STATE OF WISCONSIN

IN SUPREME COURT

No. 2004AP914-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY A. TIEPELMAN,

Defendant-Appellant-Petitioner.

STATE OF WISCONSIN'S RESPONSE OPPOSING PETITION FOR REVIEW

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STATE OF WISCONSIN'S RESPONSE OPPOSING PETITION FOR REVIEW

Defendant-appellant-petitioner Larry A. Tiepelman seeks review of a decision of the court of appeals affirming the circuit court's decision denying resentencing. Tiepelman urges review because, he contends, the circuit court and the court of appeals erroneously held that he did not suffer any harm when the circuit court, in assessing his character for sentencing purposes, mistakenly believed his record showed twenty convictions for criminal conduct rather than the correct number of nine convictions (plus one read-in offense) along with ten other instances of criminal conduct that did not result in convictions but that Tiepelman admitted he engaged in. Tiepelman

asserts — contrary to ***State v. Groth***, 2002 WI App 299, ¶ 22, 258 Wis. 2d 889, 655 N.W.2d 163, *rev. denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (table) — that once he showed the circuit court relied on inaccurate information, he did not have any further obligation to prove prejudicial reliance.

The State opposes the petition.

The circuit court properly denied Tiepelman's postconviction motion for resentencing. In affirming the circuit court's decision, the court of appeals reached the right result on the issue Tiepelman presents in his petition. The petition does not otherwise advance any claims satisfying any of the criteria this court considers when deciding whether to grant review, Wis. Stat. § (Rule) 809.62(1), and does not otherwise offer any extraordinary reason beyond those criteria for this court to devote any of its resources to further review.

Tiepelman's petition originates in the sentencing court's misstatement about the number of convictions reported in the report of the presentence investigation (PSI). The court stated that the PSI showed twenty convictions for an array of criminal violations. In fact, the PSI showed twenty instances of criminal conduct: nine convictions, one read-in offense, and ten that did not result in convictions but that Tiepelman did not dispute when offered the opportunity to correct errors in the PSI, ***State v. Tiepelman***, 2005 WI

App 179, ¶¶ 1, 4-5, ____ Wis. 2d ____, ____ N.W.2d ____.[1]

In this case, on the conviction for the underlying charge of theft by false representation as a repeater, Tiepelman faced a maximum penalty of sixteen years in prison. ***Tiepelman***, 2005 WI App 179, ¶ 3, ____ Wis. 2d ____; Wis. Stat. §§ 943.20(1)(d) & 939.62 (1995-96 ed.). The prosecutor recommended the maximum sentence (71:8-9). The author of the PSI — which contained an accurate recitation of Tiepelman's criminal history — recommended a sentence of ten to twelve years (42:25). The court sentenced Tiepelman to twelve years in prison (71:28). ***Tiepelman***, 2005 WI App 179, ¶ 3, ____ Wis. 2d ____.

In his petition, Tiepelman captures the essence of his claim in this paragraph:

> It is well established that a sentencing judge may consider dismissed charges, uncharged offenses and even offenses for which a defendant was acquitted. ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.[2] But a sentencing judge can-

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[1] Tiepelman's PSI actually shows twenty-three separate violations, resulting in nine convictions, one read-in offense, one five-year suspension for operating after suspension, and one plea to a speeding violation (42:3-8).

[2] *See also* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) ("Evidence of unproven offenses involving the defendant may be considered by the court" in "determining the character of the defendant and the need for his incarceration and rehabilitation."); ***State v. Damaske***, 212 Wis. 2d 169, 194-97, 567 N.W.2d 905 (Ct. App. 1997); ***id.*** at 195 ("sentencing court may consider conduct

(footnote continues on next page)

> not do what it did here: consider as convictions offenses that were charged but dismissed. ***Id.*** at ¶43 (court may consider facts underlying expunged conviction but it cannot consider the expunged conviction as a conviction).

