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You are hereby notified that the Court has entered the following opinion and order:

2015AP1892-CRNM State of Wisconsin v. Ernest Alan Edwards (L.C. #2012CF151)

Before Curley, P.J., Kessler and Brennan, JJ.

Ernest Alan Edwards appeals from a judgment imposing sentence after probation revocation. Appellate counsel[1] has filed a no-merit report, pursuant to WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Edwards was advised of his right to

[1] Attorney Martha K. Askins was originally appointed as postconviction/appellate counsel, and she prepared and filed the no-merit report and a supplement. Subsequently, Attorney Ellen J. Krahn was substituted, and she advised this court that she would rely on Attorney Askins' previously prepared reports.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

file a response, which he submitted. Appellant counsel then filed a supplemental no-merit report, to which Edwards also responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Edwards' responses, we conclude that there is no arguable merit to any issue which could be raised on appeal. We therefore summarily affirm the judgment.

In November 2012, Edwards was charged with arson, a Class C felony, for burning down two trailer homes that were being used for storage. Further investigation suggested one trailer was burned with permission, but led to the unintentional burning of the second trailer. The charge was amended for a no-contest plea to unsafe burning of another's building, a Class H felony. The circuit court withheld sentence and imposed three years' probation.

The Department of Corrections began proceedings to revoke Edwards' probation in June 2013. Among other things, Edwards had allegedly consumed marijuana, driven without a license, planned to kill someone, threatened to burn another building, harassed someone via Facebook, attempted to obtain a firearm, and actually obtained and possessed a BB gun and bow and arrow, all contrary to the rules of his probation.

The administrative revocation was referred to the circuit court because of competency concerns. The circuit court ordered a competency evaluation for Edwards, but the initial outpatient evaluation was inconclusive and recommended inpatient evaluation. The inpatient evaluator concluded that despite having a mental illness, Edwards did not lack competency. Edwards did not dispute this conclusion, and the circuit court remanded the matter to the Department of Corrections to finish revocation proceedings. Edwards waived the final revocation hearing.

At the sentencing-after-revocation hearing, the circuit court imposed the maximum of three years' initial confinement and three years' extended supervision. Edwards filed a postconviction motion seeking resentencing or sentence modification after obtaining a more specific mental health diagnosis while incarcerated. The circuit court denied the motion and Edwards appeals.

Because this matter is before us following sentencing after probation revocation, Edwards' underlying plea and conviction are not before us. *See* ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). In addition, Edwards cannot challenge the revocation decision. *See* ***State ex rel. Cramer v. Court of Appeals***, 2000 WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591; *see also* ***State ex rel. Flowers v. H&SS Dept.***, 81 Wis. 2d 376, 384-85, 260 N.W.2d 727 (1978). Our review is generally limited to the circuit court's sentencing discretion, which is the first issue counsel discusses in the no-merit report.

Sentencing after probation revocation is reviewed "on a global basis, treating the latter sentencing as a continuum of the" original sentencing hearing. *See* ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289. Thus, at sentencing after probation revocation, we expect the court will consider many of the same objectives and factors that it is expected to consider at the original sentencing hearing. *See* ***id.***; *see also* ***State v. Brown***, 2006 WI 131, ¶¶20-21, 298 Wis. 2d 37, 725 N.W.2d 262. When, as here, the same judge presides over both the original sentencing and sentencing after revocation, the judge need not revisit the original sentencing explanation. ***Wegner***, 239 Wis. 2d 96, ¶9.

The principal objectives of sentencing include the protection of the community, the punishment and rehabilitation of the defendant, and deterrence of others. *See* ***State v. Ziegler***,

2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

The State and defense counsel jointly suggested a sentence of time served for initial confinement plus two years' extended supervision. The State explained that with regard to Edwards' character, he had permission to burn one of the trailers, and he was not trying to collect insurance money (there was none), nor was he trying to harm a particular person or a particular person's property. The State also suggested that many of Edwards' troubling comments on record, including a statement to a competency evaluator "that he wished his attorney would go into the courtroom with a shotgun and 'blow them all away,'" were more consistent with Edwards possibly "screwing with the system" than they were actual threats. The State also opined that, having been confined for a year, Edwards may have come to understand the seriousness of his behavior that led to revocation. Defense counsel also noted that Edwards had spent more than a year incarcerated already, and emphasized that he believed Edwards would have adequate access to mental health resources if released to supervision. Edwards told the court that he "really had no plan about" hurting anyone.

The circuit court, in imposing the maximum time available, noted that this "wasn't all that serious [an offense] from the get-go." However, it also noted that Edwards' behavior while on probation was "less than appropriate in society." The court rejected the notion that Edwards had "grown up, that he has seen the error of his ways." The circuit court noted that the revocation summary had characterized Edwards "as a severe, serious threat to society and

extreme danger to the community." It commented that Edwards had made threats about law enforcement and courtroom personnel as recently as five months prior, and rejected any implication that it should treat Edwards' comments as mere jest, particularly given that Edwards actually had acquired a weapon. The circuit court noted that Edwards had an opportunity to change his behavior while on probation but did not. It was also evident to the court that Edwards did not get appropriate counseling while on probation, so "[h]opefully he will get it in a correctional facility."

