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**DISTRICT III/IV**

April 26, 2018

To:

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

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2017AP1268-CR

State of Wisconsin v. Eric P. McMahon (L.C. # 2008CF237)

Before Lundsten, P.J., Blanchard, and Kloppenburg, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Eric McMahon, by counsel, appeals a judgment and an order denying his postconviction motion for resentencing. Based upon our review of the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).<sup>1</sup> We summarily affirm.

McMahon received a maximum sentence, after revocation of probation, of twenty years of initial confinement and ten years of extended supervision for attempted first-degree sexual assault of a child under age thirteen. *See* WIS. STAT. §§ 948.02(1)(e); 973.01(2)(b)1. and (d)1.; and 939.32(1g). On appeal, McMahon argues that his sentence was unlawful because the court relied during sentencing on information from a confidential case involving a child in need of protection and/or services (CHIPS). The court referenced the CHIPS case in discussing the vulnerability of R.M., an adult with whom McMahon engaged in sexual relations in violation of the conditions of his probation. McMahon asserts that he did not have access to the confidential CHIPS case and, thus, had no opportunity to review and rebut the information referenced by the court.

A sentencing court erroneously exercises its discretion when it “actually relies on clearly irrelevant or improper factors.” *State v. Harris*, 2010 WI 79, ¶66, 326 Wis. 2d 685, 786 N.W.2d 409. The defendant “bears the burden of proving such reliance by clear and convincing evidence.” *Id.* Here, McMahon has failed to meet that burden. The information regarding R.M.’s vulnerability had been disclosed previously to McMahon. The Revocation Order and Warrant filed about one month prior to sentencing stated that R.M. “was a victim of sexual assault in her past, had a child at a very young age, lacks friends and stability and struggles for attention.” The document further stated that “it is the impression of the Department of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Corrections, Law Enforcement and other county service professionals that Ms. [R.M.] is at a very high risk of being taken advantage of.” The sentencing court used wording that was similar to the language in the Revocation Order and Warrant when the court discussed R.M.

McMahon fails to make the required showing, by clear and convincing evidence, that the court relied improperly on confidential information when discussing R.M.’s vulnerability, rather than obtaining that information from a previously disclosed, publicly available source. Accordingly, we are not persuaded that the circuit court erroneously exercised its discretion in denying McMahon’s motion for resentencing. *See State v. Sinks*, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (Ct. App. 1992) (resentencing is within the trial court’s discretion).

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*