COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2396-CR **Cir. Ct. No. 2001CF2882**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL B. HOERIG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Michael B. Hoerig appeals *pro se* from an order denying his *pro se* motion to modify his reconfinement sentence. We affirm because: (1) Hoerig has not identified "new factors" that would justify sentence modification; and (2) Hoerig's motion, even construed as brought under WIS.

STAT. § 974.06 (2007-08),[1] does not establish a violation of his constitutional right to marry. Therefore, we affirm.

BACKGROUND

¶2 On August 28, 2001, Hoerig pled guilty to one count of second-degree sexual assault of a fourteen-year-old girl,[2] in violation of WIS. STAT. § 948.02(2) (2001-02). He signed a plea questionnaire prior to entering the plea. That questionnaire stated in relevant part:

> I have decided to enter this plea of my own free will.… No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows:
>
> 3 yrs of confinement, 8 yrs of ES. Restitution, *no contact with victim*.

(Emphasis added.)

¶3 On November 27, 2001, Hoerig was sentenced to three years of initial confinement and eight years of extended supervision, consistent with the plea agreement. As part of the sentence, the circuit court imposed the following no-contact provisions:

> THE COURT: … No contact with females under the age of eighteen, unless supervised by the parents or guardian at all times.
>
> ….

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

[2] The victim was thirty-one years younger than Hoerig, who had previously dated the victim's mother and who was the mother's landlord. The victim and Hoerig had a sexual relationship for a period of about six months.

> You are to have no contact with any child at all, because you're so inappropriate with children.… I want any child you have contact with to be made known to the agent by name and birth date.
>
> ….
>
> You're to have no contact with this child [the victim] under any circumstances. You're not to have contact with this child's parents or siblings, or anyone you know to be within the circle of friends or acquaintances of this family.
>
> No contact means no contact between you and these people, not phone calls, no calls through a third person, no letters, do you understand that Mr. Hoerig?
>
> THE DEFENDANT: Yes.
>
> THE COURT: If you violate any of those conditions or the ones the Department of Corrections set[s] for you, you will serve the time remaining on your sentence, because you're going to be revoked. Eleven years less any time served in custody.

Hoerig did not appeal the conviction.

¶4 Hoerig was released to extended supervision on September 7, 2004. Approximately seven months later, in April 2005, Hoerig and the victim began living together and resumed their sexual relationship. At the time, this was not disclosed to Hoerig's extended supervision agent ("agent"). On April 21, 2006, Hoerig and the victim were married in Illinois; the marriage was likewise not disclosed to Hoerig's agent.

¶5 In September 2006, the agent received a call from the victim's mother regarding the marriage. In the first part of December 2006, Hoerig told his agent he was neither living with nor had he married the victim. However, he admitted that he "embraced" and "kissed" her sometime after Christmas in 2004. Then, at the end of December 2006, Hoerig finally admitted to his agent that he

had married his victim. The justification he offered to his agent was that he had done nothing illegal with the now-adult victim and that he had hurt no one by his conduct.

¶6 Shortly thereafter, on January 19, 2007, Hoerig filed his first motion to modify the circuit court's no-contact order. The motion was based on his marriage and supported by his victim's affidavit. Court records indicate the circuit court modified the order on March 1, 2007, to allow "contact with the victim only if specifically authorized by the supervising agent." Hoerig did not appeal the circuit court's order conditioning the contact on his agent's approval, which the agent never gave.

¶7 Meanwhile, the Department of Corrections ("DOC") sought to revoke Hoerig's extended supervision. The agent's memorandum in support of revocation ("agent's memorandum") alleged numerous violations of the conditions of Hoerig's extended supervision, including: having contact and sexual relations with the victim; having contact with children under the age of 18; leaving the state on two occasions without his agent's permission; drinking alcohol three to four times each week regularly; and lying to his agent about his behavior.

¶8 On March 15, 2007, after a hearing at which the agent's memorandum was considered, the Division of Hearing and Appeals issued a decision revoking Hoerig's extended supervision and recommending reconfinement. The circuit court held a reconfinement hearing on May 14, 2007,

where the memorandum by the agent was again considered.[3] The circuit court imposed reconfinement of three years, four months and twenty-six days. Hoerig did not appeal from the reconfinement order.

