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

February 4, 2013

To:

Hon. Dennis R. Cimpl
Circuit Court Judge
Safety Building
821 West State St.
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Benjamin J. Peirce
3616 W. National Ave., Suite 201
Milwaukee, WI 53215

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

Edward James Whitfield 14358
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2011AP2651-CRNM State of Wisconsin v. Edward James Whitfield (L.C. #2006CF5984)
2011AP2652-CRNM State of Wisconsin v. Edward James Whitfield (L.C. #2009CF2574)

Before Fine, Kessler and Brennan, JJ.

Edward James Whitfield appeals from a judgment of conviction, entered upon his guilty plea, on one count of forgery/uttering. He also appeals from an order reconfining him for three years and seven days after revocation of his extended supervision. Appellate counsel, Benjamin James Peirce, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2009-10).[1] Whitfield was advised of his right to file a response

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

and has provided two responses. Upon this court's independent review of the records as mandated by ***Anders***, counsel's report, and Whitfield's responses, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

In Milwaukee County Circuit Court case No. 2006CF5984, Whitfield pled guilty to two counts of forgery/uttering for passing bad checks. In February 2007, he was sentenced to two years' initial confinement and three years' extended supervision on each count, to be served concurrently. A motion for sentence credit was granted, and Whitfield did not appeal. He was released to extended supervision on December 9, 2008.

A revocation hold was placed on Whitfield on May 14, 2009, for multiple violations of his extended supervision conditions. Specifically, he had been terminated from his AODA treatment program, had not stayed at his approved residence, had been using heroin, was in possession of a fake identification card, and had committed more fraudulent activity. That fraudulent activity, involving a forged check, resulted in a new forgery charge in Milwaukee County Circuit Court case No. 2009CF2574, to which Whitfield would ultimately plead guilty. Whitfield waived an administrative revocation hearing and was returned to the circuit court for sentencing after revocation.

At the instigation of trial counsel, the circuit court in case No. 2009CF2574 agreed to sentence Whitfield on the revocation case. The circuit court ordered Whitfield reconfined for the maximum available three years and seven days. On the new conviction, the circuit court imposed eighteen months' initial confinement and eighteen months' extended supervision, as recommended by the State pursuant to the plea agreement, to be served consecutively.

Counsel raises three potential issues.[2] Whitfield raises those three issues and three more of his own.[3] We address an additional issue that neither counsel nor Whitfield raised.

I. The Proper Venue for Sentencing After Revocation

Appeal No. 2011AP2651-CRNM is before us on a reconfinement order following revocation of Whitfield's extended supervision. The original judgment of conviction and the revocation decision are therefore not at issue. *See* ***State v. Drake***, 184 Wis. 2d 396, 399-400, 515 N.W.2d 923 (Ct. App. 1994); *see also* WIS. STAT. § 302.113(9)(g). Generally, we would then be limited to discussing the circuit court's exercise of sentencing discretion. Here, though, Whitfield asserts that, due to recent changes by the legislature, he should have been sentenced by the Division of Hearings and Appeals in the Department of Administration or by the Department of Corrections, not by the circuit court. This is the first issue addressed by counsel and Whitfield.

Prior to October 1, 2009, WIS. STAT. § 302.113(9)(am) provided that if a defendant's extended supervision were revoked, he would "be returned to the circuit court for the county in which the person was convicted of the offense for which he … was on extended supervision, and the court shall" impose a reconfinement sentence. After October 1, 2009, if the defendant's supervision is revoked, "the reviewing authority" shall impose a reconfinement sentence. *See*

[2] Counsel does not address whether there is any arguable merit to a challenge to the circuit court's exercise of sentencing discretion in either case, nor does he address whether there is any arguable merit to a challenge to the validity of Whitefield's plea in the newer case. Counsel's failure to address these issues is unnecessarily burdensome to this court.

[3] To the extent that Whitfield has attempted to raise more issues than those we address herein, they are deemed rejected because we cannot sufficiently decipher them to address them directly. Nevertheless, we have determined there are no issues of arguable merit based on these records.

2009 Wis. Act 28, § 2726. Under WIS. STAT. § 302.113(9)(ag), the reviewing authority is either the Division of Hearings and Appeals, if a revocation hearing is held, or the Department of Corrections, if the hearing is waived. Because Whitfield's reconfinement sentence was imposed after October 1, 2009, he believes that the sentence should have been imposed by the "reviewing authority," not the circuit court. Whitfield is mistaken.

