OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

August 20, 2024

To:

Hon. Michelle A. Havas
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Lisa E.F. Kumfer
Electronic Notice

Urszula Tempska
Electronic Notice

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

2022AP825-CR State of Wisconsin v. Ana M. Vargas-Reyes (L.C. #2018CF2012)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Ana M. Vargas-Reyes appeals from a judgment, entered on her guilty pleas, convicting her on one count of first-degree reckless injury and two counts of first-degree recklessly endangering safety, all as a party to a crime with use of a dangerous weapon. Vargas-Reyes also appeals from orders that denied her postconviction motion and a motion for clarification and reconsideration. Based upon our review of the briefs and record, we conclude at conference that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and orders are summarily affirmed.

Vargas-Reyes's brother was dating a neighbor, Y.R. ("Yvie").[2] An argument ensued between the two families about Vargas-Reyes's brother not taking prescribed medication. On April 26, 2018, Vargas-Reyes and her boyfriend, Luis Javier Cruz-Correa, went to Yvie's house and started a fist fight with several people. Vargas-Reyes and Cruz-Correa left but threatened to return with a gun. They did, in fact, return a short time later, both with firearms. They opened fire towards Yvie's group until Vargas-Reyes's gun jammed and Cruz-Correa ran out of bullets. No one was killed, but Yvie was struck in the back, requiring removal of her spleen.

Vargas-Reyes was charged with one count of attempted first-degree intentional homicide and three counts of first-degree recklessly endangering safety, all with a dangerous weapon and as a party to a crime.[3] Pursuant to a plea agreement, the State amended the attempted homicide charge to first-degree reckless injury with the same modifiers. Vargas-Reyes pled guilty to that charge and to two of the reckless endangerment counts as charged; the third reckless endangerment count was dismissed and read in. The State also agreed that it would cap its sentence recommendation at twelve years of initial confinement and five years of extended supervision. The circuit court accepted Vargas-Reyes's pleas and set the matter for sentencing.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] For ease of reading and pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

[3] Cruz-Correa was charged with the same four offenses and a fifth crime, possession of a firearm by a felon, with multiple repeater enhancers added to his charges.

The Department of Corrections prepared a presentence investigation report (PSI), and Vargas-Reyes submitted a privately prepared sentencing memorandum. Both documented a long history of trauma that began in Vargas-Reyes's childhood, including sexual and physical abuse at the hands of both family members and romantic partners. The reports both reflect that Vargas-Reyes had a history of alcohol abuse, beginning at age fourteen, which she used to forget about the abusive treatment she received. The reports also discussed Vargas-Reyes's mental health; the PSI noted that Vargas-Reyes "now believes she was suffering from severe depression," and the private report listed her "mental health disabilities" as bipolar disorder, schizophrenia, depression, anxiety, "and other miscellaneous mental health conditions." The circuit court ultimately imposed sixteen years' imprisonment for the reckless injury and ten years' imprisonment for each endangering safety charge, to be served concurrently.

Postconviction counsel hired a psychologist, Dr. Brooke Laufer, who diagnosed Vargas-Reyes with postpartum depression, post-traumatic stress disorder, and battered person syndrome. Based on Dr. Laufer's report, Vargas-Reyes filed a "motion to modify sentence based on new factors or for new sentencing."[4] Vargas-Reyes sought sentence modification on the grounds that there was a "major mitigating 'new factor' 'highly relevant to this imposition of the sentence.'" Specifically, she asserted that Dr. Laufer's report establishes that Vargas-Reyes's conduct in this incident resulted from "chronic severe PTSD-Battered Wife Syndrome" and "acute Postpartum

[4] The circuit court accepted Vargas-Reyes's postconviction motion and exhibits, including Dr. Laufer's report, under seal. We also accepted Vargas-Reyes's opening brief and appendix under seal. The sealed material is hereby deemed unsealed only to the extent that it is quoted, referenced, or described in this opinion.

Depression," and she claimed that these disorders "disabled [her] ability to reflect on [Cruz-Correa's] directives, to resist them, and to 'distinguish between right and wrong.'"[5]

Vargas-Reyes alternatively sought resentencing. She argued that her sentence violated due process because it is based on "incorrect information and inferences" about "her presumed free agency … which was in fact 'compromised' by her PTSD and depression," "the gross seriousness and likelihood of re-occurrence of" her actions, and her culpability, as well as "an erroneous belief in the effectiveness of" deterrence and punishment through incarceration. That is, because Vargas-Reyes's behavior was, as she sees it, "involuntary," that behavior "cannot properly, fairly be punished or deterred with imprisonment," nor can the community be protected by her incarceration. Vargas-Reyes also sought resentencing by arguing that her sentence was cruel and unusual "because it punishes her … for involuntary action/inactions resulting from her untreated dual mental health comorbidities: chronic Battered Woman Syndrome/Stockholm Syndrome and acute Postpartum Depression" and "shock[s] public sentiment and violate[s] the judgment of reasonable people concerning what is right and proper under the circumstances."

