

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 9, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2101-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2007CF539**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BART M. KLEIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Bart Klein appeals from a judgment convicting him on his no contest plea of second-degree sexual assault of a child and from an order denying his postconviction motion seeking sentence modification. Klein

primarily argues that the circuit court relied upon inaccurate information at sentencing. To the extent the court did so, the error was harmless. We affirm.

¶2 Klein was charged with one count of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. While Klein was released on bail, he was charged with bail jumping for having unsupervised contact with another minor. The minor, who was under juvenile supervision, removed his electronic monitoring bracelet and was staying with Klein.

¶3 Klein pled no contest to second-degree sexual assault; the first-degree sexual assault charge was dismissed but read in. Two other uncharged second-degree sexual assaults of a child were read in at sentencing. Klein also pled guilty to the bail jumping charge. At the 2009 sentencing, the circuit court placed Klein on probation for five years, including nine months of condition time in the county jail. In October 2010, Klein's probation was revoked.

¶4 In sentencing Klein after revocation of his probation, the circuit court noted the seriousness of the offenses and that Klein sexually violated several children. The court observed that in most of the incidents, Klein befriended the family, gained the family's trust and then "moved in on their children." Klein then secured an invitation to spend the night at the family's home, thereby giving him the opportunity to sexually assault the victims. The court noted the efforts Klein undertook to gain the family's trust so that he could sexually assault juveniles connected to the family. The court noted the impact on the victims and how Klein also betrayed their trust. Klein deceived his probation agent and used deception to reach out to juveniles.

¶5 The court also considered the bail jumping charge and Klein's inability to comply with his release conditions. The court also noted that Klein

violated his probation rules by reaching out to a juvenile and engaging in deceptive chat room interactions in order to befriend other juveniles. Klein also drove past the homes of juveniles and reached out to them via the internet from a public library computer. By its twenty-year sentence, the court intended to protect the public and keep Klein from having contact with juveniles.

¶6 Postconviction, Klein sought resentencing because the circuit court sentenced him based on inaccurate information. The court erroneously remarked that Klein committed his probation violations while he was in jail serving his probation condition time. The court also had an erroneous view of his relationship with the family through which he encountered his victims. Klein also complained that the court did not sufficiently explain the reasons for the length of the sentence.

¶7 At the postconviction motion hearing, the parties agreed that the circuit court misspoke when it said that while jailed, Klein violated the terms of his supervision.<sup>1</sup> The parties also agreed that the court misspoke when it said that Klein targeted the family to gain access to the juveniles connected with the family, when he actually had a years-long, pre-existing relationship with the family. The parties then argued whether these misstatements were harmless.

¶8 In deciding the postconviction motion, the circuit court acknowledged its misstatement that Klein had unauthorized contact with juveniles while jailed. However, the court stated that its “intent or concern” at the time of sentencing “was that while being supervised, that even then the defendant could

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<sup>1</sup> The revocation summary stated that Klein had impermissible juvenile contacts before he reported to the jail on October 15, 2009, to begin his condition time, not after he reported to jail, as the circuit court mistakenly stated.

not control his behavior.” The court noted that there were numerous, undisputed instances in which Klein violated his probation rules. The court concluded that its statement that Klein violated his probation rules while incarcerated was harmless and had no impact on the final sentence.

¶9 The court conceded that it may have misconstrued the nature of Klein’s relationship with the family that gave him access to the juveniles. At the postconviction hearing, Klein clarified that he had a years-long, pre-existing relationship with the family, he occasionally spent the night at the family’s home, and two of the victims would frequently visit the family and sleep at the home. The court found that its sentencing remarks were consistent with a view that Klein used every available resource to gain access to juveniles for the purpose of sexual contact, and that he used his relationship with the family to this end. The court found that it did not rely upon inaccurate information.

¶10 The circuit court next addressed Klein’s complaint that it did not tie its twenty-year sentence to the sentencing objectives. The court reiterated that its goal at sentencing was to protect the public, and punish and deter Klein. The court found that it considered the appropriate factors, and the sentence met the objectives. The court declined to resentence Klein, and Klein appeals.

¶11 At sentencing, a court may consider numerous factors, including the gravity of the offense, the defendant’s character, and the need to protect the public. *State v. Harris*, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight to be assigned to each factor is within the circuit court’s discretion. *Id.* A court misuses its discretion if its sentence is based on or actually relies upon clearly irrelevant or improper factors. *Id.*, ¶30.

¶12 “[A] defendant has a constitutional due process right to be sentenced based upon accurate information.” *Id.*, ¶32. The defendant “must prove that the information was inaccurate, and that the court actually relied on that inaccurate information.” *Id.* If the defendant meets this burden, “the burden [then] shifts to the State to prove that the error was harmless.” *Id.* “An error is harmless if there is no reasonable probability that it contributed to the outcome.” *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

¶13 On appeal, Klein argues that the circuit court based its sentence on inaccurate information. Even if the circuit court referred to inaccurate information at sentencing, we conclude that the court did not rely upon such inaccurate information in fashioning the sentence. To the extent the circuit court could be deemed to have relied upon inaccurate information, the error, if any, was harmless.

¶14 It is undisputed that Klein violated his probation rules. The probation revocation summary provided to the circuit court noted that Klein admitted that while on supervision, he had unauthorized conduct with juveniles, drove past the home of one of his victims on numerous occasions and was observed doing so by the victim on one occasion, used a public library computer to access the internet, had contact with teenagers in internet chat rooms using the fictitious internet profile of a sixteen-year-old girl, contacted one of his victims using the fictitious internet profile, and lied to his probation agent about using the computer. All of this conduct violated Klein’s supervision rules.

¶15 While the circuit court misspoke when it stated that the probation rule violations occurred while Klein was jailed, we agree with the State that the court’s focus was on the fact and nature of the violations, not when Klein

committed them. The circuit court properly considered Klein's violations as part of an appropriate exercise of its sentencing discretion. Any error was harmless.

¶16 Klein also assigns error to the circuit court's characterization of his relationship with the family through which he gained access to juveniles. The circuit court found that its sentencing remarks were consistent with a view that Klein used every available resource to gain access to juveniles with whom he could have sexual contact, and Klein used his relationship with the family to this end. The court's remarks accurately focused on Klein's exploitation of his friendship and trust relationship with the family to gain access to the juveniles. If error, the court's characterization was harmless.

¶17 Finally, Klein argues that the twenty-year sentence exceeded the recommendation of his probation agent, the State and Klein's attorney. Klein cites no authority for the proposition that a sentence that exceeds such recommendations is an erroneous exercise of discretion. We conclude that the circuit court properly exercised its discretion in sentencing Klein.

*By the Court.*—Judgment and order affirmed.

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

