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

2013AP161-CRNM State of Wisconsin v. Bobby L. Byers (L.C. #2011CF205)
2013AP162-CRNM State of Wisconsin v. Bobby L. Byers (L.C. #2011CM386)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated cases, Bobby L. Byers appeals from judgments convicting him, upon his guilty pleas, of failing to update his sex offender registration and of lewd and lascivious behavior, both as a repeater. Byers' appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Byers has exercised his right to file a response. Upon consideration of the no-merit report, Byers' response

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

and our independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgments of conviction and relieve Attorney Kathilynne A. Grotelueschen of further representing Byers in this matter.

Byers was charged with failing to timely notify the Sex Offender Registry Program (SORP) about his change of residence, a felony, and with three misdemeanors—providing SORP a name other than the one he is registered under, fourth-degree sexual assault, and disorderly conduct. While in jail pending trial, Byers exposed himself to a female inmate and was charged with lewd and lascivious conduct, another misdemeanor. All counts in both cases were charged as a repeater due to a 1989 conviction for second-degree sexual assault. Byers pled guilty to the failure-to-notify felony and the lewd and lascivious conduct. The remaining counts were dismissed and read in for sentencing. Applying the penalty enhancer, the trial court sentenced him to the maximum sentence available, a total of ten years for the felony and a consecutive two years on the misdemeanor. This no-merit appeal followed.

We first consider whether a challenge could be raised to the validity of Byers' pleas. We observe that the plea colloquy appears not to have complied fully with the requirements of WIS. STAT. § 971.08(1)[2] and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). Specifically, the record does not reflect express guidance by the trial court at the plea hearing

[2] The court did not expressly advise Byers 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 and nothing in the record suggests that he is not a U.S. citizen, we conclude that this issue has no arguable merit.

that would have enabled Byers to understand the nature of the charge. *See* ***Bangert***, 131 Wis. 2d at 262. This court may review evidence outside the plea colloquy record that substantiates that the plea was knowingly and voluntarily made. ***Id.*** at 274-75. The plea questionnaire and waiver of rights forms state the elements. Byers confirmed to the court that he read the forms, reviewed them with counsel, understood them, and signed them. Byers confirmed that he had no questions.

Furthermore, it does not appear that Byers wishes to withdraw his plea. The no-merit report does not discuss plea withdrawal and counsel represents that she addressed the issues Byers wanted her to address. Also, although Byers was not required to file a response to his counsel's no-merit report, he did so. His response did not raise a claim that the plea colloquy was deficient. An effort to do so at some later time in all probability would be procedurally barred. *See* ***State v. Allen***, 2010 WI 89, ¶44, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that no meritorious issue concerning the plea could be raised on appeal.

The no-merit report and Byers' response both examine whether the sentence represents an erroneous exercise of the court's discretion, and specifically whether it was excessive. 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 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 also may consider other factors, including a past record of criminal offenses, a history of undesirable behavior patterns, and the defendant's personality and social traits. ***Id.*** 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.

The court considered that forty-six-year-old Byers' criminal history spanned his entire adult life, resulting in chronic unemployment and no identifiable job skills, his "undesirable" and apparently uncontrollable urge to expose himself that caused psychological injury to his victims, his lack of success on parole or probation, his sexual offenses even while incarcerated and the "particularly disturbing" nature of the fourth-degree sexual assault read-in (nonconsensual sexual contact with a disabled wheelchair-bound woman). It commented that it did not know Byers' true character because he is almost constantly incarcerated, and explained that it was imposing the maximum sentence because "the best thing the State can do is keep [Byers] off the streets," because the public "definitely needs protection" from his "[in]tractable" exhibitionism. The weight to be given the various factors is within the court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

Directing us to an e-mail in his appendix from a SORP agent, Byers argues that his sentence is excessive because he "was in compliance [with reporting requirements] before the State had even pursued the case," or at worst was out of compliance only briefly, and because his sentence far exceeds what others have received for similar violations. Our review is confined to the record. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). The SORP agent's e-mail to an unidentified recipient is not part of the trial court record and, in any event, does not prove compliance because it does not provide the date Byers moved. Furthermore, the sentence reflected the read-in charges and the considerations described above. His sentence does not shock public sentiment. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987).

It also is irrelevant that Byers received a lengthier sentence than some others who violate the sex-registry law. There is no requirement that defendants convicted of similar crimes receive similar sentences. ***State v. Lechner***, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). Individualized sentencing is a cornerstone of Wisconsin's sentencing system. ***Id.*** The court properly assessed the crime, the criminal, and the needs of the community particular to this case.

