

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2009

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. 2008AP1811-CR

Cir. Ct. No. 2003CF1316

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD T. SHARRARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Richard T. Sharrard pled guilty to one count of first-degree sexual assault of a child under thirteen in violation of WIS. STAT.

§ 948.02(1) (2007-08).¹ He appeals, pro se, the judgment of conviction and the order denying his postconviction motion for resentencing. Seeing no breach of the plea agreement or sentencing on inaccurate information, we affirm.

¶2 The State charged Sharrard with one count of first-degree sexual assault of a child under thirteen and one count of child enticement involving eight-year-old Nicolle B. The charges stemmed from an incident when Nicolle and her brother were at Sharrard's apartment with Sharrard's seven-year-old son. Sharrard asked the girl to go into the bathroom with him and then into his bedroom. He sexually assaulted her in both locations. Sharrard agreed to plead guilty to the sexual assault charge and the State agreed to dismiss outright the child enticement charge. The plea agreement was put on the record:

[DEFENSE COUNSEL]: Your Honor, I believe we have an agreement in this case. I met with Mr. Sharrard yesterday. He will be pleading to Count 1. Count 2 will be dismissed There was also a report from a Christina Blough that is in the discovery that I have, and the State has agreed also there will be no charges brought from any of the evidence that she has presented thus far. The State will retain a free hand on Count 1.

[PROSECUTOR]: That is correct, Your Honor.

THE COURT: And Count 2 is what? Dismissed and read-in?

[PROSECUTOR]: Dismissed outright.

THE COURT: Dismissed outright. All right. Accurately stated, [Prosecutor]?

[PROSECUTOR]: Yes, Your Honor, it is.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

¶3 The reference to Christina Blough involved a four-year relationship between Sharrard and Blough that Blough said began when she was fourteen and he was thirty-nine. Blough said the relationship was sexual from the beginning and resulted in the birth of a child when she was seventeen, and a brief marriage.

¶4 Blough submitted a written statement to the trial court setting forth the chronology of the relationship, describing the deceit and lying it involved and Sharrard's efforts to hide the paternity of their child so that he would not go to jail. The State told the court at sentencing that Blough was "not pleased" with the decision to not issue charges related to Sharrard's conduct with her. The prosecutor told the court:

So, I do think in terms of the victim impact issue she does have some standing here today; and I would ask the court to allow her to address the court at this sentencing.

....

I understand why ... the defense would rather not hear from her; but I did negotiate this case agreeing not to charge another victim's victimization ... and I think if not under the victim[']s rights law, certainly just under decency standards she should be permitted to address the court.

¶5 The court granted the State's request. Blough told the court that she feels "partly responsible about what happened to" Nicolle because she "never pressed the issue to have [Sharrard] arrested." Blough stated that she knew Sharrard was not "being sentenced for me, but ... for what happened to Nicol[le]. She's a little girl, and that will haunt her for the rest of her life." The prosecutor argued that Sharrard's "prior acts" showed the need to protect the public and observed that Blough's written and oral statements show "what it's like to be 14 and think you know everything ... and exercise bad judgment. That's why we have a statutory rape law."

¶6 Defense counsel objected, unsuccessfully, to the sentencing going forward because it had “become more about a sentence about Christina Blough than it is about the charge [Sharrard] actually plead [sic] to.” Counsel argued that Sharrard has “absolutely no criminal record, which at 48 years of age coming into a court like this is rather rare.” The court agreed with that statement, but found it “shocking” that nothing ever had come of the “improper, illegal, criminal sexual contact with another young female.” The court told Sharrard to “be clear” that it was sentencing him “for the outrageous assault against this 8 year old child,” but also noted that Blough was revictimized by feeling that her failure to report Sharrard enabled him to assault the current victim. Although Sharrard faced sixty years, the court imposed a thirty-five-year sentence, bifurcated as twenty years’ initial confinement and fifteen years’ extended supervision.

¶7 Nearly four years later, Sharrard filed a postconviction motion pursuant to WIS. STAT. § 974.06 seeking resentencing.² He argued that the State breached the plea agreement when it asked the court to allow Blough’s victim impact statement and that the court based the sentence on inaccurate and irrelevant information, namely, Blough’s statement. The court held that the record did not support his claim of a breach of the plea agreement and that it could consider Blough’s statements as part of Sharrard’s history of undesirable behavior. The court denied the motion.

