STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1865-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIO DOUGLAS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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ISSUES PRESENTED

1. Is Mario Douglas entitled to withdraw his plea because he was misinformed that he could be convicted of and sentenced for both the greater offense of first-degree sexual assault of a child and the lesser included offense of second-degree sexual assault of a child?

The circuit court refused to let Douglas withdraw his plea to second-degree sexual assault.

2. Is Douglas entitled to that same relief on the same basis in the context of an ineffective assistance claim?

The circuit court refused to let Douglas withdraw his plea to second-degree sexual assault.

3. Was Douglas sentenced on the basis of inaccurate information that he could have been convicted of both the greater offense and the lesser offense?

The circuit court ruled that it did not rely on any inaccurate understanding about the charges for which Douglas could be convicted in imposing his sentence.

4. Is the court's new understanding that Douglas could not be convicted of both first-degree and second-degree sexual assault of a child a new factor that justifies modification of his sentence?

The circuit court ruled that the new understanding was not a new factor.

5. Did the circuit court improperly prohibit Douglas from having contact with his own children, along with any other children under the age of 16, while he was serving his sentence?

The circuit court ruled that the no-contact condition should not be modified.

INTRODUCTION

When Douglas was convicted and sentenced, everyone erroneously believed that Douglas could have been convicted of and sentenced for both the greater offense of first-degree sexual assault of a child and the lesser included offense of second-degree sexual assault of a child. Because of this misunderstanding, Douglas seeks to withdraw his plea to second-degree sexual assault of a child or, alternatively, to be resentenced. However, under the facts of this case, Douglas is not entitled to withdraw his plea because the misunderstanding about the charges for which Douglas could have been convicted did not affect the validity of his plea to the charge for which he was convicted. Nor is Douglas entitled to resentencing because the misunderstanding played no part in the imposition of his present sentence.

Douglas also complains about an order prohibiting him from having contact with children under the age of 16. But he has no basis to complain since the order does not prohibit him from having contact with his own children.

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument since the arguments are adequately presented in the briefs. Publication is not warranted because this case involves application of established law to the facts.

STATEMENT OF THE CASE

A. Relevant factual background

According to the Complaint, Douglas, who was then 27 years old, having been born April 24, 1986, invited the

victim, OLG, who was then 14 years old, having been born December 16, 1998, to come to his house. (R. 1:2.) On a pretext, Douglas got OLG to go down into the basement with him. (R. 1:2.)

Douglas pushed OLG down on a bed, got between her legs and tried to unbutton her pants. (R. 1:2.) When OLG resisted, Douglas slapped her in the face, punched her and squeezed her throat. (R. 1:2.) Douglas eventually pulled off OLG's pants and inserted his penis into her vagina. (R. 1:2.)

OLG immediately disclosed the sexual assault to her mother. (R. 54:9–10.) Douglas' DNA was found on OLG's inner thigh. (R. 54:9–10.) He admitted to the police that he had sexual intercourse with OLG. (R. 1:2; 54:9; 55:11.)

B. Litigation history.

Douglas was charged with two offenses: (1) first-degree sexual assault of a child, which has a maximum penalty of 60 years in prison with a mandatory minimum of 25 years of confinement, and (2) second-degree sexual assault, which has a maximum penalty of 40 years in prison with no minimum confinement time. (R. 1:1.)

Douglas was erroneously told that he could be convicted of both the greater offense and the lesser included offense, and that he could be sentenced consecutively for both offenses to a maximum of 100 years in prison with a minimum of 25 years of incarceration. (R. 54:5–7.) The court did not further break down the maximums to possible confinement time. Believing that he faced 100 years in prison if he was convicted of both offenses, Douglas pleaded guilty to second-degree sexual assault. (R. 55:6.) The charge of first-degree sexual assault was dismissed. (R. 55:13.)

At Douglas' sentencing, the court noted that Douglas should get some credit for pleading guilty, but added, "Of course, he was faced with DNA and faced with the fact that if he goes to trial on these two counts, Count 2 is a 25-year

initial confinement as part of the bifurcated sentence." (R. 56:20–21.)

The court sentenced Douglas to 18 years in prison, 12 years of incarceration and six years of extended supervision. (R. 56:29.) The court also ordered Douglas, who had two children of his own who were then nine and four years of age, to have no contact with any children under the age of 16. (R. 56:18, 30.)