After briefing, the circuit court denied the motion without a hearing. It was unpersuaded that Dr. Laufer's report was a new factor because her opinion therein was based on "previously known or knowable facts." While the doctor's report "adds new labels to [Vargas-Reyes's] mental health issues and sets forth [the doctor's] opinion as to how this implicates the

[5] We observe that, this assertion notwithstanding, Vargas-Reyes did not seek plea withdrawal based on newly discovered evidence of a mental illness that rendered her not criminally responsible for her actions under WIS. STAT. § 971.15(1) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity … to appreciate the wrongfulness of his or her conduct[.]"). *See e.g.*, ***State v. Fosnow***, 2001 WI App 2, ¶5, 240 Wis. 2d 699, 624 N.W.2d 883.

defendant's culpability in this matter, her opinion and labeling of the defendant's mental health is not based on any new or unknown facts." The circuit court further explained that even if it considered Dr. Laufer's report and the new diagnoses to be new factors, it was "not persuaded that sentence modification is warranted based on the seriousness of the offenses."

Regarding resentencing, the circuit court rejected Vargas-Reyes's claim that she was sentenced on inaccurate information, concluding that she "failed to demonstrate by clear and convincing evidence that the court relied on any *factually* inaccurate information" because "Dr. Laufer's post-sentencing *opinion* about [Vargas-Reyes's] culpability is just that—her opinion." The circuit court also rejected the cruel and unusual punishment argument, noting that it had imposed "a mere fraction (16%) of the possible total of 100 years of incarceration" and explaining that it had taken Vargas-Reyes's mental health issues into account.

Vargas-Reyes filed a motion seeking clarification and reconsideration. The circuit court, characterizing the motion as a "rehash" of the original postconviction motion, denied the request. Vargas-Reyes appeals.

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); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***Harbor***, 333 Wis. 2d 53, ¶36. Whether a fact or set of facts is a "new factor" is a question of law. ***Id.*** If the

circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion,[6] whether modification of the sentence is warranted. ***Id.***, ¶37.

We agree with the circuit court that Dr. Laufer's report is not a new factor. By its very nature as an attempt to explain Vargas-Reyes's behavior on the date of the offense, the post-sentencing report is necessarily based on facts about Vargas-Reyes that existed well before sentencing. That is, the report is "not a 'fact or set of facts' that were not in existence or unknowingly overlooked by the parties at the time of sentencing;" it is simply "an expert's opinion based on previously known or knowable facts." *See* ***State v. Sobonya***, 2015 WI App 86, ¶7, 365 Wis. 2d 559, 872 N.W.2d 134.

We also conclude that the circuit court properly exercised its discretion when it found that sentence modification was not warranted even if the report was a new factor. In denying Vargas-Reyes's motion, the circuit court explained that it had "heard the extent of the defendant's trauma, domestic abuse history, mental health, and hardships, which were set forth in the defendant's letters to the court, the DOC PSI, the Private PSI, and through the defendant and counsel" and considered all of this information when sentencing Vargas-Reyes. Though Vargas-Reyes's "mental health and trauma were relevant to the court's assessment of her character," the circuit court concluded that "the gravity of the offenses required a significant prison sentence" and imposed the sentence accordingly.

[6] Throughout the opening brief, appellate counsel argues that the circuit court "abused" its discretion, despite the fact that the supreme court replaced the phrase "abuse of discretion" with "erroneous exercise of discretion" more than thirty years ago. *See* ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992) ("Henceforth this court will use *erroneous exercise of discretion*, in place of abuse of discretion…. We have come to believe that the term *abuse of discretion* carries unjustified negative connotations.").

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. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Proving inaccuracy is a threshold question: "A defendant 'cannot show actual reliance on inaccurate information if the information is accurate.'" ***State v. Travis***, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491 (citation omitted).

Vargas-Reyes's claim that she was sentenced on inaccurate information is premised on the circuit court accepting Dr. Laufer's opinions about Vargas-Reyes's mental health concerns and their impact on her culpability. However, the circuit court "was entitled to accept or disregard this information as it deemed appropriate." ***State v. Slagoski***, 2001 WI App 112, ¶9, 244 Wis. 2d 49, 629 N.W.2d 50, *overruled in part on other grounds by* ***Harbor***, 333 Wis. 2d 53. We are therefore unpersuaded that Vargas-Reyes has demonstrated any inaccuracies.

We also agree with the circuit court that Vargas-Reyes's sentence does not constitute cruel and unusual punishment. As noted, Vargas-Reyes received concurrent sentences requiring just sixteen years' imprisonment out of a possible maximum of 100 years. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."); ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.")

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals