

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP1850-CR

Cir. Ct. No. 2013CF1134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA A. ENRIQUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Reversed and cause remanded.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 NEUBAUER, C.J. Patricia A. Enriquez pled guilty to two counts of delivering controlled substances in violation of WIS. STAT.

§ 961.41(1)(b) (2013-14)¹. At sentencing, after Enriquez made a statement, the circuit court judge presented the parties with information he had uncovered from the internet, which he claimed showed that Enriquez’s license to practice nursing in Texas had been revoked in 2000 because she had misappropriated morphine from the hospital where she had worked and that she had never possessed a license in Illinois. Finding that Enriquez’s character for honesty was “miserable,” based in part on the foregoing, the court sentenced her to consecutive terms of sixty-six months’ imprisonment, far beyond what the State had recommended. The information that Enriquez never had a nursing license in Illinois was inaccurate, and the court actually relied on that misinformation in sentencing her. Consequently, she is entitled to be resentenced. We, thus, reverse the judgment and the order and remand for resentencing before a different judge.

BACKGROUND

Charge and Plea

¶2 On three different dates, Enriquez allegedly delivered nonnarcotic controlled substances, dextroamphetamine sulfate and alprazolam, to a witness cooperating with the Racine Police Department, receiving, each time, thirty dollars for ten pills. As a result, the State charged Enriquez with three counts of delivering controlled substances in violation of WIS. STAT. § 961.41(1)(b) and (1)(i). Subsequently, Enriquez agreed to plead guilty to the two counts charging

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

violations of § 961.41(1)(b).² In exchange for her guilty plea, the State agreed to recommend three years of imprisonment (eighteen months of initial confinement and eighteen months of extended supervision) on one count and five years of imprisonment (three years of initial confinement followed by two years of extended supervision, stayed in favor of three years of probation) on the other count.

Sentencing

¶3 At the sentencing hearing, before the Honorable Michael J. Piontek, who had not taken Enriquez's plea,³ he noted that he had received a copy of the presentence investigation report (PSI). The prosecutor argued that the court should follow the State's recommendation. The prosecutor expressed concern about Enriquez's candor given that in the PSI she said that "she was just helping someone out who couldn't afford medication." It was also troubling that Enriquez was in the profession of nursing when the charges involved delivering drugs. The prosecutor noted that according to the PSI, Enriquez's nursing license had been revoked.

¶4 Defense counsel argued for probation, as recommended by the department of corrections, pointing out that she had been a nurse for eighteen years, had been pursuing a master's degree in nursing, had served as a United

² The remaining count was dismissed and read in, as were counts charged under a separate criminal complaint involving two felony counts of bail jumping and obstruction of justice. The separate criminal charges stemmed from Enriquez hiding from police when she was seen in the presence of a known drug dealer.

³ Upon Enriquez's request for substitution, Judge Piontek was substituted for the Honorable Eugene Gasiorkiewicz.

States Army reservist for four years, had no prior criminal convictions, and had accepted her guilt by pleading guilty. In addition, she led a “very hard life” involving a number of medical problems. She had two neck fractures, one as a little girl, and another more recently, when she was in a severe car accident. She has diabetes and multiple sclerosis.

¶5 Addressing the court, Enriquez stated:

I would like to express my remorse. I did do this crime. And I know that—that this is what brings me before your Honor.

I did not do this crime over greater profit. I had no intention. I personally thought that I was helping a friend and neighbor because—and maybe I was naïve and that was my—my problem.

I know that I used poor judgment. And I no longer will be in nursing. I am retiring. And for this I am very regretful and very remorseful.

¶6 The court then presented the prosecutor and defense counsel with documents the court had printed out from the internet regarding Enriquez’s nursing licenses in Arizona, Illinois, Texas, and Wisconsin. The court asked Enriquez “to explain your revocation of your nursing license in the State of Texas in 2000 for 17 counts of taking Morphine.” Enriquez countered that these charges were never substantiated and that she returned her license to the State of Texas because she was no longer practicing in Texas. Enriquez said that these were drugs she “missed” or “did not document correctly.” She had “straightened” the matter out and, in fact, if the court looked at the State of Illinois, it would confirm as much.

