COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2248-CR **Cir. Ct. No. 2001CF1661**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MORRIS D. KING,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Morris D. King appeals from an order for reconfinement entered after revocation of his extended supervision and from an order denying his subsequent motion for relief. King asserts his reconfinement sentence was based on inaccurate information. We conclude that to the extent

there was inaccurate information, King has not shown that the reconfinement court relied on it. We therefore affirm the orders.

BACKGROUND

¶2 In May 2001, King pled guilty to one count of conspiracy to manufacture or deliver between fifteen and forty grams of cocaine, as party to a crime. He was sentenced to six years' initial confinement and four years' extended supervision.[1]

¶3 King was released to extended supervision on February 26, 2008. He tested positive for marijuana on March 5, 2008, and was given a warning. He tested positive for cocaine in April 2008 and was sent to group treatment, which he successfully completed.

¶4 In June 2008, King was at the home of his girlfriend, Felicia Wyatt. King's cousin, Tyrece Little, lived in Wyatt's basement. Little had gone to see his probation agent and Wyatt had gone to purchase a birthday cake for a party, leaving King as the only adult supervising several children. While Little and Wyatt were gone, police arrived to look for Little; they had received a tip that he had weapons, contrary to the terms of his supervision.

¶5 King let the officers into the home. Under Wyatt's mattress, police found a .22-caliber pistol along with mail addressed to King. King told officers he had moved the gun to the mattress after he discovered one of the children holding onto the weapon. King was charged with felon-in-possession, although the charge

[1] King was also sentenced to six consecutive months in the House of Correction for a felony bail jumping conviction; that case is not presently before this court on review.

was dismissed by the State upon a federal indictment. However, King's supervising agent initiated revocation proceedings.

¶6 According to the administrative law judge's factual findings, King had first told his agent that he had never handled the gun. When his agent informed him that she would review the statement he had given to police, King changed his story. He told the agent that he was watching "my baby crawling and eating stuff off the floor, when I noticed the but[t] of a gun sticking out by the stereo." King also testified at the administrative hearing that one of the children had reached behind the stereo and, when King saw the child holding the gun, he confiscated the weapon and put it under the mattress for safety.

¶7 The administrative law judge rejected all three explanations. First, their inconsistency was damaging. Second, the judge observed that King could not explain how his mail was found with the gun. Third, the judge was unconvinced by King's professed concern for the children's safety, noting that if he had truly been concerned, he would have checked to see whether the weapon was loaded rather than simply sticking it under the mattress. Finally, Wyatt had testified that there was no room for a gun to be hidden by the stereo as King had claimed. The administrative law judge concluded that reconfinement for the entire four years was appropriate, but recommended three years' reconfinement so that King would have a period of supervision upon release.

¶8 At the reconfinement hearing in the circuit court, King again explained that he was simply trying to protect the children. The court discounted King's explanation, noting the administrative law judge had already rejected it as a factual matter. As relevant to the current appeal, when the court imposed the reconfinement sentence, it began to explain factors it was considering. It noted

that it "typically ha[d] to look at" the institutional conduct record, but the agent preparing the court memo had indicated in her report that the record was unavailable. The court went on to explain additional factors, then ordered King reconfined for thirty months.

¶9 King moved for relief, arguing in part that he had been sentenced on inaccurate information. The conduct record had been part of an earlier motion for sentence adjustment and, therefore, was already part of the court record. According to King, this meant that the agent's statement that she could not obtain the institutional record was "most certainly false" and warranted resentencing.

¶10 The reconfinement court acknowledged that the agent's statement had been inaccurate,

> but it was not the kind of inaccurate information that had any bearing on the reconfinement decision. The court did not form a belief one way or the other about the defendant's institutional conduct at the reconfinement hearing because the court assumed that that information was not available. In sum, the court did not rely in any substantial way upon inaccurate information about the defendant's institutional conduct.

Thus, the court denied the motion. King appeals.