Although the sentence is the maximum, it does not exceed legal limits. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. In light of Edwards' behavior leading to revocation, the sentence would not shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the circuit court's sentencing after revocation decision.

The no-merit report also addresses whether the circuit court erred in denying Edwards' postconviction motion. Edwards moved for resentencing because of inaccurate information or sentence modification because of a new factor. Edwards moved for this relief because his mental health issues were diagnosed with greater specificity after his entry to the prison system than they had been in pre-plea proceedings. He asked the circuit court to revise the sentence to two and one-half years' imprisonment and two years' extended supervision.

"[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the

inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the [circuit] court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' so 'specific consideration' to it, or that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

It appears that Edwards' "inaccurate information" argument was abandoned in favor of the "new factor" approach, as the circuit court does not appear to have made any express ruling that might relate to ***Tiepelman***. We note, however, that there is nothing in the record suggesting that information about Edwards' mental health that was relied upon at sentencing was in any way inaccurate. The circuit court knew there was at least a diagnosis of a personality disorder with anti-social personality traits. This diagnosis later became more specific,[3] but there is no suggestion the diagnosis originally available was fatally incorrect.

A new factor is a fact or set of facts that is "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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *and see* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36.

[3] Staff at Green Bay Correctional Institution diagnosed Edwards with severe persistent depressive disorder with anxious distress, borderline personality disorder, schizotypal personality disorder, cannabis use disorder, alcohol use disorder, a learning disability, and, provisionally, posttraumatic stress disorder.

If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

The circuit court held there was no new factor, though it acknowledged that many of the specifics of Edwards' mental health issues were unknown at sentencing. However, even if there were a new factor, the circuit court determined that sentence modification was unwarranted. The circuit court explained that the details of Edwards' diagnoses and his treatment needs weighed in favor of a longer sentence, not a shorter one and, thus, a downward adjustment of the sentence was not appropriate. The record reflects a proper exercise of discretion in that regard. There is no arguable merit to a claim the circuit court erroneously denied the postconviction motion.

The other issue addressed in the no-merit report is whether the circuit court properly denied postconviction counsel's motion to withdraw. Counsel filed the motion because Edwards expressed a desire to represent himself. The circuit court denied the motion because it did not believe Edwards was competent to proceed *pro se*.

A defendant who seeks to represent himself must be competent to proceed *pro se*. *See* ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). Competency to proceed *pro se* is a higher standard than competency to stand trial. *See* ***id.*** at 212. "Whether a defendant is competent to proceed pro se is 'uniquely a question for the trial court to determine.'" ***State v. Imani***, 2010 WI 66, ¶37, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted). "In determining whether a defendant is competent to proceed pro se, the circuit court may consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." *See* ***id.*** A defendant's timely request "should be denied only where the circuit court can identify a specific problem or

disability that may prevent the defendant from providing a meaningful defense" or case. *See* ***id.*** "Our review is limited to whether the circuit court's determination is 'totally unsupported'" by the record. *See* ***id.*** (citation omitted).

The circuit court determined, from documents Edwards had already filed himself, that Edwards "cannot spell, cannot type. Probably is functionally illiterate or close to it," and "lacks the capacity … to pursue the matters on his own."[4] This conclusion is supported by the record, so there is no arguable merit to a claim the circuit court improperly denied postconviction counsel's motion to withdraw.

We turn now to issues Edwards has raised in his responses. First, Edwards complains about the conditions of confinement while at the Sawyer County Jail.[5] However, those allegations are outside the scope of this appeal and do not create an issue of arguable merit.

Edwards next raises an issue of whether he was "competent to stand trial/hearing." WISCONSIN STAT. § 971.13 prohibits trial of incompetent defendants. An attorney has a duty to raise the issue of competency if counsel has reason to doubt the defendant's competency. *See* ***State v. Meeks***, 2003 WI 104, ¶44, 263 Wis. 2d 794, 666 N.W.2d 859. However, it is not clear for which proceedings Edwards might be challenging his competency. To the extent he is referring to the original plea proceedings, those proceedings are not before us for review. *See* ***Drake***, 184 Wis. 2d at 399. To the extent Edwards believes he was incompetent to proceed with

[4] Actual or functional illiteracy presents a particular hurdle for the appellate process, as an appeal is typically reviewed on written submissions only.

[5] Edwards is no longer housed at the jail.

the revocation, we note that the matter was properly referred to the circuit court, and Edwards was deemed competent.