Petition at 11 (footnote added). He continues:

> There is a qualitative difference between dismissed charges and criminal convictions. First, the true nature of the offense is less ambiguous if there is a conviction rather than a dismissal. When a charge is dismissed, it is unclear whether the state could have ultimately obtained a conviction for the offense charged. . . . .
>
> Second, a prior conviction means that the defendant received some level of consequence for the behavior, whether a fine, probation, jail or prison. A defendant who continues to commit crimes after

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(footnote continues from previous page)

for which the defendant has been acquitted"); ***id.*** at 196 (citing *United States v. Lawrence*, 934 F.2d 868, 874 (7th Cir. 1991), for the proposition that "'a sentencing court may consider uncorroborated hearsay that the defendant has had an opportunity to rebut, illegally obtained evidence, and evidence for which the defendant has not been prosecuted'"); ***State v. Bobbitt***, 178 Wis. 2d 11, 16-18, 503 N.W.2d 11 (Ct. App. 1993) (sentencing court has discretion to consider conduct for which jury has acquitted defendant); *cf.* **State v. Mercado**, 210 S.E.2d 459 (S.C. 1974) (where the jury found the defendant not guilty of murder but guilty of grand larceny, and the trial judge stated he disagreed with the jury prior to sentencing the defendant to the maximum penalty for grand larceny, the appellate court deferred to the discretion of the trial judge who heard the evidence and saw the witnesses), *abrogated on other grounds by* ***State v. Alexander***, 401 S.E.2d 146 , 150 (S.C. 1991).

having already served consequences for prior convictions may reasonably be viewed as a greater danger to the public.

Given those differences, not surprisingly, the enhancement for habitual criminality is tied to the defendant's prior convictions, not prior criminal charges. Wis. Stat. § 939.62. . . . While a sentencing court may certainly consider charges that do not result in convictions, greater weight is afforded to convictions.

Convictions and dismissed charges are not synonymous. Consequently, this court should view with skepticism that court of appeals' conclusion that, despite what the court said at sentencing, it was concerned not with the prior convictions but with the pattern of conduct. It is evidence from the court's own words at sentencing that it was concerned about the convictions, their number and their nature:

> I counted something over twenty prior **convictions** at the time of the commission of this offense back in 1995.

(71:24; App.113)(emphasis added).

> He has a **conviction** for battery, apparently to his now ex-wife. He has a **conviction** for violating the no contact provision. He has various bail and bond violation **convictions**, again dealing with the violation of the restrictions against having contact with his wife.

(71:25; App. 114)(emphasis added). In fact, there were seven, not 20, convictions at the time of the offense and no convictions for battery, violating a no contact provision or bail jumping. The court of appeals' attempt to effectively rewrite the circuit court's sentencing decision should be rejected.

Petition at 11-13.

Tiepelman's recitation misses the point of the court of appeals' decision: that Tiepelman "failed to show that the sentencing judge *prejudicially* relied on inaccurate information in sentencing him." ***Tiepelman***, 2005 WI App 179, ¶ 14, ____ Wis. 2d ____ (emphasis added).

The record shows both that the circuit court's erroneous classification of Tiepelman's conduct did not affect the sentencing decision and that Tiepelman's selective references to the record do not accurately reflect the record.

First, a complete recitation of the circuit court's sentencing remarks on Tiepelman's criminal conduct shows that, contrary to Tiepelman's representation, the pattern of conduct rather than the precise number of convictions lay at the core of the court's assessment of Tiepelman's character:

> Turning to the character of the offender, I have to agree with Mr. Sharp's assessment of Mr. Tiepelman and Ms. Reno's assessment of Mr. Tiepelman and all of the various people who were interviewed for the purposes of the pre-sentence investigation who reported numerous small and large thefts, dishonesties, false identifications, in dealing with Mr. Tiepelman. ***Mr. Tiepelman, at the time of the commission of this offense, had a long pattern of similar offenses – or at least offenses of dishonesty, theft, false pretenses, et cetera.*** I counted something over twenty prior convictions at the time of the commission of this offense back in 1995. They include numerous issuance of worthless checks, they include other forgeries, thefts by false representation, several — more than one forgery, looks like a couple of forgeries, couple of thefts by false representation, theft in a business setting, again, worthless checks. ***A well-established pattern of criminal behavior dealing with theft***

and false representation, issuance of worthless checks, prior to the commission of this offense.

There also is a record of assaultive offenses. Although I agree with Ms. Oliveto that that is not the primary characteristic of Mr. Tiepelman, but nor can it can ignored. He has a conviction for battery, apparently to his now ex-wife. He has a conviction for violating the no contact provision. He has various bail and bond violation convictions, again dealing with the violation of the restrictions against having contact with his wife. So he is properly characterized as assaultive and a domestic abuser, at least to that extent.

