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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2004AP914-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY A. TIEPELMAN,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONETNS

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PETITION FOR REVIEW

Larry A. Tiepelman, the defendant-appellant-petitioner, by his undersigned attorney, Assistant State Public Defender Suzanne L. Hagopian, respectfully petitions to the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and (Rule) 809.62, to review the decision of the Court of Appeals, District IV, dated July 14, 2005.

ISSUE PRESENTED

The record shows that the circuit court misconstrued Mr. Tiepelman's prior record so that it treated as criminal convictions charges that had been dismissed, as follows:

(1) In its sentencing decision, the court said Mr. Tiepelman had "something over twenty prior convictions" at the

time of this offense. In fact, he had a total of nine convictions, seven of which existed at the time of this offense.

(2) The court said the convictions included "numerous issuance of worthless checks" and "a couple of forgeries." He had two convictions for worthless checks and one for forgery.

(3) The court said Mr. Tiepelman had convictions for battery, violating a no contact order, and various bail and bond violations. In truth, Mr. Tiepelman had no conviction for battery, no conviction for violating a no contact order, and no convictions for bail or bond violations. He had two convictions for disorderly conduct.

ON THIS RECORD, DID MR. TIEPELMAN SATISFY HIS BURDEN OF PROVING THAT THE COURT ACTUALLY RELIED UPON INACCURATE INFORMATION IN THE SENTENCING?

Noting that Mr. Tiepelman did not dispute the facts underlying the dismissed charges, the circuit court ruled at the postconviction hearing that he had not proven either that the information was inaccurate or that the court relied upon in at sentencing.

The court of appeals held that the circuit court's recitation of Mr. Tiepelman's prior record was inaccurate but there was no prejudicial reliance on inaccurate information.

CRITERIA FOR REVIEW

At issue in this case is a defendant's due process right under the state and federal constitutions to be sentenced on the basis of true and correct information. Specifically, review is warranted to examine the court of appeals' conclusion that the defendant has the burden of proving that the sentencing court *prejudicially* relied upon inaccurate information at sentencing. Requiring the defendant to prove prejudicial reliance is at odds with the standard applied by the United States Supreme Court, ***United States v. Tucker***, 404 U.S. 443 (1972), and by earlier court of appeals' decisions. ***State v. Johnson***, 158 Wis. 2d 458, 463 N.W.2d 352 (Ct. App. 1990); ***State v. Anderson***, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998). It further relieves the state of its obligation to prove that the error was harmless.

Review is also warranted because the court's decision rests on a faulty premise that, for purposes of assessing a defendant's character at sentencing, dismissed charges are synonymous with convictions. Although this case involves an indeterminate sentence, the court of appeals' decision, which is recommended for publication, will have equal applicability to the imposition of determinate sentences under truth-in-sentencing.

This case meets the criteria for review under Wis. Stat. § 809.62(1)(a) and (d) because it presents a significant question of constitutional law and the court of appeals' decision is in conflict with controlling opinions.

STATEMENT OF THE CASE

In 1996, the defendant-appellant, Larry A. Tiepelman, was convicted of theft by false representation as a repeat offender, in violation of Wis. Stat. §§ 943.20(1)(d) and 939.62 (1995-96). (24; 29). The court withheld sentence and placed Mr. Tiepelman on

probation for 16 years (*id*). Six years later, probation was revoked and Mr. Tiepelman was returned to court for sentencing (31). The court imposed a sentence of 12 years' imprisonment (45; App. 110).

In its sentencing decision, the court discussed Mr. Tiepelman's criminal record at length, as part of its assessment of his character. Referring to the offense history listed in the presentence report (PSI), the court described Mr. Tiepelman's criminal convictions as follows:

> 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.

(71:24-5; App. 113-14).

Picking up on the prosecutor's contention that Mr. Tiepelman was "a classic domestic abuser" (*id.* at 10), the court described Mr. Tiepelman's convictions for assaultive offenses as follows:

> There also is a record of assaultive offenses. Although I agree with [defense counsel] that that is not the primary characteristic of Mr. Tiepelman, but nor can it can [sic] 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.

(*Id.* at 25; App. 114).

Immediately before imposing sentence, the court said "to me the most significant factor is Mr. Tiepelman's character and the ongoing danger he presents to the public, as well as the seriousness of the offense." (*Id.* at 27; App. 116).

Mr. Tiepelman filed a postconviction motion seeking resentencing, alleging that the court sentenced him with an inflated view of his prior convictions (50). In his postconviction motion, as at sentencing, Mr. Tiepelman did not challenge the PSI's description of his prior record, which lists not only convictions but also a number of charges that were dismissed (42:3-8). His complaint was with the court's misreading of the PSI. As evidenced by its comments at sentencing, the court incorrectly treated each offense listed as a conviction, even though many of the offenses listed did not result in convictions but, instead, were dismissed.

Specifically, the motion alleged that nothing in the record, including the PSI, supported the court's statement that Mr. Tiepelman had "something over twenty prior convictions at the time of the commission of this offense back in 1995." (50:3). Rather, the PSI lists nine convictions, only seven of which – not 20 – existed at the time this offense was committed in 1995 (42:3-7). Those convictions were as follows: three for theft; two for issuing worthless checks; one for disorderly conduct and one for forgery uttering (*id.*).

The motion further alleged that also unsupported by the record were the court's statements that the convictions "include numerous issuance of worthless checks" and "a couple of forgeries ...." (50:3; 71:24; App. 113). What the PSI shows is that Mr. Tiepelman

has two prior convictions for issuing worthless checks and one prior conviction for forgery (42:4, 6, 7).

Finally, the motion challenged the court's statements about the number of convictions for assaultive offenses (50:4). In its sentencing decision the court said Mr. Tiepelman "has a conviction for battery," "has a conviction for violating the no contact provision" and "has various bail and bond violation convictions" involving his ex-wife (71:25; App. 114). Contrary to the court's assertions, the PSI shows no conviction for battery, no conviction for violating a no-contact provision and no convictions for bail or bond violations. The PSI lists two convictions for disorderly conduct, both of which arose from domestic disputes, but any charges for battery or bond violations resulted in dismissals rather than convictions (42:4-8).

At the postconviction hearing, the court commented that it "did note 20 prior convictions which is concededly error ..." (72:22; App. 120). However, the court said it believed "there is an issue as to whether or not this information was inaccurate in any substantial sense." (*Id.* at 23; App. 121). The court concluded there was no inaccuracy "in any material sense" because it could properly consider the dismissed charges, particularly where they were conceded by the defense (*id.* at 24; App. 122). Consequently the court ruled as follows:

> I do not believe that the defense has established by clear and convincing evidence either the inaccuracy or that it was relied on in imposing the sentence so the motion to vacate the sentence and resentence Mr. Tiepelman is denied.

(*Id.*).

The court of appeals held that the sentencing judge's recitation of Mr. Tiepelman's criminal history was in error (App. 103). Nevertheless, it affirmed,

holding that "there was no prejudicial reliance on inaccurate information and, therefore, no due process violation." (App. 102).

ARGUMENT

MR. TIEPELMAN SHOWED THAT THE CIRCUIT COURT RELIED ON INACCURATE INFORMATION IN THE SENTENCING, WHERE THE COURT TREATED DISMISSED CHARGES AS CONVICTIONS, THEREBY CONCLUDING THAT HE HAD MORE THAN TWICE THE NUMBER OF CONVICTIONS, INCLUDING FOR ASSAULTIVE OFFENSES, THAN IS CORRECT.

A. The court should grant review to decide what a defendant must show to prove that a sentencing court actually relied upon inaccurate information.

According to the court of appeals, the dispositive issue in this case was whether Mr. Tiepelman met "his burden of showing *prejudicial* reliance" on the inaccurate information (App. 105) (emphasis in original). The court concluded that he did not meet this burden.

