

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 7, 2002**

Cornelia G. Clark  
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. 01-1631-CR**

**Cir. Ct. No. 00-CF-209**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DARLA RAE DUCHAY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Darla Rae Duchay appeals a judgment convicting her of two counts of forgery-uttering, one count as a habitual criminal, contrary to

WIS. STAT. §§ 943.38(2) and 939.62(1)(b).<sup>1</sup> She also appeals the order denying her motion for postconviction relief. Duchay argues that the circuit court: (1) violated her due process rights by relying on inaccurate information in imposing sentence; (2) erred by imposing unreasonable conditions of probation and extended supervision; and (3) erred by denying her postconviction motion for sentence modification. We reject these arguments and affirm the judgment and order.

### BACKGROUND

¶2 In August 2000, Duchay was charged with three counts of forgery as a repeater arising from uttering three checks in St. Croix County. These charges were consolidated with charges filed against her in Barron County. In exchange for her guilty plea to one count of forgery as a repeater in St. Croix County and one county of forgery in Barron County, the State dismissed the remaining charges.

¶3 The circuit court sentenced Duchay to five years in prison on her conviction for forgery as a repeater. On the other forgery conviction, the court withheld sentence and imposed twelve years' probation concurrent to count one. The court denied Duchay's motion for postconviction relief and this appeal followed.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

## ANALYSIS

### I. DUE PROCESS

¶4 Duchay argues that the circuit court violated her due process rights by relying on inaccurate information in imposing sentence. Here, the presentence investigation report recommended ten to fifteen years' confinement without disclosing the basis for that recommendation. Duchay argues that a presentence investigation report can present inaccurate information by failing to disclose information. Specifically, Duchay challenges the parole agent's reliance on the Level of Service Inventory-Revised (LSI-R) and Truth-in-Sentencing Recommendation Grid for Classified Offenses as bases for his sentence recommendation.

¶5 Sentencing lies within the discretion of the circuit court. *See State v. Echols*, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *Id.* However, the question of whether a defendant's right to due process was violated is a question of law that this court reviews independently. *State v. Littrup*, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991).

¶6 A defendant has a due process right to be sentenced on the basis of true and correct information. *State v. Perez*, 170 Wis. 2d 130, 138, 487 N.W.2d 630 (Ct. App. 1992). To establish a due process violation, the defendant has the burden of proving by clear and convincing evidence that the information used in sentencing was inaccurate and that he or she was prejudiced by the misinformation. *Littrup*, 164 Wis. 2d at 132; *see also State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998) ("A defendant who requests

resentencing must show that specific information ... was inaccurate and that the court actually relied upon the inaccurate information in sentencing.”).

¶7 Here, the circuit court determined that Duchay had overstated the court’s reliance on the presentence recommendation. *See State v. Hilleshiem*, 172 Wis. 2d 1, 23, 492 N.W.2d 381 (Ct. App. 1992) (Sentencing recommendations made by the presentence preparer are not binding on the sentencing court.). The circuit court acknowledged that although it relied on the analysis and the information provided in the presentence report, it did not adopt the report’s sentencing recommendation. The court added that “to suggest that that’s what the court relied on I think is a misstatement, because their recommendation was significantly greater than what the court imposed.”

¶8 At sentencing, the circuit court made specific findings regarding its decision to confine Duchay rather than place her immediately on probation. Specifically, the court stated:

Based then on primarily the seriousness of the offense, the history of the criminal behaviors, the patterns of behaviors, together with the chance of success on probation in the past, the Court cannot conclude that probation in this case is warranted.

Generally probation is preferred unless the Court makes certain conclusions, and in this case, Ms. Duchay, I must conclude that confinement is necessary to protect the public from further criminal activity, that you are in need of correctional treatment which I believe can most effectively be provided while you are confined and that it would unduly depreciate the seriousness of these offenses if a sentence of probation was granted.