Mr. Tiepelman, having accumulated this record, has absolutely no credibility with this Court. Even as to his statements of the various errors in the pre-sentence investigation factual portion I, of course, have one account from Ms. Reno and the people who related information to her, another account from Mr. Tiepelman. I wasn't there, I have no first-hand knowledge, but why would I believe Mr. Tiepelman under this set of circumstances? My comments in the margin of the pre-sentence investigation report next to the Statement of the Offender's Version of this offense is, "nonsense."

Mr. Tiepelman takes the tack today in explaining his record — which is a pretty standard approach to take, but given Mr. Tiepelman's record it is all the more breathtaking in its sillyness [*sic*], and that is that it's someone else's fault that I've committed all these offenses. I haven't gotten the help that I've needed. It's the Department of Corrections' fault because they didn't prohibit me from having a checking account. It's someone else's fault in my past for not getting me the help I needed.

I believe that Mr. Tiepelman can stop himself any time he wants to, and ***he chooses not to be honest, chooses not to be law abiding. He is a criminal thinker from way back.*** Now, it's true that counseling might help, but this is not a mental

disease or defect. Has not been asserted as such anywhere during the course of these proceedings. It's a character defect.

Mr. Tiepelman has no moral compass that I could discern. Whether he didn't get that at his mother's knee or somewhere else in his past I don't know, but every criminal who's before a court for sentencing can point to reasons why they chose a criminal lifestyle, but that doesn't absolve one of criminal responsibility. That doesn't make it all right. That doesn't make it somebody else's fault. It comes home to roost with the offender.

Mr. Tiepelman is conning when he gets up in the morning, he's conning as he goes through the day, he's conning before he falls asleep at night if he thinks there's any advantage he can gain from it, if there's any benefit he can accrue to himself. It is pretty difficult to ask a person with this record to be believed. He steals from his family. He steals from his employers. Why would he be believed at this point?

I think that being on parole has slowed Mr. Tiepelman up a bit in that his infractions and dishonesties and false identifications appear to some extent to be not as blatant and as significant as the offense which got him convicted here, but I believe that Mr. Tiepelman is a significant risk to the public. I believe that Mr. Tiepelman's criminal lifestyle puts anybody that he comes into contact with at risk of him getting in their pocket somehow or another.

So the offense is serious; Mr. Tiepelman has very little positive going for him with respect to character, and he presents an ongoing risk to the public.

There is an issue in Mr. Tiepelman's sentencing scenario which calls for punishment, as well as sending a message of deterrence to others, but ***to me the most significant factor is Mr. Tiepel-***

> ***man's character and the ongoing danger he presents to the public***, as well as the seriousness of the offense. Mr. Tiepelman, in his comments, wants to talk about what got him revoked, and all his good motivations, and he was trying to help his daughter, et cetera, et cetera. ***I am sentencing him in light of his conduct since the offense. I'm also primarily sentencing him for the flat out theft that got him convicted.***

(71:24-28 (emphases added).)

As this recitation of the circuit court's sentencing remarks shows, the erroneous classification of Tiepelman's conduct did not influence the court's sentencing decision. The pattern of Tiepelman's conduct, not whether a specific instance of conduct resulted in a conviction, influenced the court's sentencing decision. Consequently, contrary to Tiepelman's charge, the court of appeals did not "rewrite the circuit court's sentencing decision." Rather, the court of appeals accurately discerned that the circuit court relied on a pattern of conduct rather than the number of convictions when the court decided on its sentence.

Second, contrary to Tiepelman's representation, *see* Petition at 13, Tiepelman's PSI shows twenty-three separate violations, resulting in nine convictions (not seven), one read-in offense, one five-year suspension for operating after suspension, and one plea to a speeding violation (42:3-8):

- Worthless check (3/3/90) — **convicted** 10/15/91
- Worthless check (5/26/91) — **read in** 11/20/92

- Utter forged document/amended to misdemeanor theft (6/17/91) — **convicted** 6/17/92
- Theft by false representation (5/14/92) — **convicted** 11/17/92
- Operating after suspension (6/7/92) — five-year suspension
- Forgery-uttering (6/17/92) — **convicted** 11/17/92
- Disorderly conduct (8/2/92) — **convicted** 9/17/92)
- Worthless checks (2/20/95) — **convicted** 5/20/97
- Theft in a business setting (10/16/95) — **convicted** 11/13/96
- Theft by false representation (12/1/95) — **convicted** 6/3/96
- Disorderly conduct/habitual criminality (5/5/01) — **convicted** 6/22/01
- Speeding (12/19/02) — **no-contest plea** 1/27/03

Most of the dismissals occurred in connection with pleas:

- five charges dismissed in the worthless-check plea on 10/15/91 — battery; disorderly conduct; violation of no-contact order; bail jumping; bond violation
- one count of battery dismissed in connection with the disorderly-conduct conviction on 9/17/92

For the remaining five charges, the PSI shows two dismissals (of two worthless-check charges) outside the context of other dispositions, two charges without identifiable dispositions (two

worthless-check charges), and one charge (bond violation) consolidated with another case but without an identifiable disposition.