To the extent Edwards is suggesting incompetency for this appeal, we note there is a slightly different standard for competency for appeal versus trial. *Cf.* ***State v. Debra A.E.***, 188 Wis. 2d 111, 124-26, 523 N.W.2d 727 (1994) (postconviction competency) *with* ***State v. Garfoot***, 207 Wis. 2d 214, 221-22, 558 N.W.2d 626 (1997) (trial competency). In the supplemental report, appellate counsel indicates there was no cause for her to question Edwards' competency relative to the standards for postconviction competency. Our review of the record does not cause us to question counsel's assessment. There is no arguable merit to a challenge to Edwards' competency to proceed with the revocation hearing or postconviction/appellate proceedings.[6]

Edwards next raises an issue of whether he had "efective councle" for the revocation proceedings. Appellate counsel notes that, at the time of the administrative revocation, Edwards' attorney was not licensed to practice in Wisconsin.[7] When the circuit court was made aware of this, it offered Edwards a chance to have the matter returned to the Department of Corrections to re-do the revocation proceedings. Edwards declined multiple invitations from the circuit court to have the matter remanded. Assuming that a challenge based on counsel's licensing is not already barred by waiver, our jurisdiction is limited to the sentencing after revocation; we cannot review

[6] We additionally note that while a defendant may have a mental illness, "a medical condition does not necessarily render the defendant incompetent[.]" *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477.

[7] It does appear, however, that he was a licensed Minnesota attorney, and counsel was granted *pro hac vice* status to appear in the circuit court for Edwards' sentencing after revocation.

the revocation proceedings themselves. We therefore agree with appellate counsel that there is no arguable merit to raising the other attorney's licensing issue.

Edwards protests that the reason revocation counsel was ineffective was because counsel promised Edwards that if he waived the final revocation hearing, he would get out of prison. Again assuming we can reach this issue, there is no arguable merit. To show prejudice from the waiver of the revocation hearing, Edwards would have to show that if he opted for a hearing, he would not have had his probation revoked. *See* ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (To prove prejudice from ineffective assistance of counsel, a defendant "must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (citation omitted). Given the nature of the twelve violations forming the basis for the revocation, and that Edwards gave a signed statement admitting those allegations, it is unreasonable to believe that his probation would not have been revoked after a full hearing.

Further, we note that counsel and the State made a joint recommendation to the circuit court for a sentence that amounted to time served for initial confinement plus two years' extended supervision. Had the circuit court adopted that recommendation, the effect would have been Edwards' immediate release from prison to extended supervision. Thus, to the extent that counsel's "promise" of immediate release was simply an explanation of the joint recommendation, in anticipation of the circuit court approving it, we note that counsel's incorrect sentencing prediction does not amount to ineffective assistance. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. We discern no issue of arguable merit to a claim of ineffective revocation counsel.

Edwards next claims the circuit court judge should have recused himself because of a threat, claiming the judge "seams to have based his scentence on it." We are unaware of any threat to the judge personally; thus, it appears Edwards is referring to his comment, made during a competency evaluation, that he hoped his attorney would bring a shotgun to court and "blow them all away."

WISCONSIN STAT. § 757.19(2) specifies situations in which a judge "shall disqualify himself" from the proceedings. The first six paragraphs, § 757.19(2)(a)-(f), are objective situations requiring disqualification, none of which apply here. The last paragraph, § 757.19(2)(g), is a subjective test that requires disqualification of a judge when he or she "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Here, the judge specifically commented, "I have little concern about my personal safety from the Ernest Edwards of the world[.]" While the circuit court did consider Edwards' threatening comments generally when fashioning its sentence, such consideration was appropriate, as those threats were part of Edwards' behavior while on probation. However, there is no arguable merit to a claim of subjective bias by the circuit court.

Edwards claims he was denied the right to speak at resentencing. However, the record reveals Edwards was allowed to address the circuit court at the sentencing-after-revocation hearing. To the extent Edwards is complaining that postconviction counsel did not let him speak at the postconviction motion hearing for resentencing, Edwards has no such right, given that the circuit court determined there was no need for a new sentencing hearing.

Finally, Edwards complains that due process has been violated because he was forced to represent himself on appeal when counsel "refused to persue a meaning full appeal." A

defendant does not have the right to insist that particular issues be raised on appeal. *See* ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. It is appellate counsel's duty to determine which issues, if any, have merit for an appeal. *See* ***Jones v. Barnes***, 463 U.S. 745, 751-53 (1983). The no-merit report is the protection afforded to a defendant when he disagrees with counsel's conclusion that an appeal would be frivolous. There is no arguable merit to a claim of a violation of due process merely because counsel filed a no-merit report.

Our independent review of the record reveals no other potential issues of arguable merit.[8]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ellen J. Krahn is relieved of further representation of Edwards in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[8] We observe that the presentence investigation report in this matter, which is record item 9, has not been sealed. "Except as [otherwise] provided … , after sentencing the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court." WIS. STAT. § 972.15(4). Therefore, upon remittitur, we direct the clerk of the circuit court to seal the presentence investigation report.