

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP1746-CR

Cir. Ct. No. 2005CF136

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AUGUST C. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. August C. White appeals from a judgment entered after he pled guilty to one count of first-degree reckless homicide while armed in

violation of WIS. STAT. § 940.02 (2005-06)¹. He also appeals from an order denying his postconviction motion. White claims that the trial court relied on inaccurate information (the prosecutor's version of how the shooting occurred) when it sentenced him and that his trial counsel was ineffective for not correcting this factual error at sentencing. Because the prosecutor's version of when the victim received the fatal shot was not inaccurate as a matter of law, and because there is no evidence that the trial court relied on the disputed fact, we affirm.

BACKGROUND

¶2 On December 28, 2004, White and his associate, Victor Jackson, were on North 25th Street between Chambers and Burleigh Streets, Milwaukee, when a black Jeep pulled up and stopped. Floyd Edwards, the Jeep's sole occupant, was the victim in this case. In a scheme to rob Edwards, White got into the front passenger seat with a gun. White pulled out the gun and shot Edwards. Edwards then exited the vehicle and went around to the back of the car. White exited the vehicle as well and shot at Edwards before running away. Edwards was shot twice, once in the arm and once in the left buttock. He subsequently died as a result of the gunshot wound to the buttock. White was charged with first-degree reckless homicide while armed, and felony murder.

¶3 On May 10, 2005, White pled guilty to one count of first-degree reckless homicide while armed. On July 1, 2005, White was sentenced to a term of forty-five years, with thirty-five years of initial confinement and ten years of extended supervision. At the sentencing hearing, the prosecutor claimed that the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

fatal gunshot wound to the victim's buttock was fired by White as the victim was running away.

¶3 The prosecutor's statement was consistent with the account of White's co-defendant, Jackson. White claimed that the shot to the victim's buttock occurred when the victim and White were inside the Jeep. At his allocution, White did not object to, or clarify, this alleged discrepancy in exactly where and how the victim was shot in the buttock.

¶4 On June 28, 2006, White filed a postconviction motion seeking resentencing. The trial court denied the motion stating that White's sentence was not based upon inaccurate information and as such he had not been denied his due process rights and he received effective assistance of counsel. White now appeals.

DISCUSSION

¶5 White contends that the trial court sentenced him while relying on the inaccurate fact that the fatal shot to the victim's buttock occurred as the victim was running away from him. White claims this fact was relied upon and used as an aggravating factor in his sentencing and that as such, he was denied his due process right to be sentenced on accurate information. White further claims that his trial counsel was ineffective for not contesting this point. We are not convinced.

¶6 We independently review whether White's constitutional right to be sentenced on accurate information was violated. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. For White to receive resentencing, he must "show both that the information was inaccurate and that the court actually relied

on the inaccurate information in the sentencing.” *Id.*, ¶26 (quoting *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998)).

¶7 The alleged inaccurate information relied upon for sentencing was a remark made by the prosecutor at sentencing that the fatal gunshot wound to the victim’s buttock was fired at the victim as he ran away from White. White insists that the gunshot wound to the buttock was fired as he and the victim were struggling with each other inside the Jeep, and that the shots he fired at the victim outside the Jeep were to defend himself because the victim was charging at him. To support his version of events, White points to his original statement made to the police hours after his arrest and the testimony of an eyewitness.

¶8 For a characterization of events to be incredible as a matter of law, the characterization must conflict “with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible.” *State v. Sharp*, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). While determining whether a fact pattern violates a defendant’s due process rights is an issue of law reviewed *de novo*, an inference based upon undisputed facts is given some deference by an appellate court. “It is not within the province of this court ... to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one.” *State v. Friday*, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

¶9 White is not contesting that he shot the victim, both inside and outside of the car, and he is not contesting that the wound to the victim’s buttock was the shot that proved fatal. White contends only that the shot he fired at the victim’s buttock occurred while they were both struggling with each other inside the car. White’s version of events was one possibility of how things occurred.

¶10 The prosecutor's version of events, however, presented a reasonable inference given the location of the wound, the account of White's co-defendant, and the undisputed facts. The credibility of the prosecutor's inference is bolstered by the fact that White did not correct the alleged error in his allocution.

¶11 Moreover, as the State points out in its brief, White's version of events for how the victim was shot in the left buttock appears improbable. It seems unlikely that a person in the driver's seat of a car, while facing and struggling with someone in the passenger seat, could get shot in the left buttock without a very unlikely contortion or unless the victim was in the process of exiting the car. If the latter is true, then any negative inference drawn from White shooting at the victim while he was fleeing under the prosecutor's theory would be the same under this alternative theory.

¶12 White must show both that the trial court was presented with inaccurate information and that the court relied on it for sentencing in order to warrant resentencing. *Tiepelman*, 291 Wis. 2d 179, ¶9. He has not adequately shown that the prosecutor's inference on when the fatal gunshot wound was delivered is inaccurate as a matter of law. As such, we need not reach the issue of to what extent the trial court relied upon the prosecutor's interrogation. For the sake of completeness, however, we will briefly address the issue of reliance.

¶13 There is no reason to believe that the trial court relied on the factual inference in its sentencing determination. The one reference to when White shot the victim in the buttock was a comment made by the court that the facts of the case would have supported a charge of first-degree intentional homicide. Outside of this reference, the sentence was determined according to the primary sentencing factors and the court did not link the alleged inaccurate fact to those primary

factors in its analysis. Thus, White has not shown that the *Tiepelman* standard of “whether the court gave ‘explicit attention’ or ‘specific consideration’ to it, so that the misinformation ‘formed part of the basis for the sentence,’” *id.*, ¶14, was met. White’s highlighting of a single comment in the record does not pass the threshold of this standard. We also note that the fact in dispute here—whether the fatal shot occurred in the car or outside of the car—does not impact on the crime for which White admitted his guilt.

¶14 White also contends that his trial counsel was ineffective for failing to contest this purported factual inaccuracy. To establish ineffective assistance of counsel, the defendant must show that his lawyer’s performance was deficient and that “the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). As White must satisfy both elements, we need not address both components if White cannot make an adequate showing on one. *See Strickland*, 466 U.S. at 697.

¶15 As the circuit court’s order denying the postconviction motion stated: “Because the court finds that it did not rely upon inaccurate information in sentencing the defendant for this offense, trial counsel was not ineffective for failing to raise the objection.” White cannot show that the trial court relied on the prosecutor’s version of events; thus, he was not prejudiced by trial counsel’s failure to make the argument even if this court assumed that the prosecutor’s statement at sentencing was inaccurate. As such, he cannot make out a claim of ineffective assistance of counsel under *Strickland* or *Sanchez*.

By the Court.—Judgment and order affirmed.

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