This recap of the criminal record found in Tiepelman's PSI further confirms the fact the court of appeals correctly discerned from the sentencing transcript: Tiepelman's pattern of conduct, not the number of convictions, governed the sentencing decision. Likewise, the sentencing judge's remarks at the hearing on the postconviction motion for resentencing (72:21-24) affirm rather than rewrite the history evident in the sentencing transcript.

Tiepelman contends this court should grant review and hold that a defendant should only have to prove reliance on inaccurate information, not prejudicial reliance. Petition at 7-11. Currently, Wisconsin law requires a defendant to prove prejudicial reliance:

> A defendant who asks for resentencing because the court relied on inaccurate information must show both that the information was inaccurate and that the court relied on it. [*State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993).] The defendant carries the burden of proving both prongs — inaccuracy of the information and prejudicial reliance by the sentencing court — by clear and convincing evidence. *Id. See also State v. Littrup*, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Once a defendant does so, the burden shifts to the State to show that the error was harmless. *State v. Anderson*, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). An error is harmless if there is no reasonable probability that it contributed to the outcome. *Id.* at 411, 588 N.W.2d 75.

Groth, 258 Wis. 2d 889, ¶ 22.

Here, even assuming the burden should shift to the State at the earlier point Tiepelman advocates, the record in this case shows that the sentencing result would not have differed: "there is *no* reasonable probability" — indeed, no probability whatever — "that [the error] contributed to the outcome." ***Id.*** (emphasis added). The sentencing judge excoriated Tiepelman's character (pp. 6-9, above) in terms that all but singe the pages of the transcript. The notion that the judge's erroneous classification of Tiepelman's acknowledged conduct affected this assessment defies credulity.

Regardless of where the burden lies (on the defendant to prove prejudicial reliance or on the State to prove harmlessness), the sentencing judge made clear at the sentencing hearing and again at the postconviction-motion hearing that Tiepelman's pattern of conduct, not the number of convictions, bore most heavily on the character component of the sentencing decision. The court of appeals agreed that the judge's error did not have any effect on the sentence.

Under these circumstances, this court should deny the petition. If the issue of burden-shifting requires this court's attention, the court should wait for a case in which the court's resolution of the issue will present a realistic possibility of affecting the sentencing decision in the case under review. In a case like that, the legal and policy issues will have sharper focus and greater significance than they do in this case. Here, they have none.

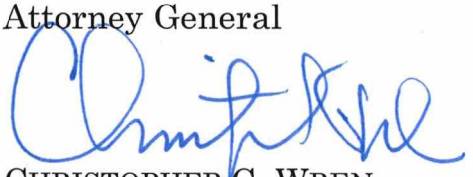
CONCLUSION

This court should deny Tiepelman's petition for review. This case does not merit further review. The circuit court correctly denied Tiepelman's postconviction motion for resentencing, and the court of appeals correctly affirmed that decision.

Date: October 6, 2005.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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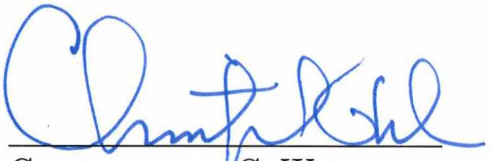
CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.62(4), I certify that this response to a petition for review satisfies the form and length requirements for a response prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 2,919 words.



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October 6, 2005

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Re: **State v. Larry A. Tiepelman**
Case No. 2004AP914-CR

Dear Ms. Clark:

Enclosed for filing in the above matter are original and nine copies of the plaintiff-respondent's Response Opposing Petition for Review. A copy of the response has been served by mail today on counsel for defendant-appellant-petitioner.

Sincerely,

Christopher G. Wren
Assistant Attorney General

CGW:km

c: Suzanne Hagopian
Counsel Defendant-Appellant-Petitioner

William Andrew Sharp
Richland County District Attorney

Enclosure