Douglas filed a postconviction motion seeking to withdraw his plea, or in the alternative to be resentenced. (R. 34.) He also sought modification of the no-contact order. (R. 34.) The circuit court denied all of the relief requested (R. 47), and Douglas now appeals (R. 48).

STANDARDS OF REVIEW

Whether a plea has been entered knowingly, intelligently and voluntarily is a question of constitutional fact. *State v. Cross*, 2010 WI 70, ¶ 14, 326 Wis. 2d 492, 786 N.W.2d 64. The circuit court's findings of fact are reviewed for clear error, but the validity of the plea is assessed independently. *Cross*, 326 Wis. 2d 492, ¶ 14.

Whether an error is harmless is a question of law that is considered independently by an appellate court. *State v. Harrell*, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

On review of a claim of ineffective assistance of counsel, the circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶¶ 21, 24, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶¶ 23–24.

Whether a defendant has been sentenced on the basis of inaccurate information is a question of law that is

determined independently on appeal. *State v. Coolidge*, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct. App. 1993), *modified on other grounds*, *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1.

Whether a defendant has demonstrated the existence of a new sentencing factor is a question of law considered independently on appeal. *State v. Harbor*, 2011 WI 28, ¶ 36, 333 Wis. 2d 53, 797 N.W.2d 828. A circuit court's decision that a new factor does not warrant a modification of a defendant's sentence is reviewed for erroneous exercise of discretion. *Harbor*, 333 Wis. 2d 53, ¶ 37.

Whether a condition of supervision improperly interferes with the exercise of a constitutional right is a question of law that is determined independently. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 659, 517 N.W.2d 540 (Ct. App. 1994).

ARGUMENT

I. Douglas is not entitled to withdraw his plea just because he was misinformed that he could be convicted of and sentenced for both the greater offense of first-degree sexual assault of a child and the lesser included offense of second-degree sexual assault of a child.

Ordinarily, a defendant who wants to withdraw a plea of guilty or no contest after sentencing has a heavy burden to show by clear and convincing evidence that his plea must be withdrawn to correct a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. Among other things, a defendant may show that there is a manifest injustice by establishing that he has been denied a relevant constitutional right. *State v. Cain*, 2012 WI 68, ¶ 21, 342 Wis. 2d 1, 816 N.W.2d 177.

A defendant may be denied the right to due process if his plea is not entered knowingly, intelligently and voluntarily. *Cross*, 326 Wis. 2d 492, ¶ 14. However, a plea based on a misunderstanding of the precise maximum penalty is not necessarily a violation of due process. *Cross*, 326 Wis. 2d 492, ¶¶ 29, 36–37. A defendant who has been erroneously told that the maximum penalty is higher, but not substantially higher, than the actual maximum authorized by law may nevertheless enter his plea knowingly because he adequately understands the range of punishments he faces. *Cross*, 326 Wis. 2d 492, ¶¶ 30, 38.

A determination of whether a difference between the actual and perceived penalties is substantial depends on the facts of the particular case. *Cross*, 326 Wis. 2d 492, ¶ 41. The determination should accord with common sense. *See Cross*, 326 Wis. 2d 492, ¶ 38.

A. Under the circumstances of this case, Douglas' plea to the lesser offense was not unknowing even though he erroneously believed that he could be convicted of and sentenced for both offenses if he went to trial.

Douglas was charged with two offenses: (1) first-degree sexual assault of a child, which has a maximum penalty of 60 years in prison with a mandatory minimum of 25 years of confinement, and (2) second-degree sexual assault of a child which has a maximum penalty of 40 years in prison with no minimum. (R. 1:1.) Second-degree sexual assault of a child is committed when the defendant has sexual intercourse with a child under the age of 16. Wis. Stat. § 948.02(2). First-degree sexual assault of a child is also committed when the defendant has sexual intercourse with a child under the age of 16, but in addition uses or threatens force or violence to have the intercourse. Wis. Stat. § 948.02(1)(c).

Second-degree sexual assault is a lesser included offense of first-degree sexual assault both because it is a less serious type of sexual assault, and because it does not require proof of any fact in addition to those that must be proved to establish the greater offense. Wis. Stat. § 939.66(1), (2p). Because second-degree sexual assault is a lesser included offense of first-degree sexual assault, Douglas could be convicted of either one of these offenses, but not both of them. Wis. Stat. § 939.66.