The record does not support Duchay’s assertion that the circuit court relied upon what she claims was inaccurate information in sentencing her. Because Duchay has failed to prove prejudice, we need not address her various arguments regarding

the parole agent's reliance on either the LSI-R or the Truth-in-Sentencing Recommendation Grid. We conclude that Duchay has failed to establish a due process violation.

## II. CONDITIONS OF PROBATION AND EXTENDED SUPERVISION

¶9 Duchay argues that the circuit court erred by imposing unreasonable conditions of probation and extended supervision.<sup>2</sup> It is within the broad discretion of the circuit court to fashion appropriate conditions of probation in each individual case, *State v. Nienhardt*, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995), as long as those conditions “appear to be reasonable and appropriate.” WIS. STAT. § 973.09(1)(a). On review, we test the validity of conditions of probation by how well they serve the dual goals of probation: rehabilitation and protection of the community. *Nienhardt*, 196 Wis. 2d at 167. Whether a condition of probation violates a defendant's constitutional rights is a question of law that we review independently. *State v. Miller*, 175 Wis. 2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993).

Here, the circuit court ordered:

As conditions of your probation and extended supervision, the Court will order that you not participate in any form of gambling, that you not enter upon the premises of any gambling properties, nor be present on any property where gambling occurs whether in an incidental or other fashion, that you not maintain a checking account and not have any access to any checkbook.

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<sup>2</sup> WISCONSIN STAT. § 973.01 authorizes a circuit court to impose conditions on a term of extended supervision. This statute places no limitations on conditions of extended supervision, whereas the relevant statutory provisions for probation require that conditions “appear to be reasonable and appropriate.” WIS. STAT. § 973.09(1)(a).

The Court will also order your continued compliance with your treatment program, together with the Court's recommendation that additional services be provided through the Department of Corrections once you have been processed at the Dodge Correctional Center.

Duchay contends that prohibiting her from gambling as a condition of probation and extended supervision without providing treatment violates her Eighth and Fourteenth Amendment rights. Because she claims that gambling occurs at the institution where she is currently confined, Duchay also challenges the condition prohibiting her presence on properties where gambling occurs.

¶10 Regarding protection of the public, Duchay's extensive criminal record of writing bad checks and forgeries is directly tied to her desire to obtain money to support her gambling habit. Further, conditions of supervision are reasonably related to rehabilitation when they serve to insulate the defendant from situations likely to result in recidivism. *See State v. Lo*, 228 Wis. 2d 531, 538-39, 599 N.W.2d 659 (Ct. App. 1999) (probationer prohibited from having contact with other gang member). A condition is reasonably related to rehabilitation "if it assists the convicted individual in conforming his or her conduct to the law." *State v. Oakley*, 2001 WI 103, ¶21, 245 Wis. 2d 447, 629 N.W.2d 200. We conclude that the conditions to which Duchay objects are reasonable and do not violate the Eighth or Fourteenth Amendments.

¶11 Citing *State ex rel. Mulligan v. DH&SS*, 86 Wis. 2d 517, 273 N.W.2d 290 (1979), Duchay nevertheless contends that the conditions of her probation and extended supervision are not reasonably related to her rehabilitation because she is incapable of complying without the proper treatment. In *Mulligan*, a probationer argued that it violated his constitutional rights "to impose as a condition of his probation that he not partake of alcoholic beverages without

providing him with treatment for chronic alcoholism.” *Id.* at 519. The court did not reach the constitutionality of imposing such a condition because Mulligan failed to show that he was an “involuntary drinker, that his self-determination and willpower were wholly destroyed and that he was unable to control his use of alcohol.” *Id.* at 520.