This court should grant review to determine if Mr. Tiepelman, or any other defendant attempting to prove a due process violation at sentencing, bears the burden of proving *prejudicial* reliance. Mr. Tiepelman submits that he need only prove that the sentencing court actually relied on the inaccurate information. Actual reliance is proven when, as here, the court gives explicit attention to and specifically considers the information in its sentencing decision. Once that is established, the burden shifts to the state to prove that the reliance on inaccurate information was harmless beyond a reasonable

doubt. ***State v. Anderson***, 222 Wis. 2d 403, 410-11, 588 N.W.2d 75 (Ct. App. 1998). The court of appeals misstated the defendant's burden in proving a due process violation at sentencing.

The court of appeals cites language in ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991), for the proposition that the defendant must prove prejudicial reliance (App. 104). But ***Littrup*** involved a different situation in that there the circuit court said in its sentencing decision that it was *not* relying on the information – the PSI – that the defendant claimed in a postconviction motion was inaccurate. ***Id.*** at 133. On appeal, Littrup argued that it was sufficient for him to show inaccuracies in the PSI without also showing that the PSI had a prejudicial impact on the sentencing court. ***Id.*** at 127. The court of appeals rejected that claim, holding that, "to establish a due process violation in the sentencing process, a defendant has the burden of proving by clear and convincing evidence both the inaccuracy prong and the prejudice prong of the due process test." ***Id.*** at 132.

Mr. Tiepelman finds no fault with ***Littrup*** to the extent that the "prejudice prong" the court of appeals referred to is the requirement that the defendant prove that the sentencing court actually relied upon the inaccurate information. Littrup was unable to prove actual reliance in light of the court's statement at sentencing that it was not relying on the disputed information.

In this case, though, the inaccuracy appears in the sentencing decision itself, as part of the court's assessment of the defendant's character. In fact, it was the sentencing court, not the PSI or prosecutor or anyone else, who interjected the inaccuracies into the proceeding. And the inaccuracies – treating dismissed charges as convictions – can only be deemed aggravating, not mitigating. Under those circumstances, Mr. Tiepelman

has proven actual reliance on inaccurate information in the sentencing. He need not prove prejudicial reliance. Rather, the state bears the burden of proving that the error was harmless. ***Littrup***, 164 Wis. 2d at 132.

By requiring the defendant to prove prejudicial reliance, the court of appeals has deviated from the standard articulated by the United States Supreme Court. In ***United States v. Tucker***, 404 U.S. 443, 444 (1972), the supreme court held that the defendant established a due process violation where the record showed that the sentencing judge gave "explicit attention" to three prior convictions that were later found to be constitutionally invalid. The court noted that the judge gave "specific consideration" to the convictions before imposing sentence. ***Id***. at 447.

From that language, the Seventh Circuit Court of Appeals concluded that the reviewing court must examine the record to see whether the court gave "specific consideration" to the inaccurate information. ***United States ex rel. Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984). "The difficult case is presented when the consideration is not explicit in the record ... or when it is ambiguous ...." ***Id***. When, as in Mr. Tiepelman's case, the consideration is explicit in the court's sentencing decision, reliance is established.

In earlier cases, citing ***Lane*** and ***Tucker***, the court of appeals held that a defendant has the burden of showing "both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing." ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990); ***see also Anderson***, 222 Wis. 2d at 408. Proof of actual reliance is relatively easy when, as here, the court gave explicit consideration to the information in its sentencing decision. Here, the court of appeals has gone astray by requiring more than actual reliance and, instead, requiring defendants to prove prejudicial reliance.

