COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2444-CR **Cir. Ct. No. 2012CF21**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEVONTE CORTEZ SCALES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Levonte Scales appeals a judgment sentencing him after revocation of his probation and an order denying his motion for resentencing. He argues the sentencing court violated his due process rights by sentencing him on false information. We reject that argument and affirm the judgment and order.

¶2 In this Barron County case, the circuit court withheld sentence and placed Scales on probation for felony resisting an officer resulting in a soft tissue injury. In Eau Claire County, Scales was also placed on probation for misdemeanor resisting or obstructing an officer. After the Department of Corrections revoked Scales's probation in both cases, he returned to Barron County for sentencing.

¶3 Before the circuit court announced its sentence, it sought clarification that Scales was being sentenced after revocation on two separate offenses. Scales's attorney answered, "Yes." Without objection, the court proceeded with sentencing on both the felony and misdemeanor charges. Scales's attorney mentioned that Scales "still has to go back to Eau Claire County and be sentenced on a misdemeanor charge that he has there," and "Mr. Scales does have the two pending cases in Eau Claire." The sentencing court was not specifically informed that the pending Eau Claire sentencing was for the same misdemeanor charge the court thought it was imposing on that day. After considering the seriousness of the felony charge, Scales's character, and the need to protect the public, the court imposed the maximum sentence on the felony charge of three years' initial confinement and three years' extended supervision. On the misdemeanor charge, the court imposed a concurrent six-month sentence, three months less than the maximum. The court explained that it originally thought it would impose the maximum consecutive sentences totaling six years and nine

months, "but after hearing all the facts and circumstances, I've decided that that's not necessary."

¶4 Two days later, the court realized its mistake in sentencing Scales for the Eau Claire offense, and it amended the judgment of conviction to remove the sentence for that offense. Scales filed a postconviction motion for resentencing, arguing the six-year sentence was based on false information that the sentencing court had authority to sentence Scales for the Eau Claire County misdemeanor. The circuit court denied the motion, concluding Scales failed to prove the court explicitly relied on the Eau Claire County conviction and explaining that the misdemeanor obstruction conviction "played no role" in the felony resisting sentence.

¶5 Scales has failed to preserve for appeal his argument that he was sentenced on false information. Not only did Scales fail to object at the sentencing hearing, but his attorney affirmatively promoted the sentencing court's erroneous impression that Scales was there for sentencing on both charges identified in the revocation summary. A defendant cannot fault the sentencing court for considering information that the defense failed to correct at the sentencing hearing even though it was given that opportunity. ***State v. Leitner***, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207.

¶6 On the merits, Scales has not demonstrated that the circuit court relied on inaccurate information when it sentenced him on the felony charge. Scales must prove by clear and convincing evidence that the information was incorrect and that the circuit court actually relied on it. *See* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. Actual reliance requires more than mere reference to an inaccuracy. *See* ***State v. Lechner***, 217 Wis. 2d 392,

421-23, 576 N.W.2d 912 (1998). Whether the court actually relied on incorrect information depends on whether the court gave explicit attention or specific consideration to it, so that the misinformation formed part of the basis of the sentence. ***Tiepelman***, 291 Wis. 2d 179, ¶14.

¶7 Although we are not bound by the circuit court's finding that the misdemeanor conviction "played no role" in the felony sentence, we conclude Scales has failed to establish the sentencing court's actual reliance on the mistake when it imposed the sentence for the felony charge. The court was entitled to consider Scales's conduct in the misdemeanor case even though it lacked authority to impose a sentence for that offense. *See* ***State v. Blake***, 46 Wis. 2d 386, 393, 175 N.W.2d 210 (1970). The mistaken belief that the Barron County court had jurisdiction to sentence Scales for the Eau Claire County misdemeanor does not by itself support an argument that the felony sentence would have been shorter had the court only considered Scales's behavior relating to the misdemeanor charge rather than actually sentencing him for that behavior. The sentencing court's mistake as to its jurisdiction did not alter its perception of the circumstances surrounding the Barron County offense.

¶8 Scales focuses on the circuit court's comment that it initially considered imposing the maximum consecutive sentences, but decided that was not necessary after hearing from Scales's counsel and family. Scales reads too much into the court's comment. The sentences the court initially imposed totaled six years' imprisonment, nine months less than the maximum consecutive sentences. The court's comment that the maximum sentences that it could have imposed were not necessary does not suggest that it would have imposed a sentence of less than six years' imprisonment on the felony count had it not made the erroneous assumption of jurisdiction over the Eau Claire County case.

¶9 Finally, even if the issue was properly preserved and if Scales met his burden of proving actual reliance on the erroneous fact, his argument fails because the error was harmless. The State has the burden to prove that an error did not affect the circuit court's selection of a sentence. ***State v. Travis***, 2013 WI 38, ¶86, 347 Wis. 2d 142, 832 N.W.2d 491. The State meets that burden beyond a reasonable doubt because there is no causal connection between the sentencing court's mistaken belief and the length of the sentence it imposed in the Barron County case. In imposing the six-year sentence for the Barron County offense, the court focused on the facts relating to that offense, Scales's probation revocation, his lack of candor, his association with dangerous individuals, his failed attempt at rehabilitation while on probation, his violent behavior toward his girlfriend, and the need to protect the public. The court did not expressly consider the facts surrounding the Eau Claire County misdemeanor charge in its assessment that a six-year sentence was appropriate. On the basis of the circuit court's comments at the sentencing hearing, we conclude the error regarding authority to sentence Scales for the Eau Claire County offense played no role in the sentencing decision regarding the Barron County offense.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).