¶7 The court retorted that the State of Illinois showed that she had no license there and never had one. Enriquez replied that she did, and after the court

challenged her, she again stated that she did, but she “might not have ... renewed” her license. “Look,” the court said, “your lies are getting you in trouble.” Enriquez interjected that she “could prove,” but before she finished, the court suggested she “close [her] mouth.” The court continued, highlighting that Enriquez’s license in Illinois did not exist, that there had been disciplinary action taken against her in Arizona in the past ten years, and that she had not had a license in Wisconsin since 1992.

¶8 Enriquez, the court continued, was saying “all of these great things,” that she has a “big heart” and is a “law-abiding citizen” who was “just helping out a neighbor,” when she had had her license pulled in Texas for taking Morphine. She was “probably the biggest liar” that had ever come before the court, it commented. The court added, “[y]ou have a terrific drug and alcohol issue. And you’re a drug dealer. And you’ve been a drug dealer for a long time. And I don’t believe much of what you’ve said in terms of your own reporting. I didn’t make this stuff up.” When Enriquez responded that she didn’t say that the court did, the court stated, “I don’t want any comment from you anymore.”

¶9 The court then went through Enriquez’s record and her report, commenting as follows:

[H]ere’s the problem with lying. Ultimately you get caught. And if you don’t accept responsibility, if you don’t recognize you have something to change, then we don’t have a chance on probation and supervision to have you change. Because why would you need to change anything? You didn’t do anything wrong. You’re just helping a neighbor out.

We’re going back, you know, 14 years. You’re in Texas. And, you know, I’m familiar with nursing discipline in my practice. I represented nurses that were rehabilitated. I see them in recovery at times. And there

are ways for them to rehabilitate themselves and get work back.

My experience with it is if they have one or two of these counts, it's unusual. Or I mean it's usual. 17 counts with—it's always Morphine. They're always short. You know, it's not administered to the patient. Don't give me this, oh, it's just one of those administrative things and I surrendered my license. Yes, you did. That's probably the only true thing you said.

But you were using Morphine or selling it or both back then. And I consider that as fact based on evidence from the Texas authorities on your discipline in the State of Texas.

Your statement, again, is this good Samaritan statement. You know, your neighbor ... was a confidential informant, told you that she didn't have any money to fill her prescriptions. So in other words, she didn't give you 30 bucks like the cops say happened here. She didn't have any money. So knowing that they took the same prescriptions, you offered her some of your pills and she would reimburse you with pills when she filled her prescription. Baloney, baloney. She gave you 30 bucks. You sold some pills to her.

Patricia indicated she gave pills on three occasions, never received any money. Baloney. She gave you 30 bucks each time. She bought the pills from you. Just being neighborly and now knows she shouldn't trust anyone. What a lie. What a lie. What a tremendous lie that you know that you can't trust anyone. You said that about the cops too later on.

You are in such blatant denial about your drug issues that, you know, I don't know how you're going to get any help because nothing's your fault.

The only thing you report is Dallas County Texas for an assault, a fight with your husband that gets out of hand. And that's why you have no prior record. No where in here do you tell the author of the presentence about this drug revocation of your licenses. You paint this picture like you're this nurse in good standing and the only thing you've ever done is disorderly conduct. Where is in this presentence report your statement about losing your license in the State of Texas and your explanation for why you lost it? It's because you were lying about it. You were hiding

it. You were, just like all this other stuff is a bunch of baloney.

You know, your only trouble has been, you know, someone who obeys the law. And, as a nurse, tries to help people. Yeah, you helped them when you have 17 counts of taking, you know, the narcotic drug. You're helping them a lot. Not giving it to the patient is what usually happens. Taking the whole thing. Not administering. I mean they keep track of these records.

Before they go on a case like that against a nurse, they, you know, this isn't just some Mickey Mouse operation where this is some kind of mistake. You know, you're taking Morphine, either not giving it to the patients, administering it to yourself, selling it. I don't know what exactly it is. But I do know that it's true that your license was revoked because you took Morphine that was destined for patients or destined for discarding. And you used it or sold it or a combination of both.

....

I mean there's—there are multiple offenses under the 17 charges that are contained in your, you know, revocation order from the State of Texas. So [you are] telling me as a trained professional registered nurse that you're simply helping someone out with pills is probably the biggest set of lies that I've heard on the bench.

You have no insight into your dishonesty. You keep arguing the case. You have no insight into your treatment needs. And that requires you not to use any narcotics including any that are prescribed for you.