¶9 On February 20, 2008, Hoerig filed his first motion for modification of his reconfinement sentence (hereafter, "First Reconfinement Motion"). Although Hoerig's motion admitted he had indeed violated numerous rules of extended supervision, Hoerig nonetheless claimed—for the first time and thirteen months after the agent's memorandum was created—that the agent's memorandum contained inaccurate information and that the agent's recommendation for reconfinement was flawed. Hoerig also argued that the DOC reconfinement guidelines demonstrate he received excessive reconfinement. With no apparent sense of the obvious hubris, Hoerig informed the circuit court that "had the rules of supervision been amended in 2005, when the request to lift the order of no-contact was originally brought before [his agent] there would have been no violations." Hoerig asked the circuit court to "modify his sentence to a period of not more than 18 months."

¶10 Because Hoerig's appeal rights had long expired, the circuit court construed the First Reconfinement Motion as one filed under WIS. STAT. § 974.06 and denied the motion, finding that nothing in the motion established that inaccurate information was actually in the court memorandum. Hoerig did not appeal the order denying the First Reconfinement Motion.

[3] Hoerig did not object to any facts contained in the memorandum, either at the revocation hearing before the administrative law judge or at the reconfinement hearing before the court.

¶11 On August 8, 2008, Hoerig filed his second motion to lift the no-contact restrictions with his victim (the first such motion having been filed prior to his revocation). He complained about the restrictions imposed by the DOC (ignoring that the restrictions were part of the court-ordered sentence) and claimed the conditions were "overly broad and unreasonable." He admitted his marriage to his victim, and argued that their right to marry was constitutionally protected. The circuit court denied the motion on August 14, 2008, citing the same grounds it set forth when it modified the no-contact provision on March 1, 2007, to allow contact only with the agent's permission. Hoerig did not appeal the denial of his second motion to lift the no-contact restrictions.

¶12 Four days later, on August 18, 2008, Hoerig filed his second motion to modify his reconfinement sentence ("Second Reconfinement Motion"), substantially repeating the allegations that Hoerig made in his first motion to modify his reconfinement sentence. In the Second Reconfinement Motion he argued that his sentence should be modified based on new factors and then offered twenty paragraphs of argument outlining his concerns with his reconfinement sentence. His complaints can be divided into three main categories: (1) arguments that the agent who drafted the memorandum did not correctly analyze his rule infractions and relied on inaccurate, improper and "deceptive" information; (2) challenges to the circuit court's exercise of sentencing discretion and (3) assertions that the no-contact order should never have been a rule of supervision and that the no-contact order should have been lifted. Hoerig also raised a constitutional issue, citing case law about the fundamental right to marry.

¶13 The circuit court denied the Second Reconfinement Motion on August 20, 2008, in a written order. The circuit court held that because Hoerig did

not challenge the contents of the revocation memo either at the revocation hearing or by petition for writ of *certiorari*, he "waived his opportunity to challenge the accuracy of the agent's memo." The circuit court also noted that Hoerig's challenge to the court's exercise of sentencing discretion was barred because he did not raise the issue within ninety days of reconfinement pursuant to WIS. STAT. § 973.19 or on direct appeal. The circuit court's decision did not address Hoerig's claim that new factors warranted sentence modification. Hoerig appeals from the circuit court's order, making this the first time his case has been before this court.

DISCUSSION

¶14 We begin our analysis by defining the issues that are properly before us and by addressing the issue of timeliness. The order appealed from denied Hoerig's Second Reconfinement Motion, which he characterized as a motion for sentence modification. Sentence modification motions as a matter of right can be brought pursuant to WIS. STAT. § 973.19[4] within ninety days of the imposition of sentence. This provides defendants with an alternative to filing a direct appeal: "if a defendant opts not to pursue a direct appeal of a conviction and seeks only to challenge his or her sentence, [] § 973.19(1)(a) provides the mechanism for asserting an erroneous exercise of discretion based on excessiveness, undue harshness, or unconscionability." ***State v. Noll***, 2002 WI App 273, ¶10, 258

[4] WISCONSIN STAT. § 973.19(1)(a) provides:

> A person sentenced to imprisonment or the intensive sanctions program or ordered to pay a fine who has not requested the preparation of transcripts under s. 809.30 (2) may, within 90 days after the sentence or order is entered, move the court to modify the sentence or the amount of the fine.

Wis. 2d 573, 653 N.W.2d 895. If a defendant does not proceed under § 973.19(1)(a), there is a second option for seeking sentence modification:

> The second approach a defendant may take to seek sentence modification is to move for discretionary review, invoking the "inherent power" of the circuit court. The court exercises its inherent power to modify a sentence only if a defendant demonstrates the existence of a "new factor" justifying sentence modification.

