COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 1998

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. 98-1471-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM F. HUGHES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

VERGERONT, J.[1] William Hughes appeals from his judgment of conviction after revocation of probation and the trial court order denying his motion to modify his sentence. He contends he was sentenced based on inaccurate

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

information in violation of the due process clause and is therefore entitled to a reduced sentence. We conclude that the trial court did take into account inaccurate information in sentencing Hughes, but that the court's reconsideration of that sentence in light of the correct information provided Hughes with the remedy to which he is entitled. We therefore affirm.

BACKGROUND

Hughes was charged in a criminal complaint with possession of marijuana in violation of § 961.41(3g)(e), STATS.; unlawful use of the telephone in violation of § 947.012(1)(a), STATS.; and disorderly conduct in violation of § 947.01, STATS., all as a repeater under § 939.62(1)(a), STATS..

The complaint alleged that Hughes' wife, Michelle Baker, stated to the police that Hughes had taken some money from her to buy marijuana, some of which he left in their home and Baker turned over to the police. Baker also stated that in the resulting argument with Hughes he pushed her, called her names, and threatened to hurt her if she got in his way; and she feared that he would physically retaliate against her. The complaint also alleged that Gregory Schrock, an employee at Octopus Car Wash, stated that on the following day he received a phone call from an individual whom he believed to be Hughes. The caller asked for Michelle and when Schrock told Hughes Michelle was not in the area, Hughes threatened Schrock and other employees if they did not allow him to speak to Michelle. The complaint further alleged that on the same day as the phone call, John Morris, the father of Baker's two children and also an employee at Octopus Car Wash, stated that Baker told him the money he had given her for the children had been taken by Hughes and used to purchase marijuana. Morris stated that he

had seen Hughes in the area around Octopus Car Wash and was concerned that Hughes was going to carry out threats against him and Baker.

Hughes pleaded guilty, as a repeater, to the first two charges and the disorderly conduct charge was dismissed. The plea and sentencing hearing was held on October 9, 1996. Under the plea agreement, the parties jointly recommended the sentence be withheld and Hughes be placed on probation for two years on each count, concurrent, with certain conditions. The trial court accepted the joint recommendation. Among the conditions of probation were that Hughes obtain counseling such as alternatives to aggression (ATA); participate in alcohol and other drug abuse (AODA) assessment, evaluation and follow up; not use or possess any controlled substances without a valid prescription; and have no contact with Baker, Morris and Schrock. The court was aware that Hughes was on probation for another offense and stated that if an AODA assessment had been completed for that probation another was not needed, and any treatment recommended as a result of that assessment was incorporated as a condition of this probation. The court also ordered Hughes to spend sixty days in jail as a condition of probation.

Hughes began his jail term on October 11, 1996. Shortly after Hughes had completed the sixty-day jail term, he absconded from his probation supervision, leaving the state and the country. After Hughes was apprehended, his probation was revoked and he was returned to court for sentencing on October 7, 1997. The court, Hughes' counsel and the prosecutor had been provided with a "revocation summary" prepared by Hughes' probation agent, Pam Charvat, but that is not part of our record. Charvat did, however, provide the following information at the October 7 hearing.

Charvat began supervising Hughes in June of 1996, when he was on probation for felony intimidation of a witness, and she continued supervising him when probation was imposed in this case. She stated that Hughes began ATA when he was in jail as a condition of probation in this case. He was set up to do a psychological evaluation and an AODA assessment, but none of that was started because he absconded. When Charvat first began supervising Hughes, he admitted to being a regular pot smoker, and that is when she set him up for an AODA assessment. She had time to do only two urine analyses before he absconded. She stated that he "only had one urine screen that was negative." Because Hughes absconded, there was not ample time to see if he was cleaning up his drug use. He also violated the no contact provision of probation because he signed up for visitation time in jail when he knew Baker was coming to visit him, and she did visit him. Hughes told Charvat that he left the state within thirty hours of being released from jail because he had heard Baker was having sex with other men.