¶10 The court then commented on Enriquez's character, the need to protect the public, and the nature of the offenses, stating as follows:

You stand convicted of two felonies relating to the delivery of narcotics for money, which you say was, you know, just being a good Samaritan.

And your leisurely activities are needlepoint, teaching CPR, reading, and how about selling Morphine and selling pills. You know, you portray yourself as a person that's just this law-abiding, nice person. And maybe you've done some nice things in your life. But this stuff is, for a nurse, it's all totally dishonest.

....

So, you know, where it says here that your doctor has concern, your doctor up at Advanced Pain Management had concern because he thought you were selling your meds, you know, that kind of raised some of my concern. I started looking. I figured I'm going to look and see what is there.

....

So, well, you're going to be having a problem now. Because you're going to be given some time to think about your honesty. And it's the first thing you need to work on is to get honest, not with me necessarily. I'm not offended by it. I just recognize what's there. But you have to get honest with yourself. You weren't honest with your lawyer. You weren't honest with the Court. You weren't honest with the author of the presentence investigation.

And if you're going to lie to friends, that's up to you. If you're going to lie to the Court and present patently false information to me in order for me to fashion a sentence, and I was born but it wasn't yesterday, and I find out about it, there is a—there is a consequence to that....

....

Your character is, I would classify as miserable concerning honesty.... The aggravating circumstances are your dishonesty to the Court, to the Court's agencies including the author of the presentence report.

¶11 The court sentenced Enriquez to consecutive terms of sixty-six months' imprisonment (sixty months of initial confinement and seventy-two months of extended supervision in total) on the two counts of violating WIS. STAT. § 961.41(1)(b).

Enriquez's Motion for Resentencing

¶12 Enriquez, through postconviction counsel, moved for resentencing, arguing that the court relied on inaccurate information, that she was denied her right to rebut information, that the court was objectively biased, and that the court

erroneously exercised its discretion in sentencing Enriquez to nearly the maximum sentence and ordering as a condition of her extended supervision that she not take narcotic medication even if prescribed by a physician.

¶13 In support of the motion, Enriquez submitted a printout from the Illinois Department of Financial and Professional Regulation's website indicating that she held a license as a registered professional nurse with the State of Illinois from May 5, 1986, until May 31, 2014. Also, Enriquez submitted documentation from the Texas Board of Nursing showing that she had voluntarily surrendered her nursing license.⁴ Incorporated into the board's order accepting Enriquez's voluntary surrender was a document charging her with seventeen counts of violating Texas law.⁵ Enriquez asserted that there was nothing in the nursing board's order showing that she sold morphine.

¶14 The State did not file a response.

⁴ The order accepting Enriquez's voluntary surrender of her Texas license provided that it could be conditionally reinstated upon, among other things, proof of twelve consecutive months of sobriety.

⁵ The charges were as follows: withdrawal of medications but failure to document or accurately document administration of them; withdrawal of morphine in excess of a physician's order (two counts); tested positive for morphine; failed to document nursing care given; withdrew a certain amount of morphine and failed to account for the wastage (three counts); withdrew fentanyl but failed to document its administration; withdrew fentanyl without a physician's orders; withdrew morphine without a physician's order (two counts); failed to wear a gown and gloves when entering the room of a patient who had methicillin resistant staphylococcus aureus; misappropriated morphine, Dilaudid, and fentanyl; misappropriated morphine; and engaged in intemperate use of morphine.

The Hearing on Enriquez's Motion

¶15 At the hearing, the State said it had nothing to offer other than that it did not believe that the circuit court relied on any inaccurate information. Thus, the State requested that the court deny the motion.

¶16 The court then made a record recounting the charges against Enriquez, the procedural history of the case, how the case came before Judge Piontek, and the contents of the presentence investigation report. The court discussed why it had investigated Enriquez's nursing records and its concerns about her returning to nursing with a substance abuse problem, stating as follows:

In this case I reviewed the presentence on October 3rd which is that Friday and which is the same day that I looked at her nursing records.

The sentencing was on October 6, 2014, which was the Monday following that weekend.

....

But on October 3rd of 2014 when I looked at this, especially her statement that she had her license revoked in Wisconsin, my decision at that time was to look at her nursing records for two reasons. One, if she's an addict and is selling medication and needs treatment and she shows no recognition of those facts, she presents a great danger to our community.

And, No. 2, if she's pursuing her master's degree and she intends on returning to nursing in any capacity, if she's an addict and has access to the medication that nurses have access to, she poses a tremendous problem, not only for her, but for our community.

