COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP195-CR **Cir. Ct. No. 2010CF757**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN J. HODGKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARK D. GUNDRUM, Judge, and ROBERT MAWDSLEY, Reserve Judge. *Affirmed.*

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

¶1 PER CURIAM. Justin J. Hodgkins appeals from a judgment of conviction, entered upon his guilty pleas, on one count of physical abuse of a child recklessly causing bodily harm and one count of second-degree recklessly

endangering safety. Hodgkins also appeals from an order denying his postconviction motion for resentencing. Hodgkins contends that the circuit court sentenced him based on inaccurate information. We conclude that Hodgkins has waived the challenge and, in any event, has failed to demonstrate that the circuit court actually relied on inaccurate information. Accordingly, we affirm.

BACKGROUND

¶2 For allegedly causing injuries to almost-four-year-old E.L.H., Hodgkins was charged with one count of physical abuse of a child intentionally causing bodily harm, two counts of physical abuse of a child recklessly causing bodily harm, and one count of second-degree recklessly endangering safety, all as a repeat offender. Among other things, it was alleged that, when E.L.H. refused to get ready one morning, Hodgkins pushed him from behind, causing him to fall forward, face-down. When Hodgkins rolled him over, E.L.H. had blood coming out of his nose and his eyes began to roll back into his head. Hodgkins got E.L.H. to come to, cleaned him up, and took him to Hodgkins' mother's house, evidently for day care. She called him shortly after he left, telling him that she thought E.L.H. had a concussion and should be taken to the hospital.

¶3 Pursuant to a plea agreement, Hodgkins pled guilty to one reckless-injury abuse charge and to the reckless endangerment charge. The other counts would be dismissed and read-in, the repeater allegation would be dropped, and the State would recommend a prison sentence but refrain from recommending any specific length.

¶4 Prior to sentencing, Hodgkins sent a *pro se* letter to the circuit court, claiming multiple inaccuracies in the presentence investigation report (PSI). At the start of the sentencing hearing, defense counsel informed the circuit court that

he "had an opportunity to speak to Mr. Hodgkins at Green Bay Correctional Institution as well as here today in the Waukesha County Jail. He no longer wishes to pursue those issues that he set forth in his letter. We've resolved those to a satisfaction without any further commentary." Aside from some corrections to Hodgkins' employment history, then, no changes were made to the PSI.

¶5 The circuit court sentenced Hodgkins to the maximum sentence for each count: one and one-half years' initial confinement and two years' extended supervision for the physical abuse charge, and five years' initial confinement and five years' extended supervision for the reckless-endangerment charge. The sentences were also ordered to be served consecutively.

¶6 Hodgkins filed a postconviction motion seeking resentencing. As relevant to the appeal, he alleged:

> The presentence investigation states that the defendant made claims to [the author] regarding [E.L.H.] having a brain bleed. The truth is that the defendant stated that [E.L.H.] had a hemorrhage on his brain and that doctors suspected that it was there for [E.L.H.'s] entire life and that the fall aggravated the condition.

The circuit court held a hearing but rejected the motion, concluding that the sentencing court had not relied on any inaccurate information but, rather, on Hodgkins' character as demonstrated by his criminal record and the serious harm, both emotional and physical, that had come to E.L.H. Hodgkins appeals.

DISCUSSION

¶7 A defendant has a due process right to be sentenced based on accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To be entitled to resentencing because a circuit court allegedly relied

on inaccurate information, a defendant must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy. *See* ***id.***, ¶2. The defendant must make his case by clear and convincing evidence. *See* ***State v. Harris***, 2010 WI 79, ¶34, 326 Wis. 2d 685, 786 N.W.2d 409. Whether a defendant has been denied due process is a question of law that an appellate court reviews *de novo*. ***Tiepelman***, 291 Wis. 2d 179, ¶9.

¶8 There are several safeguards to protect a defendant's right to be sentenced on the basis of true and correct information. *See* ***State v. Mosley***, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996). "The defendant and defense counsel are allowed access to the [PSI] and are given the opportunity to refute what they allege to be inaccurate information." ***Id.*** Also, "both the defendant and defense counsel are present at the sentencing hearing and have a chance to make a statement relevant to sentencing." ***Id.***

¶9 On appeal, the State contends that Hodgkins waived the right to challenge the inaccuracies in the PSI when defense counsel indicated that he no longer wished to challenge the issues raised by his letter. *See* ***Handel v. State***, 74 Wis. 2d 699, 704, 247 N.W.2d 711 (1976) ("Since the facts contained in the [PSI] were not challenged or disputed by the defendant at the time of sentencing, we find no abuse of discretion by the sentencing judge[.]"); *see also* ***State v. Leitner***, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207 (failure to make contemporaneous objection to allegedly inaccurate information at sentencing constitutes waiver). Hodgkins contends that when his trial attorney indicated he no longer wished to challenge the inaccuracies in the PSI, the circuit court was required to conduct a personal colloquy with Hodgkins to ensure a knowing, intelligent, and voluntary waiver of the challenge.