Noll, 258 Wis. 2d 573, ¶11 (citations omitted).

¶15 Here, Hoerig did not file a direct appeal pursuant to WIS. STAT. § 809.30 and he did not bring his sentence modification motion within ninety days of sentencing. The circuit court correctly concluded that the motion could not proceed under WIS. STAT. § 973.19(1)(a). However, the State concedes, and we conclude, that the circuit court should have analyzed whether Hoerig had presented new factors justifying sentence modification, as Hoerig's motion asserted the existence of new factors.[5] On appeal, we consider this issue and conclude that Hoerig has failed to demonstrate the existence of any new factors, for reasons discussed in Section I below.

¶16 The State also concedes that Hoerig's constitutional claim—that the no-contact provision violates his constitutional right to marry and carry on intimate relationships—should have been decided by the circuit court because it falls within WIS. STAT. § 974.06(1), which states:

> a prisoner in custody under sentence of a court … claiming the right to be released upon the ground that the sentence

[5] Hoerig's motion specifically stated that he was seeking sentence modification pursuant to the court's inherent authority "based on the merits of new factors" and cited a governing case: ***State v. Noll***, 2002 WI App 273, 258 Wis. 2d 573, 653 N.W.2d 895.

> was imposed in violation of the U.S. constitution or the constitution or laws of this state … [to] move the court which imposed the sentence to vacate, set aside or correct the sentence.

Accordingly, we address Hoerig's constitutional claim as well.

¶17 To the extent Hoerig's motion alleges other errors, we reject them because they have been waived or forfeited, or they are untimely.[6] For instance, Hoerig takes issue with the agent's characterization of Hoerig and with the agent's memorandum, including the agent's analysis under ***State ex rel. Plotkin v. Department of Health & Social Services***, 63 Wis. 2d 535, 217 N.W.2d 641 (1974).[7] Hoerig fails to show he raised these issues at the revocation hearing—no

[6] We also decline to address the issues that Hoerig has raised for the first time on appeal. *See* ***Kolupar v. Wilde Pontiac Cadillac***, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93 ("Generally, arguments raised for the first time on appeal are deemed waived.").

[7] Although we decline to address Hoerig's challenges based on ***State ex rel. Plotkin v. Department of Health & Social Services***, 63 Wis. 2d 535, 217 N.W.2d 641 (1974), we do note that Hoerig's reliance on ***Plotkin*** for support of any of his claims is curious. It is hard to imagine a case more directly supportive of Hoerig's reconfinement than the facts and conclusion in ***Plotkin***. Plotkin pled guilty pursuant to a plea agreement that included the provision that he not go to the bar where he had engaged in the illegal gambling that led to his conviction. *See* ***id.*** at 537-38. Plotkin separately initialed this provision and it was incorporated into the plea agreement he signed. ***Id.*** at 538. The sentencing judge further amplified this provision, stating that "Plotkin was to stay 'completely away from the premises known as the Clock Bar.'" ***Id.*** Plotkin ignored the restriction and repeatedly went to the bar, which led to revocation of his probation. ***Id.*** at 538-40. In affirming the revocation, the Wisconsin Supreme Court noted that Plotkin told his probation officer that he considered the restriction to be "a violation of his rights" and that he felt "he should be exonerated from the violation because he had not indulged in any illegal activities." ***Id.*** at 539. Plotkin also argued against revocation because he "was not a man of violence" and thus posed no risk to others or society. ***Id.*** at 546.

(continued)

transcript of that hearing is contained within the record—and he did not file a petition for writ of *certiorari* to challenge either the revocation or the agent's memo. We also reject Hoerig's suggestion that his reconfinement sentence is excessive; not only does the sentence fail to shock the conscience, *see* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983), challenges to a circuit court's exercise of discretion are not appropriately brought in a WIS. STAT. § 974.06 motion, *see* ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). Finally, Hoerig's challenge to the circuit court's exercise of discretion denying Hoerig's motion to lift the no-contact provision should have been raised in a direct appeal of the order denying that motion; we will not address that issue in the context of a motion for sentence modification or as a challenge under § 974.06. *See* ***Smith***, 85 Wis. 2d at 661.

