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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 II

January 23, 2013

To:

Hon. Kathryn W. Foster
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Brad Schimel
District Attorney
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kathilynne Grotelueschen
Seymour, Kremer, Koch & Lochowicz LLP
23 N. Wisconsin St.
P.O. Box 470
Elkhorn, WI 53121-1737

Vincent J. Peil, #138199
Prairie Du Chien Corr. Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

2012AP1286-CRNM State of Wisconsin v. Vincent J. Peil (L.C. #2010CF695)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Vincent J. Peil appeals from a judgment convicting him of uttering a forgery. Peil's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2009-10)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Peil was informed of his right to file a response but has not done so. Upon consideration of the report and our independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the appeal may be disposed of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment of conviction and relieve Attorney Kathilynne A. Grotelueschen of further representing Peil in this matter.

Peil opened a business checking account by depositing a $22,537 check. The next day he went to a branch bank and withdrew $10,500. The bank soon discovered that the deposited check was counterfeit. Peil pled no contest to uttering a forgery. A repeater penalty enhancer was dismissed. In addition, one count of fraud against a financial institution ($500 - $10,000) with a repeater penalty enhancer was dismissed and read in for sentencing. The trial court sentenced Peil to two years' initial confinement and three years' extended supervision and ordered, among other conditions, that he pay full restitution. This no-merit appeal followed.

The no-merit report addresses whether Peil's plea colloquy was sufficient. To withdraw his plea after sentencing, Peil would have to show by clear and convincing evidence that failure to allow a withdrawal would result in a manifest injustice—*i.e.*, "a serious flaw in the fundamental integrity of the plea." *See* ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891 (citation omitted). The record establishes that the trial court personally engaged Peil in a plea colloquy that generally conformed to WIS. STAT. § 971.08[2] and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and that the plea had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). In addition to the

[2] The court did not specifically advise Peil that, if not a United States citizen, his plea "may result in deportation, the exclusion from admission to this country, or the denial of naturalization, under federal law." *See* WIS. STAT. § 971.08(1)(c). A plea withdrawal is permitted upon such a failure if the defendant later shows that the plea is likely to result in his or her deportation. Sec. 971.08(2). As the plea questionnaire indicated his understanding of the omitted information, the presentence investigation report states that he grew up in Mukwonago, Wisconsin, and that Peil reported that he had a security clearance while in the U.S. Army, and nothing else in the record suggests that he is anything but a U.S. citizen, we conclude that this issue has no arguable merit.

substantive colloquy, the court properly relied upon Peil's signed plea questionnaire. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987); *see also* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Because Peil changed his plea from guilty to no contest, the court verified that Peil understood that a no-contest plea offers civil protections unavailable to one who pleads guilty. *See* ***State v. Black***, 2001 WI 31, ¶15, 242 Wis. 2d 126, 624 N.W.2d 363. No issue of merit could arise from the plea taking.

The report also addresses the court's exercise of sentencing discretion. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must address sentencing objectives that include the protection of the public, punishment and rehabilitation of the defendant, and deterrence, ***id.***, ¶40, and the primary sentencing factors—the gravity of the offense, the character of the offender and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). The court must provide a "rational and explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76.

We agree with appellate counsel that no basis exists to disturb the sentence. The court applied the proper sentencing objectives and factors in a reasoned and reasonable manner and provided a thorough, rational explanation for imposing the sentences it did. It noted Peil's history of dishonest behavior, failure to accept responsibility, repeated victimization of people in the community and an inability or unwillingness to learn from measures in place to help him. Peil faced a total of six years' imprisonment and $10,000 in fines. Considering the potential sentence, we cannot conclude that the imposed sentence is so excessive or unusual so as to shock

public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

The no-merit report also considers whether new factors exist that would justify sentence modification. Appellate counsel states that Peil identified two potential new factors: (1) the death of his father while Peil was serving his sentence and his eighty-four-year-old mother's terminal illness; and (2) inaccurate or incomplete information in the presentence investigation report (PSI).[3] New factors are those facts highly relevant to sentencing but not known to the trial court at the time of the original sentencing. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). A new factor need not frustrate the purpose of the original sentence. ***State v. Harbor***, 2011 WI 28, ¶¶48-52, 333 Wis. 2d 53, 797 N.W.2d 828.