¶10 Some rights are so fundamental that a personal colloquy with a defendant is required before waiver of the right can be affirmed. *See* ***State v. Denson***, 2011 WI 70, ¶60, 335 Wis. 2d 681, 799 N.W.2d 831 (explaining that waiver colloquies are required when defendant waives right to testify, right to counsel, or right to jury trial); *see also* ***State v. Francis***, 2005 WI App 161, ¶¶15-18, 285 Wis. 2d 451, 701 N.W.2d 632.

¶11 Some rights, however, do not rise to that level, or there are other considerations that weigh against requiring a colloquy. *See* ***Denson***, 335 Wis. 2d 681, ¶¶63-65 (declining to require colloquy when defendant waives the right *not* to testify); ***Francis***, 285 Wis. 2d 451, ¶¶19-23 (explaining that the choice to forego a defense, and therefore to not present evidence, does not require a colloquy; rather, the defense can be waived by counsel on defendant's behalf).

¶12 Here, Hodgkins cites no authority and develops no analysis to establish that when a defendant decides to forego factual challenges to the PSI, the circuit court must engage him in a colloquy. Moreover, Hodgkins was given the opportunity to personally address the circuit court during sentencing and did not raise any inaccuracies himself. Therefore, we agree with the State that any challenge to inaccuracies in the PSI was waived.

¶13 Even if the waiver doctrine did not apply, however, Hodgkins has failed to show that the circuit court actually relied on an inaccuracy. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶2. In his letter to the circuit court, Hodgkins had complained, in relevant part:

> The agent also said that I said [E.L.H.] had a brain bleed, that's not true, what I said was [E.L.H.] had a hemmerage on his brain that [doctors] suspect was there his whole life and the fall agravated it. This information is misleading to the court, in an attempt to make the court believe that

> [E.L.H.'s] brain was bleeding prior to the hemmerage being agravated.

(Misspellings in original.) Hodgkins' complaint was similarly set forth by the postconviction motion, *see* ¶6, *supra*, and in his appellate brief.[1]

¶14 It is not clear, however, where the purported inaccuracy lies. "Hemorrhage" means either a "copious discharge of blood from the blood vessels" or, more simply, to "bleed."[2] *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1056 (unabridged 1993). If we substitute "hemorrhage" where the PSI used "brain bleed," then the PSI says almost precisely what Hodgkins claims he told the PSI author: that E.L.H. had a preexisting problem—be it "hemorrhage" or "brain bleed"—that was merely exacerbated, but not caused, by Hodgkins' push.

¶15 It is alternatively possible that Hodgkins wants to dispute the nature of E.L.H.'s preexisting problem. The State at sentencing commented that Hodgkins was "talking about this other injury … another brain bleed, and he tries to at least portray this … as some sort of congenital problem … when, in fact, the medical reports … [say] the most likely explanation for that is previous trauma. It's a fluid collection in the brain." The implication of this comment appears to be that Hodgkins was responsible for the prior trauma, which might mean that Hodgkins was trying to make it clear that he believed the preexisting problem was organic to E.L.H.

[1] Hodgkins' letter identified at least nine purported inaccuracies and accused the presentence investigation author of bias. The postconviction motion alleged at least seven claimed inaccuracies. On appeal, the only issue raised, and thus the only issue we address, relates to this claim about the hemorrhage.

[2] We do not know whether "hemorrhage" has another or different meaning to the medical profession.

¶16 In neither case, though, does Hodgkins offer any information to show what E.L.H.'s prior diagnosis was as a way of demonstrating whether the PSI author or the State were in error. Indeed, for all this court knows, E.L.H.'s prior condition may be exactly as the PSI described it.

¶17 We are additionally not persuaded that the circuit court relied on any inaccuracies at sentencing. Hodgkins refers us to this comment by the circuit court: "But as identified, there did seem to be a fair amount of trying to deminimize the situation and the severity of it … and that also tells the Court about your character and troubles the Court about your character."

¶18 While Hodgkins might dispute the details of the PSI, he does not appear to dispute its point: by claiming E.L.H. had a preexisting hemorrhage, irrespective of its origin, Hodgkins could be viewed as attempting to downplay or "deminimize" the seriousness of his own actions. Indeed, Hodgkins had offered explanations for other injuries that E.L.H. had sustained, like claiming scratches on E.L.H.'s head were due to dull blades in a hair trimmer, or attempting to explain how he accidentally slammed E.L.H.'s head in a car door.

¶19 In any event, Hodgkins' explanation of E.L.H.'s preexisting condition is, as far as this court has been shown, not inaccurately described as an attempt to minimize Hodgkins' culpability. Moreover, Hodgkins has not shown that the circuit court relied precisely on that point, accurate or not, rather than any of his other attempts at shifting blame. *See* ***Harris***, 326 Wis. 2d 685, ¶34 (defendant challenging sentence must do so by clear and convincing evidence). The motion for resentencing was properly denied.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).