Whitfield's supervision was revoked on September 30, 2009. The revision to WIS. STAT. § 302.113(9)(am), changing the entity that imposes a reconfinement sentence, first applied "to revocations of extended supervision that occur on the effective date" of the revision. *See* 2009 Wis. Act 28, § 9311(4q). The effective date of the revision is October 1, 2009. ***Id.***, § 9411(2u). The revocation of Whitfield's extended supervision occurred *before* the revision's effective date, so the prior version of the statute applies, and there is no arguable merit to a claim that the circuit court was the wrong venue for sentencing after revocation.

II. Judicial Substitution

The next issue that counsel and Whitfield both address is whether it was erroneous for the sentencing court in the newer case to assume the obligation for imposing the sentence after revocation. Whitfield specifically claims that there was no transfer order, which he believes is contrary to WIS. STAT. § 971.20. Whitfield further contends that strict compliance with § 971.20 is required, and that his trial attorney inappropriately requested the transfer when she contacted the circuit court's clerk via email.

WISCONSIN STAT. § 971.20 does not address all instances of judicial substitution but, rather, deals specifically with a defendant's right to request judicial substitution. *See* WIS. STAT. § 971.20(2) ("In any criminal action, the defendant has a right to only one substitution of a

judge…. The right of substitution shall be exercised as provided in this section."). The "strict compliance" to which Whitfield refers is required when a case is returned to a previously substituted judge under WIS. STAT. § 971.20(11). *See* ***State v. Austin***, 171 Wis. 2d 251, 257-58, 490 N.W.2d 780 (Ct. App. 1992). This case is not a § 971.20 case.

Further, as appellate counsel aptly points out, the transfer in this case was appropriate under Milwaukee County Local Rule 4.16, which provides:

> All proceedings relating to reconfinement hearings and sentencing after revocation shall be assigned to the judge who presided at sentencing, or to that judge's successor, except that *when such proceedings are commenced against a defendant against whom another case is pending in the same division, such proceedings shall be assigned to the branch in which the pending case is assigned*.

(Emphasis added.) Thus, the transfer—whether properly requested by trial counsel's email or not—was actually required by local rule.[4] *See* WIS. STAT. § 753.35(1) (authorizing circuit court to adopt local rules). There is no issue of arguable merit to a claim of improper judicial substitution.

III. Validity of the Guilty Plea

The next issue we address is one that we identify independently of both counsel and Whitfield: whether the circuit court followed the appropriate procedures in accepting Whitfield's plea in Milwaukee County Circuit Court case No. 2009CF2574. Our review of the

[4] We also note that Whitfield failed to make a contemporaneous objection to the judicial substitution, which generally means the issue was not preserved for appeal. *See* ***Grant v. State***, 73 Wis. 2d 441, 447, 243 N.W.2d 186 (1976) (failing to object when the basis for objection is known waives the right of review of the issue on appeal).

record—including the plea questionnaire, waiver of rights form, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Whitfield's plea was anything other than knowing, intelligent, and voluntary.

IV. Allocution

The third issue that both counsel and Whitfield discuss is whether Whitfield was denied the right of allocution. Whitfield had been addressing the circuit court when it interrupted him. The circuit court never returned to Whitfield for further comment.

Allocution is the right to present a defendant's plea in mitigation of a sentence. *See* ***United States v. Carter***, 355 F.3d 920, 926 (6th Cir. 2004). Allocution is also available before a reconfinement sentence is imposed. *See* ***State v. Hines***, 2007 WI App 39, ¶20, 300 Wis. 2d 485, 730 N.W.2d 434. Wisconsin provides a statutory right to allocution. *See* WIS. STAT. § 972.14(2) ("Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced … and allow the … defendant an opportunity to make a statement with respect to any matter relevant to the sentence."); *see also* ***State v. Greve***, 2004 WI 69, ¶¶34-35, 272 Wis. 2d 444, 681 N.W.2d 479. "Denial of allocution is reversible error." ***Carter***, 355 F.3d at 926. "A denial generally occurs when a defendant is not … invited to address the court before sentencing … or when a court refuses to listen to the defendant's statement." ***Id.***

This is not a case where the circuit court deprived Whitfield of the right to allocution by not inviting him to speak. Whitfield was asked if he wanted to make a statement to the circuit

court, and he did begin speaking. Thus, the question is whether the circuit court's interruption amounts to a refusal to listen to his statement, thereby denying him the right of allocution in that fashion.