Hughes addressed the court and disagreed with parts of Charvat's statement to the court. Hughes stated that he had attended an interview with a drug therapy counselor while he was on probation for the prior felony and was told he did not need drug therapy and Charvat knew that; he did not tell Charvat he was using drugs at the time Charvat began supervising him, and he was not; he had never given her a "dirty urine" test; and he had completed half of the ATA sessions before he absconded. Hughes stated that Baker came to visit him in jail without his prior knowledge. Hughes denied the allegations of the complaint, saying he had pleaded guilty only because his lawyer told him he would not be acquitted because of his prior record. Hughes said that Baker told him the phone call, the marijuana joint, and the statements to the police were all fabricated by

Schrock and Morris, and Baker had gone along with it because Morris said if she did not, he would take the children away from her permanently. Hughes did not abscond in order to avoid probation rules, he said, but because he found out about Baker's behavior with other men while he was in jail.

Because of the repeater enhancements, the maximum prison term for the two charges to which Hughes pleaded guilty was six years. The prosecutor argued that Hughes' criminal history, the failure of probation, the abusive behavior evidenced by the allegations of the complaint, and Hughes' failure to take responsibility and tendency to blame the victims warranted a prison term, and she recommended thirty months total. Hughes' counsel argued that Hughes had shown an interest in rehabilitating himself—in addition to attending ATA until he absconded, he voluntarily enrolled in joint counseling with Baker for their marital problems and New Beginnings. Hughes' counsel also pointed out that since Hughes' conviction and six-year sentence for voluntary manslaughter (the date is not identified in the record), he had remained crime free until the recent incidents, except for a 1992 misdemeanor obstructing charge. Hughes' counsel described the current offenses as not serious, because Hughes had no prior drug convictions and the threats over the telephone were simply sounding off: Hughes did not attempt to follow through. Hughes' counsel recommended four months' jail time on the possession charge, noting that the maximum without the repeater enhancement was six months, and ninety days on the telephone offense, the maximum without the repeater enhancement.

After lengthy comments explaining the factors it was taking into account in sentencing Hughes, the court sentenced Hughes to eighteen months in prison on each charge, consecutive, with credit for time served. The court explained that it had accepted Hughes' plea and placed him on probation because

it recognized that Hughes, with the exception of the 1992 misdemeanor, had stayed out of the criminal justice system for a period of time, and it felt that Hughes could benefit from the rehabilitative and supportive programming the community had to offer. But, the court continued:

> Regardless of the motivation for why Mr. Hughes left Wisconsin and the United States on at least more than one occasion by his own admission, I think it's safe to say that probation was a dismal failure. I think it's safe to say that regardless of his explanations, Mr. Hughes has flaunted the opportunity that this Court gave him to successfully complete his probation. I believe that basically Mr. Hughes has ignored the counseling and the treatment that this Court hoped that he would get. i [sic] believe that Mr. Hughes, while he may have fled for his personal motivational reasons, when and if he ever recovered from that emotional trauma from the discussion with his spouse, didn't come back and turn himself in. He was arrested on his third re-entry into the United States, based on his statements, and there's absolutely no reason to believe that Mr. Hughes was going to surrender himself at any time after he had absconded.

The court determined that, in spite of Hughes' explanations, he had contact with Baker in jail when he knew he was not supposed to. The court considered significant the information that Hughes had falsified his job application for Huber while in jail. The court also considered it significant that Hughes had absconded even though he was on probation and facing "substantial time" not only in this case but in the prior felony. The court observed that Hughes had either lied at the time he entered his pleas and admitted the allegations in the complaint, or was lying at the hearing, and the court decided that he was lying at the hearing. The court found Hughes' behavior as alleged in the complaint to be aggressive and threatening, and that Hughes minimized the seriousness of what had occurred. The court emphasized Hughes' repeater status.

Hughes filed a postconviction motion requesting that his sentence be modified or that he be resentenced, on the ground that the court had relied on three inaccurate pieces of information in sentencing Hughes. First, contrary to what Charvat told the court, Hughes did not start ATA when he began the sixty days in jail on October 11, 1996, as a condition of his probation in this case; rather, he began ATA on September 18, 1996, and attended four group and four individual counseling sessions before October 11, 1996. Second, Charvat's testimony implied that one of two urine tests was positive for drugs, but Charvat's own records show that Hughes had two urine screens in September 1996 and both were negative. Third, while Charvat's testimony implied that Hughes did not follow through with an AODA assessment, Hughes had one on October 2, 1996, at Lutheran Social Services, and that agency recommended no treatment at that time but rather recommended abstinence from drug use and "deal[ing] with his personality disorders." Accompanying the motion were a letter from Lutheran Social Services supporting Hughes' statements on ATA and the AODA assessment, and a copy of a "chronological log" with the client name of "William Hughes" and notations supporting his statements concerning the urine tests.

At the hearing on his motion, Hughes' counsel asked the court to reduce each sentence by six months, because the corrected information showed that Hughes made more of an effort to comply with the conditions of probation than the court thought he had. The court denied the motion. The court agreed that it did not have all the correct information on the three points at sentencing.[2] It also acknowledged that it "took to some extent that information into account," as

[2] The court emphasized that it found no intent on the part of Charvat to deceive or mislead.

evidenced by its statement at sentencing that Hughes had "basically … ignored the counseling and the treatment that this Court hoped that he would get." However, the court concluded that this was only one sentence in eight and one-half pages of reasons for its decision and therefore Hughes was not prejudiced by the incorrect information.

The trial court then reviewed the factors it had considered at sentencing—the offenses, Hughes' character, the protection of the public, Hughes' overall behavior while on probation, his absconding, and his credibility as it relates to character—and stated that all of those had gone into its decisions to impose the sentence it had imposed. The court stated that it had re-read the entire sentencing transcript and the probation agent's report and was persuaded that, had it had the information Hughes presented with his motion, that information would not have affected its determination of the proper sentence.

DISCUSSION

On appeal, Hughes renews his argument that he is entitled to a reduction in his sentence because his due process rights were violated in the sentencing process. Defendants have a due process right to be sentenced on the basis of accurate information. ***State v. Johnson***, 158 Wis.2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990) (citing ***United States v. Tucker***, 404 U.S. 443 (1972)). In order to establish a due process violation, the defendant has the burden of proving by clear and convincing evidence both that the information was inaccurate and that the court actually relied on the inaccurate information in sentencing. ***State v. Littrup***, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). After a defendant meets this burden, the burden of persuasion shifts to the State to establish that the constitutional error was harmless. ***Id***. Sentencing is

within the trial court's discretion and a reviewing court presumes the trial court acted reasonably in imposing the sentence, upholding the sentence unless the trial court erroneously exercised its sentencing discretion. ***Id.*** at 126, 473 N.W.2d at 166. However, the question of whether Hughes' right to due process was violated is a question of law, which we review without deference to the trial court. ***Id.***

The trial court found the information it had at sentencing on Hughes' urine tests, ATA attendance and AODA assessment was not complete and correct. The court also found that it did take the incorrect and incomplete information into account in sentencing. The transcript of the sentencing hearing bears that out. Hughes has established a due process violation. The remaining issue, then, is whether the State has demonstrated harmless error.

The parties' briefs merge the issue of reliance with that of harmless error, but they are distinct inquiries. *See* ***Littrup***, 164 Wis.2d at 132, 473 N.W.2d at 168. Reliance on the inaccurate information is part of the determination of whether there was a due process violation, because if the trial court does not consider the inaccurate information in deciding the appropriate sentence, then the defendant's right to be sentenced on accurate information has not been violated. However, even if a trial court did consider inaccurate information in sentencing, that constitutional error may be harmless if there is no reasonable possibility that the sentence would have been less if the court had the correct information. In other words, the court may have considered the inaccurate information, but, in view of other factors the court considered and the weight it attached to the factors, the court may have imposed the same sentence even with the corrected information.