The Wisconsin Supreme Court rejected Plotkin's claims, concluding that "the presence of Plotkin in this particular bar ha[d] been inextricably intertwined with his criminal conduct." ***Id.*** While acknowledging that Plotkin was not likely to physically assault anyone, the court noted that his "return to his 'locus operandi' contrary to the conditions of probation constituted a threat to society, to others, *and to his own chances of rehabilitation*." ***Id.*** at 546-47 (emphasis added). Further, the court considered Plotkin's admission that he repeatedly violated the condition that he have no contact with the bar as evidence of "a brazen disregard of the conditions to which he had voluntarily agreed as a portion of his plea bargaining agreement.… He demonstrated a callous disregard for the court's judgment and decided to take the law and its interpretation into his own hands." ***Id.*** at 547.

Like Plotkin, Hoerig accepted the benefits of his plea bargain, then took matters into his own hands and brazenly violated the order to which he had agreed (that he have no contact with his victim). Hoerig then violated conditions of supervision when he lied to his agent about his persistent violations of the no-contact order. Finally, Hoerig claimed a violation of his constitutional rights when the court enforced the order to which he had agreed (and never appealed). Hoerig ultimately went so far as to blame his violations on the agent's refusal to eliminate the no-contact condition of supervision or to support his motion to remove the no-contact order from both the sentence and the rules of extended supervision.

I. New factors justifying sentence modification.

¶18 Hoerig's motion asserted that a variety of new factors justified sentence modification. "In order to obtain sentence modification based on a new factor, an inmate must show that: (1) a new factor exists; and (2) the new factor warrants modification of his or her sentence." ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524. "Whether a set of facts is a 'new factor' is a question of law" that this court reviews *de novo*. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). Conversely, whether a new factor warrants sentence modification is an issue within the circuit court's discretion, *see* ***id.***, and on appeal we will not reverse unless discretion was erroneously exercised, *see* ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999) ("When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach.").

¶19 A new factor is:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

Crochiere, 273 Wis. 2d 57, ¶14 (citation omitted). A defendant must prove the existence of a new factor by clear and convincing evidence. ***Id.***

¶20 In this case, the circuit court concluded that Hoerig's motion was barred. Therefore, the circuit court did not consider whether a new factor existed and, if so, whether it warranted sentence modification. Nonetheless, we affirm the

order denying Hoerig's motion because we conclude, as a matter of law, that Hoerig failed to prove the existence of a new factor. *See* ***Rolland v. County of Milwaukee***, 2001 WI App 53, ¶6, 241 Wis. 2d 215, 625 N.W.2d 590 ("an appellate court may affirm a [circuit] court's correct ruling irrespective of the [circuit] court's rationale").

¶21 Hoerig's Second Reconfinement Motion never explicitly stated which of the facts that he discussed in his motion constituted new factors. Rather, he referred generally to the "new factors herein presented." Thus, we will examine each of his complaints, organized by category.

¶22 First, Hoerig argues that the agent who drafted the memorandum did not correctly analyze Hoerig's rule infractions and relied on inaccurate, improper and "deceptive" information. For instance, Hoerig asserts that he did not initiate contact with his victim or have unsupervised contact with minors, and that his agent wrongly concluded that having contact with the victim was not good for Hoerig's rehabilitation or the victim. We have carefully examined Hoerig's complaints about his agent's memorandum and recommendations. At no time did the motion identify any facts that were unknown or overlooked. *See* ***Crochiere***, 273 Wis. 2d 57, ¶14. Instead, Hoerig raised facts that he knew at the time of

sentencing, but did not raise before the circuit court.[8] These are not new factors that entitle him to sentence modification. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (even if circuit court may have unknowingly overlooked certain facts, they do not constitute new factors if the defendant was aware of them, as facts are new only if "'unknowingly overlooked by *all* of the parties'") (citation omitted; emphasis in ***Crockett***).

¶23 Second, Hoerig raised several issues with respect to the circuit court's exercise of sentencing discretion. For instance, he argued that his sentence was inconsistent with the standard DOC reconfinement guidelines. But such guidelines were known to all parties at the time of the reconfinement hearing and would not constitute a new factor justifying sentence modification. As noted earlier, a challenge to the circuit court's sentencing discretion is appropriately brought in a direct appeal or in a motion for sentence modification brought within ninety days pursuant to WIS. STAT. § 973.19(1)(a). Hoerig has not proven the existence of a new factor related to sentencing and, therefore, his argument fails.