DISCUSSION

¶11 A defendant has the right to be sentenced based on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1; *see also* ***State v. Brown***, 2006 WI 131, ¶29, 298 Wis. 2d 37, 725 N.W.2d 262. Whether a defendant has been denied this right is a question of law we review *de novo*. ***Tiepelman***, 291 Wis. 2d 179, ¶9; *see also* ***State v. Littrup***, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991), *overruled in part on*

other grounds by ***Tiepelman***, 291 Wis. 2d 179, ¶2. A defendant who seeks resentencing because the court relied on inaccurate information must show that the information was inaccurate and that the court relied on it. ***Tiepelman***, 291 Wis. 2d 179, ¶2. If the defendant shows the sentencing court actually relied on inaccurate information, the burden shifts to the State to show that any erroneous reliance was harmless. ***Id.***, ¶3.

¶12 We question whether the agent's statement that the institution conduct report "is not documented in file" is "inaccurate information" as contemplated by our jurisprudence. The first enunciation of the right to be sentenced on accurate information was made in ***Townsend v. Burke***, 334 U.S. 736, 741 (1948), where the Supreme Court held that materially untrue assumptions about a person's criminal record are inconsistent with due process. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶10. Thus, in ***Tiepelman***, for example, the inaccurate information was the court's belief that as of sentencing, Tiepelman had twenty prior convictions when, in fact, he had only five. ***Id.***, ¶6. In ***State v. Groth***, 2002 WI App 299, 258 Wis. 2d 889, 655 N.W.2d 163, the inaccurate information was the State's representation that Groth "beats up women who are pregnant." ***Id.***, ¶16.

¶13 Here, the "inaccurate information" is not exactly a representation of any material fact. Rather, it is a representation that the agent could not find the necessary document or documents she needed to allow her to provide the court with material facts. That is, the situation appears to be more one of sentencing without particular information rather than sentencing based on inaccurate

information. Assuming without deciding, however, that the agent's representation was inaccurate,[2] King fails to establish the circuit court actually relied upon it.

¶14 In rejecting King's motion, the court explicitly stated that the information was not the kind "that had any bearing on the reconfinement decision[.]" The court also stated that it "did not rely in any substantial way upon inaccurate information" about King's institutional conduct because it could not form a belief one way or the other in the absence of the information.

¶15 Of course, the court's assertion of non-reliance is not necessarily dispositive. *See* ***Groth***, 258 Wis. 2d 889, ¶28. We may independently review the record to determine whether there was any reliance on inaccurate information. ***Id.*** Here, we conclude the record indicates that the court did not rely on the inaccurate information.

¶16 The transcript indicates that the reconfinement court's primary concern was King's behavior following his release to extended supervision—that is, with behavior leading to revocation, not behavior during initial confinement. The court disagreed with the administrative law judge's determination that King should be reconfined for the full four years, stating, "I don't believe that this record justifies taking all of the time." However, after reciting the series of events leading to the reconfinement proceedings, the court observed: "I think there are reasons, in part, to be optimistic[,] … but I'm not particularly enthused about you

[2] The agent's note in the revocation memo is that "[a]ccording to file material, Mr. King's institution conduct record is not documented in file." King makes much of the fact that a copy of his conduct record is in the circuit court record. King does not establish, however, what file the agent reviewed in preparing her memo, nor does he establish that the conduct record was, in fact, in the file the agent reviewed.

getting out and testing positive for weed one week after you're released from prison. That's not a nice way to start out your supervision."

¶17 Although the reconfinement court rejected the administrative law judge's recommendation as too harsh, no part of the court's reconfinement decision suggests that it was made in reliance upon the agent's representation that the institution conduct report was unavailable. Instead, the reconfinement sentence was based on King's behavior, positive and negative, while on extended supervision. Because King has not met the burden of showing the court's actual reliance on inaccurate information, we need not advance to a harmless error analysis.[3]

By the Court.—Orders affirmed.

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

[3] In his brief, King contends his "institutional conduct record was very good." The conduct report in the record, which goes through February 26, 2007—one year prior to King's release—shows thirteen violations on eight dates. Two dates contain major violations; on one of those dates, King was sanctioned with what appears to be sixty days of twenty-four-hour, in-room confinement. We thus consider King's representation of his conduct record to be "most certainly false."