The ill health of Peil's mother, analogous to the deterioration of a defendant's own health, is not a new factor. *See* ***State v. Johnson***, 210 Wis. 2d 196, 204, 565 N.W.2d 191 (Ct. App. 1997). The death of Peil's father likewise is not a new factor—especially since the PSI indicates that Peil reported that his father already was deceased. Even if that was incorrect, and

[3] Neither Peil nor his counsel objected at the sentencing hearing to any perceived error in the PSI. Peil also declined to exercise his right to allocution, which would have given him a second opportunity to correct inaccuracies. A defendant forfeits a challenge to the accuracy of information in a presentence investigation report by failing to raise the challenge during the sentencing proceeding. *See* ***State v. Mosley***, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996). We nonetheless may address the issue in the appropriate case. *See* ***State v. Leitner***, 2001 WI App 172, ¶¶41-42, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341. We will do so here for the sake of completeness.

A claim that trial counsel ineffectively failed to challenge the accuracy of the PSI would have no arguable merit because, as will be discussed, Peil could not show that the lack of an objection was prejudicial. *See* ***State v. Anderson***, 222 Wis. 2d 403, 408-09, 588 N.W.2d 75 (Ct. App. 1998).

Peil does not assert that it was, he also told the PSI writer that his father abandoned him when he was four and that he desired no further contact with his father after last seeing him twenty-five years ago. Neither fact about his parents is highly relevant to the sentence imposed.

The no-merit report also indicates that Peil contends the PSI inaccurately stated that: (1) he used some of the money from the counterfeit check to start his business, when in fact he incorporated his business two years earlier; (2) while on parole in 2002 he initially lived with his mother in Mukwonago, but he actually did not; (3) an administrative law judge determined that, on two specific dates in 2003, he failed to deliver two Rolex watches someone purchased from him, but omitted that he intended to deliver them when they returned from being cleaned but was arrested before he could do so; and (4) he received a conduct report for prescription drug misuse while in jail in 2005, but omitted that he later successfully challenged that disciplinary action.

A defendant claiming that a sentencing court relied on inaccurate information must show both that the information was inaccurate and that the sentencing court actually relied on it. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. The information also must be highly relevant to the imposed sentence. ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656.

The court gave significant attention to the PSI. Even if the first item was erroneous, the court's comments regarding it did not touch on how he used the money from the swindle. As to his place of residence in 2002, the court simply read the statement from the PSI as it reviewed Peil's prior history. Such a *de minimis* reference does not negate the overall accuracy of the sentencing analysis. *See* ***State v. Way***, 113 Wis. 2d 82, 91, 334 N.W.2d 918 (Ct. App. 1983). Furthermore, neither claimed error is highly relevant to his sentence, if relevant at all.

Counsel reports that Peil complains that the PSI is incomplete in regard to the third and fourth items. He does not attack the ALJ's finding that he failed to deliver the paid-for Rolexes or that he received a conduct report. Rather, Peil complains that the PSI omits that he would have delivered the paid-for Rolexes had he not been taken into custody and that he later successfully challenged the jail disciplinary action.

Neither presents an issue of arguable merit. While the court relied on the ALJ's finding, the fact remains that Peil never delivered the Rolexes and his aunt paid $5000 to the disappointed buyer. His self-serving assertion that he was prevented from delivering the watches does not undermine the integrity of the sentence. Assuming Peil did successfully challenge the disciplinary action, there is no evidence that the court relied in any way on the 2005 conduct report, so it was not highly relevant to his sentence. Our review of the record discloses no other issues of arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kathilynne A. Grotelueschen is relieved from further representing Peil in this matter.

Diane M. Fremgen
Clerk of Court of Appeals