¶24 Finally, we consider Hoerig's assertions that the no-contact order should never have been a rule of supervision and that the no-contact order should have been lifted. Once again, we conclude these assertions are not new factors

[8] Specifically, the complaints Hoerig makes all concern matters known to him, and/or his lawyer, and/or the prosecutor and the court because the agent's memorandum specifically addressed those matters. If as "highly relevant" facts not considered Hoerig is referring to a list titled "Mitigating Factors," attached to his motion, which appears to be his list of what he considers his positive conduct or character attributes, our response is that his personal attributes were obviously known to Hoerig at the time of the reconfinement hearing. Yet he withheld this "highly relevant" information from the reconfinement court. As the reconfinement hearing transcript shows, even when throwing himself on the mercy of the circuit court, Hoerig did not tell the court of any of the factors he now asserts would have affected the circuit court's reconfinement decision.

relevant in a motion for sentencing modification brought pursuant to the circuit court's inherent authority to modify its sentences. Hoerig was well aware of the rule of supervision forbidding him from having contact with the victim—he even filed motions to lift the no-contact provision. Nothing in his arguments concerning the no-contact order identified a new factor that entitles him to sentence modification.

¶25 We conclude that Hoerig's motion failed to identify a new factor entitling him to sentence modification. *See* ***Crochiere***, 273 Wis. 2d 57, ¶14. Therefore, he is not entitled to relief pursuant to his motion for sentence modification. *See* ***Noll***, 258 Wis. 2d 573, ¶11. We affirm the circuit court's order denying Hoerig's motion to modify his sentence.

II. Constitutional challenge to the no-contact provision.

¶26 Hoerig's Second Reconfinement Motion raises a constitutional challenge: that the no-contact provision unconstitutionally infringes on Hoerig's right to marry and carry on intimate relationships. Although Hoerig did not cite WIS. STAT. § 974.06(1) in his motion, we choose to liberally construe the constitutional challenge as a § 974.06(1) motion and will address it on its merits. *See* ***State ex rel. McMillian v. Dickey***, 132 Wis. 2d 266, 279, 392 N.W.2d 453 (Ct. App. 1986) (courts should liberally construe claims by *pro se* prisoners and "look beyond the legal label affixed by the prisoner to a pleading and treat a matter as if the right procedural tool was used") *overruled on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900.

¶27 As we have seen, Hoerig was ordered at sentencing to have "no contact" with his victim during the entire term of his sentence. The circuit court

amplified that order to explain that "[n]o contact means no contact between you and these people, not phone calls, no calls through a third person, no letters," which Hoerig acknowledged he understood. Neither Hoerig nor his attorney voiced any objection to the condition. But now, after violating that condition of his sentence, first by living with his victim, and continuing it by marrying her, Hoerig claims his constitutional right to marry was violated by that sentencing provision. We conclude that Hoerig both waived and forfeited his right to contest the provision, and that in any event, the provision does not unconstitutionally limit his right to marry.

¶28 "'[W]aiver is the intentional relinquishment or abandonment of a known right'" and "'forfeiture is the failure to make the timely assertion of a right.'" ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted). In this case, Hoerig did both. The plea agreement contained an explicit "no contact with victim" statement. The prosecutor recited the terms of the plea agreement, including the no-contact provision. Hoerig did not offer any objection to this provision and, in fact, specifically agreed to it in the plea agreement. Further, after sentencing, Hoerig neither pursued a direct appeal of the sentence (including the no-contest provision) nor filed a WIS. STAT. § 973.19(1)(a) motion for sentence modification within ninety days of sentencing. We agree with the State's assessment that Hoerig waived and forfeited his objection:

> [A]t every point where Hoerig could have timely objected to the no-contact restriction included in his judgment of conviction or to any aspect of the restriction, he did not do so. Rather, he remained silent, eventually challenging the restriction after he had repeatedly violated it, after he had lied about the violations, and after DOC sought revocation based on those violations. Moreover, he affirmatively told the sentencing judge that he understood the scope of the restriction.

For these reasons, we conclude Hoerig is not entitled to relief.

¶29 Even if Hoerig had not waived or forfeited his right to challenge the no-contact provision, his argument would still fail because the no-contact provision is constitutional under the facts of this case. The United States Supreme Court recognized long ago that a rule of supervision can include a requirement that a probationer or parolee (and, now, a person on extended supervision)[9] obtain permission to do many things that people not subject to supervision take for granted, including obtaining permission to marry. As the Supreme Court explained in ***Morrissey v. Brewer***, 408 U.S. 471 (1972):

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms….. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also *they must seek permission from their parole officers before engaging in specified activities, such as* changing employment or living quarters, *marrying*, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness.