Ordinarily, when this court applies a harmless error analysis, we are deciding whether there is a reasonable possibility that the error contributed to the jury's verdict. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The harmless error inquiry in this case is different in that the decision maker—the sentencing court—has actually been presented with the corrected information and has already determined that, having that information, it would still impose the same sentence because the inaccurate information was not significant compared to the other factors upon which it based the sentence. The parties have not presented us with any case law that addresses the nature or scope of our review of this aspect of the trial court's decision on the postconviction motion. We are not aware of any Wisconsin case law that does so. We have therefore looked to federal case law implementing ***Tucker*** for guidance.

In at least four federal circuits, when the postconviction judge is the same as the sentencing judge and determines that the sentence would be the same even with the corrected information, the appellate courts have concluded that is a sufficient remedy for the defendant. *See* ***Farrow v. United States***, 580 F.2d 1339, 1352-53 (9th Cir. 1978); ***Reynolds v. United States***, 528 F.2d 461, 462 (6th Cir. 1976); ***Crovedi v. United States***, 517 F.2d 541, 546-47 (7th Cir. 1975); ***McAnulty v. United States***, 469 F.2d 254, 255-56 (8th Cir. 1972). The rationale is that the defendant has thus received the relief to which he or she is entitled—resentencing based on correct information—because "the mental process used by the court in 'reconsidering' the old sentence or 'resentencing' is the same." ***Farrow***, 580 U.S. at 1353.

We find this reasoning persuasive. In this case, the trial court had the additional and correct information from the postconviction motion. The court heard argument concerning how that impacted on the sentence. It reread the

sentencing transcript and the report submitted at sentencing. The court determined that it would have imposed the same sentence, and explained why. In effect, Hughes did receive a resentencing based on the corrected information.

Moreover, the trial court's determination that the corrected information was not so significant that it would have altered the sentence is supported by the record. The additional information that Hughes presented to showing that he had complied with some conditions of probation does not alter the fact that he absconded within thirty hours after he was released from jail, a fact to which the court attached great significance at sentencing. Nor does the additional information alter the fact that he had visits with Baker in spite of the no contact provision, or that he made false statements on his Huber application. Hughes showed that he began attending ATA sessions before probation was imposed in this case, apparently as a condition of probation on the prior felony; but it remains true that Hughes did not complete ATA because he absconded. Hughes showed that no drug treatment was recommended as a result of the AODA assessment, but this does not controvert Charvat's statement that he was to be set up for a psychological evaluation, which did not occur because he absconded.

In addition to Hughes' failure to comply with conditions of probation, the court placed significant weight at sentencing on the aggressive and threatening nature of the offenses, his repeater status, his minimization of the seriousness of his conduct, and his character. The corrected information did not affect these factors. At sentencing the court did not believe Hughes' denial of the allegations in the complaint, and this was significant in the court's assessment of Hughes' character and credibility. The court explained at the postconviction hearing that the corrected information did not change its view of Hughes' character and credibility.

We conclude that even though a due process violation did occur in that the trial court took into account incorrect information in sentencing Hughes on October 7, 1997, Hughes has already received the remedy to which he is entitled. The trial court has reconsidered the sentence it imposed on Hughes in light of the corrected information. In doing so, it considered appropriate sentencing factors and explained its decision. *See* ***State v. McCleary***, 49 Wis.2d 263, 282, 182 N.W.2d 512, 522 (1971). We are persuaded that there is not a reasonable possibility that the incorrect information contributed to a greater sentence. Therefore, Hughes is not entitled to a reduction in his sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.