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**DISTRICT IV**

February 23, 2023

*To:*

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

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2021AP1160-CR                      State of Wisconsin v. Kevin D. Brooks (L.C. # 2012CF1153)

Before Kloppenburg, Graham, and Nashold, 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).**

Kevin Brooks appeals a judgment sentencing him after revocation of probation, as well as an order denying his postconviction motion for resentencing or sentence modification based on a new factor.<sup>1</sup> Based upon our review of the briefs and record, we conclude at conference that this

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<sup>1</sup> Brooks also appeals a separate order denying his petition for sentence adjustment, but he does not discuss the order in his appellate briefing. We therefore conclude that he has abandoned his appeal of that order, and we discuss it no further.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>2</sup> We summarily affirm.

In 2012, Brooks was charged with one count of second-degree sexual assault. Brooks pled guilty to the charge, and the circuit court withheld sentencing and placed Brooks on probation for four years. Twice, the circuit court amended the judgment of conviction to add conditional jail time as alternatives to revocation of probation. Brooks' probation was revoked in 2014 and he was sentenced to nine years of initial confinement and three years of extended supervision.

In 2020, Brooks filed a postconviction motion alleging that he was sentenced based on inaccurate information or, alternatively, that he was entitled to sentence modification based on a new factor. The postconviction motion focused on certain statements made by the circuit court judge during the hearing in which Brooks was sentenced after revocation of probation. At the hearing, the judge discussed a list of Brooks' character traits and then stated, "Every description of character I just described[,] there is part of the factors for a diagnosis of psychopathology. I think you are probably a psychopath. I'm not a psychiatrist or a psychologist, I'm a judge." The judge also stated that Brooks had the ability to change but "probably need[ed] to accept the fact that [he is] a psychopath first."

Brooks submitted with his postconviction motion a report from Dr. Robert Barahal, a psychologist who evaluated Brooks in the autumn of 2020 using the PCL-R, a tool for diagnosing psychopathy. The tool is a checklist, and its scores range from 0 to 40. Barahal's report explains

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

that “most experts have used scores of 30+ as effective practical confidence that psychopathic functioning is clearly evident[.]” Brooks scored a 26 on the PCL-R.<sup>3</sup> Barahal’s report indicated that scores of 26 “do not indicate pervasive psychopathic traits. Nor do they indicate a full absence of such features.” Brooks argued in his postconviction motion that Barahal’s report showed that the information regarding his PCL-R score constituted a new factor justifying sentence modification. The circuit court denied Brooks’ motion without a hearing, and Brooks appeals. On appeal, Brooks appears to argue that he is entitled to resentencing because Barahal’s report establishes that the circuit court relied on inaccurate information or, alternatively, that he is entitled to sentence modification because the score information in the report constitutes a new factor.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. If a defendant can establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the court relied upon the misinformation in reaching its determination, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26.

Here, Brooks has failed to meet the initial burden of showing by clear and convincing evidence that inaccurate information was presented and relied upon at sentencing. The circuit court judge stated explicitly on the record that he was not making a diagnosis of psychopathy.<sup>4</sup> The circuit court did not sentence Brooks based on any diagnosis but, rather, based on his character

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<sup>3</sup> Barahal’s report explains that “the ‘standard error of measurement’ for the PCL-R is approximately three points, meaning that about two-thirds of examiners assessing Mr. Brooks would likely report scores between 23 and 29.”

<sup>4</sup> Although we do not agree with Brooks that the circuit court made or relied upon any diagnosis of psychopathy in this case, we note that it is better practice for judges to avoid using clinical and diagnostic terms during sentencing, unless those terms are proffered by an expert during the case.

and the danger he presented to the public. The court discussed several character and personality traits that made Brooks a danger to the community, including a history of manipulation and promiscuous sexual behavior, impulsivity, poor behavior controls, and a lack of empathy and responsibility. Brooks does not dispute that he possesses these traits. Many of the traits are the same or similar to traits assessed on the PCL-R checklist. Nonetheless, they are character traits that the circuit court was permitted to consider at sentencing. A “defendant’s personality, character and social traits” are among the factors that courts may take into account in the proper exercise of their sentencing discretion. *State v. Gallion*, 2004 WI 42, ¶43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197 (quoted source omitted). The circuit court did so here. We reject Brooks’ argument that he is entitled to resentencing.

We also reject Brooks’ argument that the information contained in Barahal’s report is a new factor entitling him to sentence modification. The circuit court considered the applicable two-part test for sentence modification motions based on an alleged new factor: whether the defendant has demonstrated the existence of a new factor by clear and convincing evidence and, if so, whether that new factor justifies modification of the sentence, which is a discretionary determination by the circuit court. See *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. Here, the circuit court determined that Barahal’s report did not present a new factor justifying sentence modification. We reach the same conclusion. A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the judge at the time of sentencing. *Id.*, ¶40 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Here, Barahal’s professional conclusion in the report that Brooks comes close to, but does not fall within, the range of scores necessary for a psychopathy diagnosis is not highly relevant to the imposition of sentence. As discussed above, the circuit court did not rely upon a diagnosis of psychopathy,

or any other diagnosis, in sentencing Brooks. The information contained in the report therefore does not qualify as a new factor justifying sentence modification. Having determined that the report does not present a new factor, we need go no further in our analysis. See *Harbor*, 333 Wis. 2d 53, ¶38.

IT IS ORDERED that the judgment and orders 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*