Id. at 478 (emphasis added).

¶30 Further, court-imposed restrictions on the right to marry as a result of a no-contact order have been upheld in Wisconsin courts. In ***Edwards v. State***, 74 Wis. 2d 79, 246 N.W.2d 109 (1976), the sentencing court imposed a probation condition prohibiting Edwards from "contact[ing] either of her co-defendants." ***Id.*** at 80. Edwards moved to modify the no-contact restriction. ***Id.*** at 81.

[9] The legal standards governing the imposition of restrictions on a person's exercise of constitutional rights while on probation have been applied to restrictions placed on a person on extended supervision. *See, e.g.*, ***State v. Trigueros***, 2005 WI App 112, ¶¶10-12, 282 Wis. 2d 445, 701 N.W.2d 54.

Edwards stated that she and one of her co-defendants "wanted to be married as soon as possible, and while he was incarcerated they wanted to communicate by mail and visit according to the rules of the state reformatory at Green Bay." ***Id.*** Although the no-contact restriction was modified to allow Edwards to correspond with her co-defendant, the motion was otherwise denied. ***Id.*** Edwards appealed, arguing that the restriction infringed her constitutionally and statutorily protected right to marry. The Wisconsin Supreme Court rejected her contention, holding that the restriction "was intended to prevent further crime … [and] was reasonably related to her rehabilitation and … was not overbroad." ***Id.*** at 85.

¶31 Where, as here, a defendant challenges a condition of extended supervision on grounds that it infringes on a constitutional right, a question of law is presented and we review the constitutionality of the provision *de novo*. *See* ***State v. Oakley***, 2001 WI 103, ¶8, 245 Wis. 2d 447, 629 N.W.2d 200 (analyzing challenge to a condition of probation). The conditions of extended supervision are not subject to strict scrutiny analysis. *See* ***id.***, ¶16 n.23. Rather, "given that a convicted felon does not stand in the same position as someone who has not been convicted of a crime ... [conditions of extended supervision] 'may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.'" ***Id.***, ¶19 (citation and footnote omitted).

¶32 We conclude that the no-contact restriction was reasonable. Hoerig had a sexual relationship with a fourteen-year-old girl who was thirty-one years his junior. There is ample evidence to support the circuit court's decision to prohibit Hoerig from contacting—much less having sexual relations with—his victim. The provision both protected the victim from Hoerig's improper conduct and became part of Hoerig's rehabilitation, which required him to recognize the

criminal conduct that led to his incarceration and interact truthfully with his agent.[10]

¶33 To the extent Hoerig is arguing that the provision has become unreasonable, as opposed to having been unreasonable at the time he was sentenced, we likewise reject his argument. The first time Hoerig sought relief from the no-contact provision was after he had already married his victim. Continuing to deny Hoerig the right to have contact with the now-adult victim under those circumstances is constitutionally reasonable. Clearly, Hoerig has not demonstrated that he can be candid with his agent about his relationship with the victim, nor has he demonstrated any understanding of the rehabilitative purpose of removing him from activity involving his victim. His untruthfulness—which led to his revocation—is inconsistent with the goal of his successful rehabilitation.

¶34 The restriction was also not overbroad. The no-contact provision limited only Hoerig's right to have contact with his victim; he was free to marry anyone else. Even if he wants to have contact with and marry the victim, he is not prohibited from *ever* marrying her; he is only prohibited from having contact with his victim *during the term of his sentence*. Hoerig bristles now at having to wait, and blames his present incarceration on the agent's refusal to agree to grant Hoerig's request to waive the no-contact provision. His dissatisfaction, caused by

[10] Hoerig argues that "the order of no-contact does not serve any legitimate correctional objective; not the protection of the community or the victim, or the rehabilitation of Mr. Hoerig, who lived an entirely law-abiding life on supervision." Hoerig's argument underscores the reason why Hoerig is in need of continued rehabilitation—while he may not have broken any laws applicable to everyone, he undeniably violated his rules of extended supervision, going so far as to have contact with his victim, marry her and then lie directly to his agent about both matters. We are unconvinced that under these facts the no-contact provision is unreasonable.

his own conduct (in committing the offense, then agreeing to the no-contact order and then intentionally violating the order and lying about it), does not establish a constitutional violation.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.