Requiring the defendant to prove prejudicial reliance effectively eliminates the state's burden of proving that the error was harmless. If the defendant bears the burden of proving that the information is inaccurate and the court prejudicially relied on the inaccurate information, the state is relieved of its burden of proving that there is no reasonable probability that the error contributed to the outcome. ***Anderson***, 222 Wis. 2d at 411. After all, if the erroneous information was not what "mattered" to the sentencing court, meaning there was no prejudicial reliance (App. 105), there is also no reasonable probability that the error contributed to the outcome. Without expressly saying so, the court of appeals' decision in this case has substantially rewritten the test for proving a due process violation at sentencing, by shifting the entire burden to the defendant.

The standard for proving a due process violation at sentencing is ripe for review. Though this case involves an indeterminate sentence, the test employed by the court of appeals will apply to any sentencing, including those under truth-in-sentencing. This court has expressed a need for greater care when imposing determinate sentences. ***State v. Gallion***, 2004 WI 42, ¶¶28-38, 270 Wis. 2d 535, 678 N.W.2d 197. But the bar is lowered, rather than raised, at sentencing proceedings by a standard that makes it more difficult for a defendant to obtain a resentencing due to inaccurate information.

At stake is the integrity of the sentencing process. Circuit courts have broad discretion at sentencing. ***Id.*** at ¶18. The defendant, prosecutor and public should be confident that the discretion is exercised on the basis of true and correct information. Indeed, the due process right to be sentenced on the basis of accurate information is a safeguard specifically aimed at protecting the integrity of the sentencing process. ***State v. Groth***, 2002 WI App 299, ¶32, 258 Wis. 2d 889, 655 N.W.2d 163. Review is necessary to ensure that the safeguard is not

undermined by the standard applied by the court of appeals in this case.

B. The court of appeals' decision rests on an erroneous premise that, for purposes of assessing a defendant's character at sentencing, there is no meaningful distinction between dismissed charges and convictions.

This court should grant review because the court of appeals' decision rests upon an untenable conclusion, which is this: For purposes of assessing a defendant's character at sentencing, there is no meaningful distinction between dismissed charges and criminal convictions. The court's conclusion cannot withstand scrutiny.

Critical to the court's determination that there was no prejudicial reliance is the fact that Mr. Tiepelman did not dispute the PSI's description of the facts underlying the dismissed charges (App. 103). It is true that he did not dispute the PSI's recitation of his criminal history (72:21). That recitation correctly indicated that many of the charged offenses were ultimately dismissed. What Mr. Tiepelman did dispute, and continues to dispute, is the sentencing court's treatment of dismissed charges as convictions.

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. But a sentencing judge cannot 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).

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. In reviewing information contained in affidavit for a no-knock search, this court noted that information regarding a suspect's prior arrests is less reliable and less illuminating than information about prior convictions. ***State v. Eason***, 2001 WI 98, ¶¶21-26, 245 Wis. 2d 206, 629 N.W.2d 625. Dismissed charges are only marginally better than the record of an arrest.

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 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. And the sentencing guidelines direct the courts to list the defendant's previous convictions. Wisconsin Sentencing Guidelines Notes prepared by the Criminal Penalties Study Committee, p. 15. 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 the 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 evident 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.

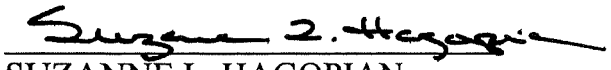
(71:25; App. 114)(emphasis added). In fact, there were seven, not 20, convictions at the time of the offense and no convictions for battery, violating a no contact provision or bail jumping. The court of appeals' attempt to effectively rewrite the circuit court's sentencing decision should be rejected.

CONCLUSION

For these reasons, petitioner Larry A. Tiepelman respectfully requests that the court grant his petition for review in this case.

Dated this 4th day of August, 2005.

Respectfully submitted,



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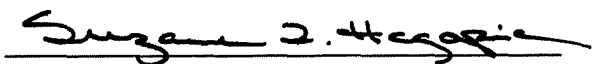
CERTIFICATION

I certify that this petition meets the form and length requirements of Rule 809.19(8)(b) and (d) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 2,931 words.

Dated this 4th day of August, 2005.

Signed:



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