² Sharrard claims he did not take a direct appeal because his postconviction counsel frightened him into believing he would get more time if he sought resentencing.

¶8 Sharrard appeals.³ He first contends the State breached the plea agreement by asking the court to permit Blough to make a statement because “the Prosecutor and the Court agreed that Count 2 be ‘dismissed outright’ concerning any conduct [per]taining to Christina Blough.”

¶9 A criminal defendant has a due process right to the enforcement of a negotiated plea agreement. *State v. Howard*, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244. To be entitled to relief, a breach must deprive the defendant of a material and substantial benefit for which the defendant bargained. *See State v. Deilke*, 2004 WI 104, ¶¶13-14, 274 Wis. 2d 595, 682 N.W.2d 945. Whether the prosecutor’s conduct breached the terms of the plea agreement is a question of law that we review de novo. *Howard*, 246 Wis. 2d 475, ¶15.

¶10 Sharrard correctly states that all parties agreed that count two would be dismissed outright. He misrepresents his understanding of that count, however. Both the complaint and the information plainly state that counts one and two arise from the incident with Nicolle. Count two, the child enticement charge, specifically alleges that Sharrard “cause[d] a child, Nicolle B. ... to go into a room” with intent to have sexual contact with her. At the arraignment, Sharrard’s counsel acknowledged receipt of the information, asked the court to enter not-guilty pleas to both counts, and advised that Sharrard understood the charges, which were “the same that were in the complaint.” Neither Blough’s name, nor

³ The State initially contended that, under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), and *State v. Lo*, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756, Sharrard’s failure to file a direct appeal barred his WIS. STAT. § 974.06 motion because he did not establish a sufficient reason for not raising his issues on direct appeal. At conference, this court concluded that *Escalona-Naranjo* does not apply where a defendant has not filed a WIS. STAT. § 974.02 motion or pursued a direct appeal. *See Lo*, 264 Wis. 2d 1, ¶44 n.11. We ordered the State to brief the merits, and Sharrard filed a response to the State’s rebriefing.

even any reference to her existence, was mentioned at the arraignment or in the complaint or information. We are satisfied that Sharrard understood that count two could have related only to Nicolle.

¶11 In the part of the plea agreement pertaining to Blough, the State agreed only to bring no charges from any evidence known to that point. The State honored that promise. The court was entitled to consider Blough's victim impact statement as part of its consideration of Sharrard's character. The defendant's character is one of the primary factors a court must consider at sentencing. *See State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). Whether the crime is an isolated act or a pattern of conduct is essential to determining the character of the defendant and his or her need for incarceration and rehabilitation. *Id.* The court may consider evidence of unproven offenses for this purpose. *Id.*

¶12 Sharrard next contends that he was sentenced upon inaccurate and irrelevant information, specifically Blough's unproved statement that her relationship with Sharrard was of a sexual nature before she turned eighteen. He asserts that "[t]he Court Agreed that Count 2 would be 'DISMISSED OUTRIGHT' yet the court relied on Christina Blough[']s allegations that something happened prior to her being of legal age." In large part, this argument is a reiteration of first claim. We reject it again.

¶13 A defendant has a constitutional 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. The defendant must establish both that the information before the sentencing court was inaccurate and that the court actually relied on it. *Id.*, ¶2. We review this issue de novo. *Id.*, ¶9.

¶14 Sharrard's assertion that the information is inaccurate fails. He himself told the presentence investigation report writer that he and Blough became friends when she was fourteen or fifteen and intimate when she was sixteen and he was in his early forties. While his and Blough's versions of their relationship may not dovetail exactly on ages and dates, it does on the essential nature of their relationship, and what it revealed about Sharrard's character. That was the purpose for which the court considered it. In that sense, Sharrard points to nothing in the record that disputes the information's accuracy.

¶15 As to whether information about Sharrard's relationship with Blough is irrelevant, we already have dispensed with that claim. Such information is highly relevant because, to the extent it reveals a pattern of behavior, it casts light on Sharrard's character, a primary factor the court must consider at sentencing.

By the Court.—Order affirmed.

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