What about the patients that are supposed to get their medication? What about patients where she's impaired and don't get their medications? She intends on returning to nursing. According to her, this is no big deal. So I look at the nursing records. And they're dated October 3rd, 2014, which is a Friday, as I said, before the sentencing.

Once these issues were raised in the presentence. When I look at the Texas records, for example, and those were the main records. The other ones were, you know, they were there. They weren't a big deal to me. They weren't anything I'd really consider with any seriousness at the time of sentencing.

But the Texas records are going back to 2000. They accepted voluntary surrender of [her] license.

¶17 The court then proceeded to recount most of the charges the Texas Board of Nursing leveled against Enriquez.

So I see this. You know, now, mind you, when I look for her records, I don't know what I'm going to see. I don't know if it's going to be good. I don't know if it's going to say Patricia was a great nurse and every place she worked loved her. I don't know if there's anything there. I'm not on a—a quest of some kind.

The issue was raised by her in the presentence when she said my license was revoked. And all I did was access a public record. You can go on the Internet. Although I'm not that good on the Internet, I could find these things. And so I accessed them from the various dates.

And, you know, this idea that counsel has somehow—that I sandbagged the defendant, and it goes laying in the weeds for her, I, you know, to me that is exactly what she has told us all along. So counsel is right in line with what she's said which is it's everyone else's fault. This time it happens to be the judge's fault.

We should return a person like this to the nursing profession and let her work on people in our community without any treatment because she, again, has said I don't have any treatment needs. I don't—I have never misused, you know, a drug. I've always taken them as prescribed.

So my statements in the presentence stand. You know, I gave her—the reason I didn't give it to her timing wise until after the presentation by the attorneys, to be honest, is she has a right of [allocution].

I wanted to hear her say, you know, Judge—she said I accept responsibility when everything she says in detail says I don't accept responsibility....

....

So maybe in our job as advocates, we—we believe the judge screwed up and, you know, somehow caused all of this, and, you know, is a bad person and shouldn't have decided, is biased.

I can tell you absolutely I was not biased. I simply wanted the truth. And that's what I got. And when I got the truth, I expected her to acknowledge it and she didn't.

....

And although the transcript doesn't indicate it after I passed out the documents, I gave time for both counsel to look at it, gave her an opportunity, another right of [allocution] for the defendant to explain the revocation of her license because that paints a much different picture than she paints.

And it's unfortunate that, you know, she decided to handle it that way. But I don't, you know, determine that. So, again, I did not see her until the date of sentencing. The Friday before is when I decided to look at the nursing records, before deciding whether she posed really a danger to the community as someone addicted, someone who's willing to sell drugs, accept no responsibility and serious drugs that affect this community tremendously.

¶18 In response to defense counsel's inquiry as to whether the court was finding that it did not rely on inaccurate information, the court said as follows:

I didn't. If, you know, whether she had an Illinois license or didn't have an Illinois license, that wasn't a big deal to me. And we talked about it. But there's a lot of things I talked about that aren't major factors of me deciding.

My reason for deciding are the major things that I just talked about, the dishonesty, the need for help, the addict part of it, the drug-seeking behavior and the failure to recognize what a risk that poses for someone that's now in a master's program in nursing to pursue as a nurse later on.

I can't, you know, I couldn't in good conscience, let someone like that stay in our community without, you know, trying to affect her somehow in recognizing—and I run a treatment court. I have a veterans treatment court, so

I am fully in favor of treatment, but not when someone doesn't have it and not a need for it. And that's where we were at.

¶19 A written order was entered denying Enriquez's motion with the exception of vacating the requirement in the judgment that she pay ninety dollars in restitution for the buy money. Enriquez now appeals from the judgment and the order.

ANALYSIS

Enriquez's Contentions

¶20 Enriquez contends that the circuit court was biased, that she was denied her right to rebut the information the circuit court presented at sentencing and to be sentenced upon accurate information, and that her sentence both in length and the condition precluding her from taking prescribed narcotics was an erroneous exercise of discretion.

¶21 We conclude that Enriquez was denied her right to be sentenced upon accurate information and, thus, reverse and remand for resentencing on that basis alone. We do not address her other contentions. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on narrowest possible grounds).