The no-merit report considers whether Byers was erroneously charged as a repeater based on his 1989 conviction for second-degree sexual assault. The prosecutor has the discretion whether to charge the defendant as a repeater. *See* WIS. STAT. § 973.12(1); *see also* ***State v. Radke***, 2003 WI 7, ¶25 n.34, 259 Wis. 2d 13, 657 N.W.2d 66. Here, the statutory "preceding 5-year period" reached back to Byers' 1989 sexual assault conviction because he was nearly continuously confined. *See* WIS. STAT. § 939.62(2). Before entering his plea in this case Byers acknowledged the underlying conviction and that he understood the repeater charge and enhanced penalty. Still, he now asserts that he was wrongly convicted in 1989, engaging in hair-splitting so absurd it almost does not bear repeating. He admits that, while "severely intoxicated," he entered a residence uninvited, saw a woman asleep on a couch, unzipped his pants, leaned over her and, with one hand on the back of the couch for support, began masturbating. He disputes that he "broke in" or that he assaulted her, however, because the door was unlocked and his erect penis simply "brush[ed] slightly" against her face when he lost his balance. Any challenge to the charging decision would lack merit.

Once Byers was convicted, imposing an enhanced sentence was within the trial court's discretion. Byers has been convicted of numerous sex-related crimes and repeatedly has failed on probation and parole. "[T]he repeater statute was passed for the very purpose of increasing the punishment of those persons who do not learn their lesson or profit by the lesser punishment

given for their prior violations of the criminal laws." ***Hanson v. State***, 48 Wis. 2d 203, 207-08, 179 N.W.2d 909 (1970) (citation omitted). The court properly explained its sentencing decision.

The no-merit report also addresses whether the trial court wrongly considered the dismissed-and-read-in fourth-degree sexual assault charge. Byers claims he did not assault the woman, a resident at a home for disabled adults, by allegedly touching her breast and vaginal area over her clothing but only gave her a hug. Appellate counsel engaged an investigator who interviewed the woman in January 2013 and produced a report. As the report indicates that she could not recall the May 2011 event or recognize Byers' picture, Byers argues it amounts to either a new factor or inaccurate information upon which the trial court relied for sentencing.

A new factor is

> a fact or set of facts 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.

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Frustration of the purpose of the original sentence is not an independent requirement of the new factor analysis. ***Id.***, ¶48. Whether a particular fact or set of facts constitutes a new factor is a question of law, subject to de novo review. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). The report does not constitute a new factor. Byers' claim that he did not assault the woman was known to him at sentencing and appeared in the presentence investigation report. He waived his right to allocution. Further, the report indicates that when the investigator interviewed her, the woman was in hospice care, her "cognitive state had deteriorated significantly" and she no longer could "track time frames and events."

There also is no merit to the possible claim that the trial court sentenced Byers on inaccurate information. A defendant who seeks resentencing on this basis must show both that the information was inaccurate and that the court actually relied on it at sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Saying the information is inaccurate does not prove it is. The trial court knew that Byers gave a different version of the facts. Its decision to give credit to an account set forth in the PSI is a matter of credibility and the weighing of competing inferences, not a question of inaccurate sentencing information. We agree with appellate counsel that no basis exists to disturb the sentence.

Byers contends that, "based on the investigator's findings," he "would like to raise the issue of ineffectiveness of trial counsel" for failing to raise this information at sentencing. Trial counsel could not have alerted the court to findings that first became available over a year later.

Finally, appellate counsel considers whether the trial court failed to properly exercise its discretion in ordering Byers to pay the DNA surcharge. Counsel expresses concern that this issue may have merit because the court "did not consider any factors or state any reasons for its decision." *See* ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. Our reading of the transcript persuades us that the court did not fail to exercise its discretion because it did not order Byers to pay the DNA surcharge in the first instance.

At sentencing, the State advised the court that it did not know if Byers ever provided a DNA sample because his 1989 sexual assault conviction predated WIS. STAT. § 973.047, the DNA statute. The court then ordered: "If he's not already provided a DNA sample, he must. Pay court costs and costs will be inserted into the judgment and due out over his period of extended supervision." The judgment of conviction does not match the court's clear

pronouncement. The judgment reads, "Provide biological specimen to the state crime lab for DNA analysis, and pay DNA analysis surcharge unless previously provided." The court ordered Byers to pay "court costs," not a "surcharge." "[T]he record of the circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction." ***State v. Prihoda***, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857; *see also* WIS. STAT. § 973.06 (addressing "costs," "fees," and "surcharges"), and ***State v. McKenzie***, 139 Wis. 2d 171, 177, 407 N.W.2d 274 (Ct. App. 1987) (when legislature chooses particular words, it is reasonable to presume it selected them to precisely express intended meaning).

Moreover, we take judicial notice that in January 2010 Byers pled guilty in Walworth county case no. 09CM609 to lewd and lascivious behavior, a violation of WIS. STAT. § 944.20(1)(b). As it was required to do, the trial court ordered Byers to provide a biological specimen to the state crime lab for DNA analysis. *See* WIS. STAT. § 973.047(1f). Accordingly, we do not discern an issue regarding the DNA surcharge that runs afoul of ***Cherry***. Our review of the record discloses no other potential issues for appeal. Therefore,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kathilynne A. Grotelueschen is relieved from further representing Byers in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals