The State asserts that this argument "is conclusory in the extreme" and asks that this court "refrain from addressing this claim, because it is inadequately briefed." We do not disagree with the State's characterization of Hereford's argument, but we do not think it necessary to avoid addressing the issue.

agreed to testify against Hubanks. As the remarks progressed, and the circuit court inquired about the posture of the co-actors' cases, the State indicated that the other defendants agreed to testify against Hereford. Defense counsel then interjected.

¶8 The circuit court, in rejecting the postconviction motion, explained what happened next:

> The record shows that defense counsel reminded the court that the State had agreed to give the defendant consideration for his willingness to testify against Hubanks, and the State agreed that the defendant should be given credit for that. The court indicated that it would take the defendant's cooperation into consideration and did just that during its rendition of sentence. The record suggests that the State's failure to present this aspect of the plea agreement was due to some confusion on the part of the prosecutor about the procedural posture of the case and not a calculated omission. The bottom line is that the prosecutor agreed that the defendant should be given credit for his willingness to testify, and therefore, resentencing is not warranted.

¶9 We agree with the circuit court. As it noted, the sentencing court did, in fact, account for Hereford's willingness to testify against Hubanks when it imposed sentence. Accordingly, there is no material and substantial breach of the plea agreement because Hereford was not deprived of the benefit for which he bargained.

¶10 Hereford's second complaint on appeal is that "[t]he sentencing court was unaware of Hereford's mental health history," specifically, diagnoses of attention deficit/hyperactivity disorder and oppositional defiant disorder. He asserts that resentencing is warranted because these diagnoses "mitigate the nature of the offense and help prove that Hereford's probationary recommendation was reasonable." Hereford presents his mental health issues as a new factor.

¶11 A new factor is a fact or set of facts, that is "'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, even though it was then in existence, 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). Whether something constitutes a new factor is a question of law, but whether a new factor warrants sentence modification is committed to the circuit court's discretion. ***Id.***, ¶33.

¶12 The circuit court, although not expressly saying so, appears to have rejected the notion that Hereford's specific diagnoses constitute a new factor. It explained that:

> defense counsel advised the court that the defendant "does have some learning disability issues, things like that he struggled over the years." She also asked the court to order a mental health assessment to "flush out whatever issues he might have." Thus, while the court may not have been aware of a specific mental health diagnosis, the court was aware that the defendant had some mental health issues.

(Record citation omitted.) We agree with the implied finding that the specific diagnoses are not a new factor because the sentencing court knew that Hereford "had some mental health issues." "[A]ny fact that was known to the court at the time of sentencing does not constitute a new factor." ***Id.***, ¶57.

¶13 Even if we did not agree with that particular determination, however, we would still conclude that no new factor has been shown. Hereford does not contend that his diagnoses were not in existence at the time of sentencing, and he

fails to explain how his own mental health diagnoses could have been "overlooked by *all* the parties"—surely, he was aware of them himself prior to sentencing.[3]

¶14 Hereford's final argument on appeal is that the sentencing court relied on inaccurate information at sentencing. The dismissed and read-in misdemeanor stemmed from an incident at Washington High School. A no-contact order was imposed as a condition of Hereford's bond in that case. Hereford contends that the sentencing court "inaccurately concluded that Hereford had basically been expelled from the school … [because] as soon as the court dismissed and read-in [the misdemeanor], the no contact order was no longer in effect and Hereford was free to return to Washington High School."

¶15 A defendant has a due process right to be sentenced on accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A motion for resentencing because of inaccurate information "must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." ***Id.***, ¶2. The defendant must show the circuit court's improper reliance by clear and convincing evidence. *See* ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409.

¶16 As the circuit court explained, however:

> During his allocution to the court, the defendant discussed the incident at the high school, which formed the basis for the charge filed in the misdemeanor case. The court asked the defendant if he had been expelled, to which the

[3] Also, the only documentation of Hereford's specific diagnoses was in the letter from his mother, and we agree with the circuit court's opinion that her letter is not sufficient confirmation of those diagnoses.

> defendant replied, "No. They just gave me a no contact order." Contrary to the defendant's assertion in his motion, the court did not conclude that the defendant "had basically been expelled from the school." The court stated that the no contact order was the *equivalent* of being expelled because the defendant could not go back to the school. This was not an inaccurate statement and was not a major factor in the court's sentencing decision.

(Record citation omitted.) In addition, we note that Hereford has not actually demonstrated that the no-contact order was lifted prior to sentencing, and we note that Hereford had enrolled in GED classes just prior to entering his plea, before the misdemeanor case was dismissed. Thus, we agree with the circuit court's assessment that the no-contact order was the functional equivalent to being expelled from the high school, even though a school record might not officially indicate expulsion.

¶17 Based on the foregoing, we conclude Hereford has demonstrated no basis for resentencing. Accordingly, the circuit court did not err in denying the postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).