A Defendant's Right to Due Process at Sentencing

¶22 "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. There is no "constitutional right to a particular sentence available within a range of alternatives, but" there is "a right to a fair

sentencing *process*—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.” *Id.*, ¶26 (quoting *United States ex rel. Welch v. Lane*, 738 F.2d 863, 864-65 (7th Cir. 1984) (alteration in original)). Therefore, where a criminal sentence is based in part on materially untrue information, whether the result of carelessness or design, it is inconsistent with due process of law and must be vacated. *State v. Travis*, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491.

¶23 In order to be entitled to resentencing, a defendant must show by clear and convincing evidence that the information at the original sentencing was inaccurate, and that the court actually relied on the inaccurate information at sentencing. *Id.*, ¶21. The former is a threshold question. *Id.*, ¶22. Once that showing is made, the defendant “must establish by clear and convincing evidence that the circuit court actually relied on the inaccurate information.” *Id.* “Once the defendant shows actual reliance on inaccurate information, the burden then shifts to the State to prove the error was harmless.” *Id.*, ¶23. Review of this constitutional issue is de novo. *Id.*, ¶20.

*The Circuit Court Actually Relied on Inaccurate Information
in Sentencing Enriquez*

¶24 Here, the circuit court clearly had inaccurate information as to whether Enriquez was licensed in Illinois. The circuit court, in undertaking an independent investigation of the status of her license in Illinois, apparently limited

its search to Cook County.⁶ Enriquez, in her subsequent motion for resentencing, produced documentation showing that she was licensed in the State of Illinois from May 1986 through May 2014. The circuit court, in fact, appears to have acknowledged during the postconviction hearing that it had erroneous information, but discounted it, stating that “whether she had an Illinois license or didn’t have an Illinois license, that wasn’t a big deal to me. And we talked about it. But there’s a lot of things I talked about that aren’t major factors of me deciding.”

¶25 The State argues that Enriquez’s documentation shows that her license was not renewed in 2012 and that it expired in 2014. The State posits that whether Enriquez never had a license in the State of Illinois and whether her license was not renewed and expired “is not significant.” In other words, the court’s statement that Enriquez never had a license in Illinois “was not a materially inaccurate statement.” We disagree. As Enriquez argues, she wanted to show to the court that she was licensed as a nurse after the surrender of her license in Texas.⁷

⁶ Under the Code of Judicial Conduct, SCR 60.04(1)(g), “[a] judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding” except under certain circumstances that do not apply here. The comments to SCR 60.04 go on to state that “[a] judge must not independently investigate facts in a case and must consider only the evidence presented.” Comment, SCR 60.04. As our supreme court has said, “[a] judge must not go out and gather evidence in a pending case. To do so is error.” *State v. Vanmanivong*, 2003 WI 41, ¶34, 261 Wis. 2d 202, 661 N.W.2d 76. We reject the State’s suggestion that the independent gathering of “facts” for sentencing purposes does not relate to a pending “case.” Indeed, one of the many problems with an independent investigation is the potential for error and, as was the case here, the inability of the parties to factually and legally address the judge’s information other than in an ad hoc manner, leading to further error.

⁷ While the State noted that the Illinois information “shows she had a disciplinary action on her license in 2010 ‘due to sister state disciplines and a misdemeanor conviction,’” we are not provided with any information as to what these references mean, or how this renders the court’s conclusion that she never had an Illinois license accurate.

¶26 The threshold question having been established, the next question, “[w]hether the circuit court ‘actually relied’ on the inaccurate information ... 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 (quoting *Lane*, 738 F.2d at 866). Here, the circuit court made “explicit and repetitive” references to Enriquez having no license in Illinois and, in fact, never having one. *Id.*, ¶32.

¶27 Specifically, the court told Enriquez that from its independent investigation “the State of Illinois shows that you have no license there” and, again, that she had “no license in the State of Illinois ... never have.” When Enriquez challenged the court on the status of her Illinois license, the court told her, “your lies are getting you in trouble.” Enriquez said she “could prove” but the court cut her off, suggesting that she “close [her] mouth.”⁸ The court continued, again stating, “[y]our license in the State of Illinois does not exist,” and then stated that it did want any further comment from Enriquez.