¶12 As in *Mulligan*, Duchay has failed to show that her self-determination and willpower are wholly destroyed and that she is unable to control her gambling habit. The trial court characterized Duchay’s gambling addiction as “incurable” to emphasize that Duchay would have to be vigilant throughout her life in staying away from gambling. The court stated:

[T]his addiction like many others is incurable. They are treatable, but there is no cure known and each day, as you recognize, will be and is a battle. And as you forthrightly indicate, your commitment can be only day-to-day, sometimes hour-by-hour in terms of not gambling and staying away from that particular addiction.

Thus, the circuit court determined that Duchay’s gambling was volitional to the extent that her rehabilitation was dependent on her continued commitment to stay away from gambling.

¶13 With respect to Duchay’s claim that she is exposed to gambling at the Taycheedah Correctional Institution, gambling is specifically prohibited by institution rules. *See* WIS. ADMIN. CODE § DOC 303.60 (2001). As the State contends, Duchay has the option of filing a confidential inmate complaint to inform the proper authorities that gambling is occurring in violation of institution rules. *See* WIS. ADMIN. CODE § DOC 310.16 (1998).

¶14 Based upon the foregoing, we conclude that these conditions of Duchay's probation and extended supervision were reasonably tailored to protect the public and encourage her rehabilitation.

### III. MOTION FOR SENTENCE MODIFICATION

¶15 Duchay argues that the circuit court erred by denying her motion for sentence modification. Specifically, Duchay claims that the Wisconsin prison system's lack of treatment programs for gambling addictions was a new factor warranting modification of her sentence. We are not persuaded.

¶16 The purpose of a sentence modification is to correct an unjust sentence. *State v. Koeppen*, 2000 WI App 121, ¶33, 237 Wis. 2d 418, 614 N.W.2d 530. "Before a sentence will be modified, the defendant must demonstrate, by clear and convincing evidence, that there is a new factor justifying the court's reconsideration." *Id.* A new factor is a fact "relevant to the imposition of the sentence and unknown to the trial court at the time of sentencing ... or which frustrates the sentencing court's intent." *Id.* (citations omitted). This court reviews without deference the question of law of whether the facts constitute a new factor. *Id.*

¶17 At the hearing on Duchay's motion for sentence modification, the circuit court concluded that the unavailability in prison of treatment for a gambling addiction was not a new factor because the court at sentencing understood that treatment would most likely be delayed until Duchay's release from prison. Duchay's trial counsel indicated his belief that "specific treatment of the type that [Duchay] needs is not available in our correctional system." Because the sentencing court was aware that treatment programs for gambling addictions



would likely be unavailable to Duchay in prison, the actual unavailability of these programs does not constitute a new factor.

¶18 Further, the unavailability of treatment programs for gambling addictions does not frustrate the sentencing court's intent. *See Koeppen*, 2000 WI App 121 at ¶33. At the hearing on Duchay's postconviction motion for sentence modification, the circuit court explained:

So when the Court addresses the treatment components that I believe were necessary and continue to believe are necessary, it was certainly not to suggest that those would be available only while confined, but rather to, again, explain that the total parameters of the sentencing could address those additional issues.

The circuit court intended that the "total parameters of the sentencing" from confinement through probation and extended supervision would address Duchay's treatment needs.

¶19 At sentencing, defense counsel argued that Duchay's gambling problems were rooted in the underlying psychological problems caused by sexual abuse she suffered as a child and adolescent. To that end, the court noted:

Treatment programs, hopefully, can assist. Counseling programs, hopefully, can assist you in dealing with that victimization and coming to grips with those issues. And again, while the Court is not a social scientist, nor a psychologist, there may be even some connection between these addictive behaviors and what happened to you as a child and adolescent.

It is undisputed that while confined, Duchay may access general treatment programs addressing her underlying psychological problems. Because Duchay can follow up with more specific treatment for her gambling addiction upon her release from prison, the unavailability of treatment programs for gambling

addictions while confined does not frustrate the sentencing court's intent. We conclude that the circuit court properly denied Duchay's motion for sentence modification.

*By the Court.*—Judgment and order affirmed.

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