As noted, Whitfield began giving a statement, and was explaining that it was difficult for him to be without medication for his post-traumatic stress disorder. When Whitfield stated, "I am not using this PTSD as an excuse," the circuit court interrupted him:

> Yes, you are, sir, with all due respect, yes, you are. And you have been using it as an excuse for the past 20 years. You used the same thing with Judge Kahn back in February of 2007, I have read the transcript. Your lawyer's argument and your remarks sound the same thing that you said to Judge Kahn and your lawyer then said to Judge Kahn.

The circuit court then segued into its sentencing decisions, without returning to Whitfield.

Counsel concludes that there is no issue of arguable merit because it was clear from the circuit court's comments that nothing Whitfield said would have made a difference to the sentence. *See* ***State v. Lindsey***, 203 Wis. 2d 423, 448, 554 N.W.2d 215 (Ct. App. 1996) (applying harmless error analysis to alleged violations of right to allocute). We agree with counsel that there is no issue of arguable merit to this issue, consistent with ***Lindsey***, with regard to the reconfinement sentence. The circuit court concluded, in light of the information before it, particularly Whitfield's record, that the only appropriate reconfinement sentence was the maximum time available.

The circuit court did not, however, rely on the same rationale when imposing sentencing for the new conviction. However, we also conclude that there is no arguable merit to a claim that Whitfield was denied the right to allocution on his new sentence. Here, it is clear that the circuit

court merely declined to allow Whitfield to present information that the circuit court had deemed either irrelevant or nonmitigating in light of the proceedings as a whole.[5] *See* ***United States v. Li***, 115 F.3d 125, 133 (2d Cir. 1997) (allocution is right "to express relevant mitigating information"); ***United States v. Kellogg***, 955 F.2d 1244, 1250 (9th Cir. 1992) (right of allocution is not unlimited).

V. Sentencing Discretion

The next issue—which Whitfield raises but counsel does not address—is whether the circuit court erroneously exercised its discretion in imposing the two sentences. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

A. Sentencing on the New Conviction

At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit 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* ***Ziegler***, 289 Wis. 2d 594, ¶23. Our review of the record

[5] Though not dispositive, we note that despite the length of his replies to the no-merit report, Whitfield has not suggested what other information he might have provided to the circuit court had it not interrupted him.

satisfies us that the circuit court properly exercised its discretion when imposing sentence for the new conviction.

The circuit court commented that punishment, deterrence, and Whitfield's rehabilitation were important objectives in this case. It commented that these objectives would have to happen in an institution because the community is "not playing games" anymore. The circuit court did note that Whitfield was a veteran and that forgery is a nonviolent crime, but that Whitfield had "one of the worst records that I have ever seen," with sixteen prior felony convictions. The circuit court also observed that Whitfield continued to use his post-traumatic stress disorder and his cocaine and heroin habits as crutches.

The maximum possible sentence Whitfield could have received for his new conviction was six years' imprisonment. The sentence totaling three years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion for the new case.[6]

[6] Whitfield appears to complain that the circuit court failed to consider sentencing guidelines. *See* ***State v. Grady***, 2007 WI 81, ¶2, 302 Wis. 2d 80, 734 N.W.2d 364. However, the rule so requiring was retroactively repealed, effective July 1, 2009. *See* ***State v. Barfell***, 2010 WI App 61, ¶4, 324 Wis. 2d 374, 782 N.W.2d 437. Thus, there is no issue of arguable merit because the circuit court, when it sentenced Whitfield, was not obligated to consider the sentencing guidelines for forgery/uttering. Even if it had been, any issue of arguable merit would now be moot. *See* ***id.***, ¶¶9,14.

B. The Reconfinement Sentence

A reconfinement hearing is akin to a sentencing hearing and we review the circuit court's reconfinement decision for an erroneous exercise of discretion. ***State v. Brown***, 2006 WI 131, ¶¶20, 22, 298 Wis. 2d 37, 725 N.W.2d 262. So long as the circuit court "considered the relevant factors, and not irrelevant or improper ones, and the decision was within the statutory limits, the sentence will not be reversed" unless it is so disproportionate to the offense as to shock public sentiment. ***Id.***, ¶22.

When making a reconfinement decision, the circuit court will likely consider the nature and severity of the original offense and the amount of incarceration necessary to protect the public, taking into account the nature of the defendant's violation of his terms. *See* ***id.***, ¶34. The circuit court might also consider additional factors, such as the defendant's record, attitude, and rehabilitative goals. *See* ***id.***, ¶36. The amount of explanation necessary will vary from case to case. ***Id.***, ¶39.