¶28 Where a court gives “explicit attention to the misinformation,” the court “demonstrates [its] reliance on that misinformation in passing sentence.” *Id.*, ¶¶44, 46 (where circuit court mentioned eight times—four at the plea and four at the sentence—that there was a mandatory minimum of five years, but, in fact, there was none, that inaccurate information formed part of the basis for the sentence); *Tiepelman*, 291 Wis. 2d 179, ¶¶6, 29-30 (one mention of inaccurate

⁸ Without referring to the record, the State contends that Enriquez waived this argument by failing to object. The transcript, however, clearly demonstrates that Enriquez disputed the circuit court’s claims. The State’s unsupported argument has no merit given that the court suggested she “shut her mouth,” and when she subsequently attempted to speak, advised her it didn’t want any more comment.

fact—that defendant had twenty convictions when it was only five—satisfied actual reliance element).

¶29 The State argues that the court did not rely on the status of Enriquez’s license in other states, “but instead focused on how her failure to address these issues” demonstrated her dishonest and addictive behavior and the risk she posed to the public as a nurse.⁹ Yet, the very portion of the sentencing transcript that the State cites has the circuit court recounting as “aggravating circumstances” Enriquez’s “dishonesty to the Court, to the Court’s agencies, including the author of the presentence report,” which obviously referred to, among other things, the status of her nursing license in Illinois. It was *part* of what led the court to conclude that Enriquez’s character was “miserable concerning honesty.” This is all that is required—that the inaccurate information form part of the basis for the sentence.

¶30 The State also notes that during the hearing on Enriquez’s postconviction motion the court said that “whether she had an Illinois license or didn’t have an Illinois license, that wasn’t a big deal to me.” However, “[a] circuit court’s after-the-fact assertion of non-reliance on ... inaccurate information is not dispositive of the issue of actual reliance.” *Travis*, 347 Wis. 2d 142, ¶48. The circuit court judge’s repeated reference to Enriquez having no Illinois license, as well as the court’s conclusion that she was not being honest about it, shows that it was no *de minimus* matter. The court responded to her attempt to rebut by concluding that she was being dishonest and failing to acknowledge the truth—all of which, in fact, formed part of the sentence.

⁹ The State’s brief is unclear as to what exactly are “these issues.”

¶31 Finally, the State (as did the circuit court), applies an erroneous analysis in arguing that the court did not rely on the inaccurate information because other considerations justified the sentence. “[T]he fact that other information *might* have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as *part* of the basis of the sentence.” *Id.*, ¶47 (quoting *Lane*, 738 F.2d at 867, *cited with approval in Tjepelman*, 291 Wis. 2d 179, ¶14) (the defendant is not required to prove prejudicial reliance in order to establish actual reliance).¹⁰

¶32 The State does not develop any argument that the error was otherwise harmless, that is, “that the sentencing court would have imposed the same sentence absent the error.” *Travis*, 347 Wis. 2d 142, ¶73. Thus, we will not address it. *See State v. Tillman*, 2005 WI App 71, ¶18, 281 Wis. 2d 157, 696 N.W.2d 574 (“[T]he court’s role in a conventional appeal is limited to addressing the issues briefed by appellate counsel.”). Moreover, the State’s failure to address harmless error amounts to a failure to meet its burden of proof. *Travis*, 347 Wis. 2d 142, ¶23.

¶33 Accordingly, Enriquez’s motion should have been granted, and we remand the matter for resentencing.

¹⁰ While we need not reach the additional claims of inaccurate information Enriquez raises, we note that, while the circuit court repeatedly characterized Enriquez as a “long time” “drug dealer,” as Enriquez points out, “[t]here is nothing in [the voluntary surrender] Order that accuses [her] of selling Morphine ... or other drugs.” At the postconviction hearing, the court never addressed its repeated accusations at sentencing that Enriquez was a long time drug dealer. We also note that the State has failed to address this issue at all. In short, while the issue has not been adequately addressed by the parties, it appears that the court compounded the error it made in relying on information that it had independently uncovered, contrary to SCR 60.04(1)(g), by drawing inferences from that information that had no clear factual support.

CONCLUSION

¶34 The circuit court judge had inaccurate information that Enriquez never had a license to practice nursing in Illinois, and the judge actually relied on it in sentencing Enriquez. The court explicitly and repeatedly referred to the inaccurate information and precluded Enriquez from attempting to address the inaccuracy. A convicted offender has a right to a fair sentencing process—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information. The circuit court’s errors deprived Enriquez of her due process right to be sentenced upon accurate information. Therefore, she is entitled to be resentenced.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

