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DISTRICT II

September 18, 2024

To:

Hon. David M. Reddy
Circuit Court Judge
Electronic Notice

Hector Salim Al-Homsi
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

Kathleen Henry
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP1719-CR

State of Wisconsin v. Jonathan R. Krubert (L.C. #2021CF521)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jonathan R. Krubert appeals from a judgment entered after he pled guilty to third-degree sexual assault. He also appeals from an order denying his postconviction motion alleging he was sentenced on inaccurate information. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In September 2021, Krubert made sexual advances toward his friend's wife, Mary, while at the friend's house.² The advances included touching her; attempting to kiss her; coming up behind her while he was completely naked; grabbing her; putting his hand down her shirt; touching her breasts; pulling her bra and shirt up; and licking/kissing her on her mouth, neck, and chest. Mary repeatedly told Krubert to stop; however, he continued forcing himself on her, and she continued resisting until she was able to escape his grasp and run upstairs to tell her husband, who called the police. The State charged Krubert with one count of attempted second-degree sexual assault contrary to WIS. STAT. § 940.225(2)(a) and one count of felony bail jumping contrary to WIS. STAT. § 946.49(1)(b). In July 2022, Krubert agreed to a plea bargain where he would plead guilty to an amended count of third-degree sexual assault (§ 940.225(3)(b)) and the bail-jumping charge would be dismissed and read in at sentencing.

The sentencing hearing took place in October 2022.³ During the State's comments, the prosecutor said: "This quite frankly was a rape in every sense of the word." The prosecutor also told the circuit court that Krubert had "not gone on [after high school] though to get any -- to do any kind of apprenticeships, any kind of tech school, or other sorts of higher education."

The sentencing court sentenced Krubert to the maximum term allowed by statute: five years' initial confinement followed by five years' extended supervision. *See* WIS. STAT. §§ 940.225(3)(b), 939.50(3)(g). In imposing this sentence, the court considered the need to

² Mary is a pseudonym used for confidentiality. *See* WIS. STAT. RULE 809.81(8).

³ The Honorable David M. Reddy presided over the sentencing hearing and imposed sentence.

protect the community, punish and rehabilitate Krubert, and deter others, and it further explained that it was specifically relying on the following factors:

[Krubert's] past record of criminal offenses; in 2016, the defendant was convicted of possession of methamphetamines and THC; the degree of the defendant's culpability is full; the defendant's age, 44; his educational background, high school; and employment record, he has been gainfully employed in the past; the rights of the public, the public has the right to be free from sexual abuse.

The court also discussed aggravating and mitigating factors. During the course of sentencing, the court did not mention the prosecutor's "rape" comment or the prosecutor's statement about Krubert's lack of post-high school educational efforts. Rather, it focused on Krubert not having taken advantage of the multiple chances he was afforded after committing past crimes, the fact that Krubert seemed to blame his drug addiction for his conduct, and the need to protect the public. It also relied on the presentence investigation report (PSI).

After the sentencing court imposed sentence and entered the judgment, Krubert filed a motion seeking sentence modification based on his claim that the sentencing court relied on inaccurate information when it imposed the sentence. The postconviction court held a hearing and thereafter denied Krubert's motion.⁴ He now appeals.

On appeal, Krubert asserts that the prosecutor's comment that "[t]his quite frankly was a rape in every sense of the word" and the comment about his lack of post-high school education and/or training were inaccurate and that these purported inaccuracies influenced the sentence, thus entitling him to sentence modification.

⁴ The Honorable James P. Daley presided over the postconviction hearing.

“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. In establishing he is entitled to resentencing based on a claim that he was sentenced based on inaccurate information, Krubert must prove by clear and convincing evidence both that: (1) inaccurate information was presented to the sentencing court; and (2) “the circuit court actually relied on the inaccurate information” when it imposed Krubert’s sentence. *See id.*, ¶2; *State v. Coffee*, 2020 WI 1, ¶38, 389 Wis. 2d 627, 937 N.W.2d 579. “A circuit court actually relies on incorrect information when it gives ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence.’” *Coffee*, 389 Wis. 2d 627, ¶38 (quoted sources omitted). We independently review the sentencing transcript to determine whether the sentencing court actually relied on the allegedly inaccurate information. *State v. Alexander*, 2015 WI 6, ¶¶25, 29, 360 Wis. 2d 292, 858 N.W.2d 662.

Here, we need not address whether Krubert proved by clear and convincing evidence that the information presented to the sentencing court was inaccurate because after reviewing the sentencing transcript, we conclude Krubert failed to prove that the sentencing court relied on either of the prosecutor’s comments that Krubert claims were inaccurate. First, the court did not use the word “rape,” and it also did not describe Krubert’s conduct as “rape.” Second, the court did not reference Krubert’s lack of formal post-high school education. The court simply gave no attention or specific consideration to those particular comments. Rather, it focused on the primary sentencing factors, information provided in the PSI, and its concern that Krubert failed

to take advantage of the prior chances he was given in past contacts with the criminal justice system.⁵

We therefore conclude that Krubert failed to satisfy his burden of proving the sentencing court actually relied on inaccurate information. Accordingly, we reject his request for sentence modification and affirm.⁶

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

⁵ Although the sentencing court did indicate it was relying on Krubert’s “educational background, high school; and employment record,” it did not explicitly refer to the prosecutor’s specific statements. Moreover, Krubert’s educational background, which was set forth in the PSI, is a pertinent factor for the sentencing court to consider. We also note that despite Krubert’s claim that the prosecutor’s comment about his lack of post-high school education was inaccurate, the Record reflects that this statement was *not* inaccurate—to wit, the PSI reflects that Krubert’s education history was limited to having completed high school, the alternate sentencing report Krubert submitted on his own behalf stated that he “has not had any other schooling” aside from having graduated from high school, and his attorney at sentencing confirmed that Krubert never attended “college or technical school.” That Krubert seemingly had professional success without additional formal education after high school does not render the prosecutor’s statement regarding Krubert’s lack of additional education inaccurate, particularly given that Krubert does not assert that he actually *did* pursue any such educational opportunities.

⁶ Krubert’s motion sought sentence modification rather than resentencing. The State notes that an inaccurate information challenge is remedied by resentencing rather than sentence modification. Because we reject Krubert’s claim, we need not address this further.