Our review of the record reveals the circuit court properly exercised its discretion. While Whitfield appears to complain about the circuit court's extensive reference to the original sentencing transcript from his 2006 case, there is no issue of arguable merit stemming from such use. The circuit court had not originally sentenced Whitfield in the 2006 matter, so it properly reviewed the record, including the original sentencing transcript and other documents in the circuit court file, to become "familiar with the particulars of the case at issue." *See* ***State v. Walker***, 2008 WI 34, ¶3, 308 Wis. 2d 666, 747 N.W.2d 673.

In deciding to reconfine Whitfield for the maximum period of time, the circuit court read extensively from the prior transcript before commenting, "How can I do anything else, sir? You

have got 17 prior convictions, 16 felonies, 15 prior forgeries and you are doing it again." The circuit court commented that "the community will not let me" sentence Whitfield to anything less than the maximum, explaining that "there is no restitution in this case; but there has got to be punishment and there has got to be deterrents [sic] and rehabilitation has got to take place in prison because we can't afford to do it as a community anymore outside." The circuit court also observed that Whitfield's character "is one of the worst records that I have ever seen and in looking at the things that I have to under reconfinement, he basically did nothing; he got out and did it again."

The circuit court relied on only proper factors in making its determination.[7] The sentence is within the range permitted by law and not so excessive as to shock public sentiment. The reconfinement decision was therefore an appropriate exercise of discretion.

VI. Ineffective Assistance of Trial Counsel and Prosecutorial Misconduct

Finally, Whitfield also makes a handful of claims about ineffective assistance of trial counsel and prosecutorial misconduct. There is no issue of arguable merit stemming from these complaints.

Whitfield complains about ineffective assistance of trial counsel relating to "guidelines." It is not clear to what Whitfield refers, although to the extent he is suggesting the circuit court

[7] Whitfield complains, "All [the circuit court] had to use against me was my record and the new case and my age. I thought I had to be sentenced on accurate info[rmation]!" Whitfield's record, new case, and his age are all proper considerations, and he has identified no inaccuracies.

was required to consult sentencing guidelines for his new conviction, he is incorrect.[8] *See supra* note 5. Whitfield also complains that trial counsel failed to have his reconfinement sentencing moved to the Division or the Department. As explained above, the circuit court was the proper venue. Counsel is not ineffective for failing to pursue meritless issues. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

Whitfield complains of prosecutorial misconduct in three respects. First, he contends that there was collusion between the circuit court and district attorney. As a result, Whitfield contends that the district attorney handling the new case was improperly assigned to handle Whitfield's reconfinement case. The record does not support any claim that the circuit court had a role in assigning the district attorney to either case. In any event, we know of no rule that entitles a defendant to prosecution by any particular member of the district attorney's office or otherwise controls how the district attorney staffs cases.

Second, Whitfield contends that the State told the circuit court that his supervision agent recommended the whole time for reconfinement. The record does not support this claim.

Third, Whitfield complains that the State repeatedly recommended that he receive the full time for his revocation, despite a plea agreement. Our review of the records indicates that the plea bargain here covered only the new charge, not the reconfinement proceedings. Further, the

[8] In referring to guidelines, Whitfield cites WIS. STAT. §§ 973.01, 303.01, and 303.11. These citations are not illuminating: § 973.01 refers to the structure of bifurcated sentences generally, § 303.01 discusses prison industries, and § 303.11 is nonexistent.

district attorney made the recommendation for the new conviction as called for under the terms of that agreement.[9] There is no arguable merit to any claim of prosecutorial misconduct.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment of conviction in appeal No. 2011AP2652-CRNM (Milwaukee County Circuit Court case No. 2009CF2574) is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the reconfinement order in appeal No. 2011AP2651-CRNM (Milwaukee County Circuit Court case No. 2006CF5984) is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Benjamin James Peirce is relieved of further representation of Whitfield in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[9] Whitfield may be complaining about the fact that the circuit court made his sentences consecutive. As a result, Whitfield's confinement time is four and one-half years, a term that is greater than the maximum amount of reconfinement time available and greater than the sentence called for by the plea bargain in the new case. But Whitfield's sentence is merely the sum of its parts, not some illicit suggestion by the prosecutor or illegal sentence by the circuit court, and it is the product of the proper exercise of sentencing discretion.