Nevertheless, Douglas was erroneously told that he could be convicted of both the greater and the lesser included offenses, and that he could be sentenced consecutively for both offenses to a maximum of 100 years in prison with a minimum of 25 years of incarceration. (R. 54:5–7.) Believing that he faced up to a 100-year sentence if he was convicted of both offenses, Douglas pleaded guilty to second-degree sexual assault of a child. (R. 55:6.) The State dismissed the charge of first-degree sexual assault. (R. 55:13.)

At first glance, it might seem that Douglas should be allowed to withdraw his plea because it appears that the maximum sentence he was told he faced was substantially more than the sentence that could actually be imposed if he was convicted of the greater of the two offenses charged. After all, combined sentences maxing out at 100 years with at least 25 years' incarceration are mathematically more than a maximum 60-year sentence with at least 25 years' incarceration. But as a practical matter, both maximums were essentially the same because both amounted to a de facto sentence of life in prison.

Douglas was born April 24, 1986, making him 28 years old when he was sentenced on July 17, 2014. (R. 1; 2; 24.)

From Douglas' perspective, a sentence of 100 years in prison would have been a de facto sentence of life in prison because no one lives 128 years. But from his perspective, a

sentence of 60 years in prison likewise would have been a de facto sentence of life in prison for Douglas because he would be 88-years-old when a sentence of 60 years would expire.

Considering the facts with common sense, a 100-year de facto sentence of life in prison is not substantially different from a 60-year de facto sentence of life in prison. Indeed, for all practical purposes they are the same—de facto life in prison.

Douglas' argument is based solely on the mathematical difference between 100 and 60. It fails to consider the lack of any practical difference between a sentence of 100 years and a sentence of 60 years imposed on a 28-year-old man. It fails to take into account the fact that, despite the mathematical difference, a sentence of 100 years or a sentence of 60 years are both de facto sentences of life in prison.

Douglas argues that his plea bargain, which resulted in the dismissal of one of the two counts with which he was charged, was illusory because he could not properly be convicted of both counts anyway. But the plea agreement did not just result in the dismissal of one of the two charges. It resulted in the dismissal of the greater offense of first-degree sexual assault of a child.

Unlike the charge in *State v. Dillard*, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44, on which Douglas relies, the charge of first-degree sexual assault of a child was neither a factual nor a legal impossibility. Douglas was not told that he could be convicted of an offense of which he could not possibly be convicted. *See Dillard*, 358 Wis. 2d 543, ¶ 25.

Rather, more like the situation in *State v. Denk*, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775, Douglas could have properly been charged with a single count of first-degree sexual assault of a child. The allegations in the Complaint

indicate that he used force and violence to have sexual intercourse with a child under the age of 16. (R. 1:2.) Pursuant to a plea agreement the State could have properly amended the charge to second-degree sexual assault of a child. Douglas would have benefitted because he would have become subject to a maximum penalty of 40 years in prison instead of a maximum penalty of 60 years in prison and a minimum penalty of 25 years of incarceration.

The situation here is no different. The plea agreement had the effect of eliminating Douglas' exposure to the penalties for the greater offense of which he could have been convicted and exposing him only to the penalty for the lesser offense. He got exactly the same benefit he would have received if he had been properly charged with only one crime.

Because the maximum sentence Douglas was told he could get was not, as a practical matter, substantially greater than the maximum sentence he could actually get if he was convicted of the greater of the two crimes with which he was charged, his plea was not unknowing, there was no violation of due process, there was no manifest injustice and Douglas is not entitled to withdraw his plea.

B. Any error would have been harmless because Douglas would have pleaded guilty to the lesser offense even if he had known that he could have been convicted of and sentenced for only the greater offense.

A defendant's failure to know and understand the precise maximum penalty can be harmless error. *Cross*, 326 Wis. 2d 492, ¶ 36. An error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the conviction. *State v. Weed*, 2003 WI 85, ¶¶ 29–30, 263 Wis. 2d 434, 666 N.W.2d 485. Here, any error would have been harmless because Douglas would have pleaded guilty to

the lesser included offense of second-degree sexual assault of a child even if he had been properly charged only with the greater offense of first-degree sexual assault of a child and had been told the correct statutory penalty for that offense.

Douglas admitted to the police that he had sexual intercourse with OLG, who was 14 years old at the time. (R. 1:2; 54:9; 55:11.) His DNA was found on OLG's inner thigh, and OLG immediately disclosed the sexual assault to her mother. (R. 54:9–10.) Since it was virtually certain that Douglas would be convicted of at least second-degree sexual assault if he went to trial, Douglas gave up next to nothing by pleading to the lesser included offense.

However, Douglas gained a great deal by eliminating the risk of conviction of the greater offense, along with its minimum of 25 years of incarceration, if a jury would have believed OLG's testimony that he slapped her, punched her, choked her, and forcibly pulled down her pants to have intercourse with her. (R. 1:2.) And that was a distinct possibility since a jury would most likely find that a 14-year-old girl would resist intercourse with a 27-year-old man to whom she had never expressed any attraction, particularly given that she reported the assault immediately to her mother.

Under these circumstances, no rational defendant would have rejected the State's plea offer. Any rational defendant would have gladly accepted the opportunity to plead guilty to a charge he would have been convicted of anyway as the best conceivable outcome of a trial. The misstatement of the maximum penalty would have had no influence on Douglas' decision to plead guilty.

II. Alternatively, Douglas cannot demonstrate ineffective assistance because he was not prejudiced by his attorney's erroneous statement of the maximum penalty.

Among other things, a defendant may be allowed to withdraw his plea if he can show that the attorney who represented him in connection with his plea provided assistance that was ineffective. *State v. Kelty*, 2006 WI 101, ¶ 43, 294 Wis. 2d 62, 716 N.W.2d 886. The defendant has the usual dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Thiel*, 264 Wis. 2d 571, ¶ 18.

To prove that his attorney's performance was deficient the defendant must show that counsel acted unreasonably. *Thiel*, 264 Wis. 2d 571, ¶ 19. To prove prejudice, a defendant who wants to withdraw his plea because he says his attorney is ineffective must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty but would have insisted on going to trial. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

As discussed above, there is no reasonable possibility that Douglas would have rejected the State's plea offer and insisted on a trial if his attorney had correctly informed him that if he went to trial he could be convicted of only one of the offenses with which he was charged, and that the penalty for the greater offense of which he could be convicted was a maximum of 60 years in prison with a minimum of 25 years of confinement.

Douglas had nothing to gain and everything to lose by going to trial, where he would unnecessarily risk a conviction of first-degree sexual assault with no reasonable chance of acquittal of second-degree sexual assault. *See United States v. Payton*, 380 F. App'x. 509, 512–13 (6th Cir. 2010). He had everything to gain and nothing to lose by

pleading guilty to the least serious offense of which he would be convicted if he went to trial, thereby eliminating the risk of being convicted of and penalized for the greater offense.

Douglas argues that he should have an evidentiary hearing on his claim of ineffective assistance. (Douglas' Br. 20–23.) But no hearing is required when the record conclusively shows that the defendant is not entitled to relief, even if the facts alleged in the motion would otherwise be sufficient. *State v. Balliette*, 2011 WI 79, ¶¶ 18, 50, 336 Wis. 2d 358, 805 N.W.2d 334.

Here, it is so certain that any reasonable defendant would have pleaded guilty to the lesser offense that Douglas' allegations to the contrary are incredible as a matter of law. The record conclusively shows that, regardless of what Douglas now claims he would have done, in fact he would have pleaded guilty even if his attorney had not erred.

Douglas has not shown that his attorney was ineffective because he has not shown that he was prejudiced by his attorney's erroneous statement of the maximum penalty.

Thus, Douglas is not entitled to withdraw his plea just because he was misinformed that he could be convicted of and sentenced for both the greater offense of first-degree sexual assault of a child and the lesser included offense of second-degree sexual assault of a child.

III. Douglas was not sentenced on the basis of inaccurate information since the circuit court's erroneous belief that Douglas could have been convicted of and sentenced for both offenses charged if he had gone to trial played no part in the imposition of a sentence for the lesser offense alone.

A sentence is presumed to be reasonable. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The

defendant has the burden to overcome this presumption by showing some unreasonable or unjustifiable basis in the record for the sentence, *Lechner*, 217 Wis. 2d at 418, including a heavy burden to show that the sentence was based on inaccurate information. *State v. Harris*, 2010 WI 79, ¶¶ 30–32, 326 Wis. 2d 685, 786 N.W.2d 409. The defendant must prove by clear and convincing evidence that inaccurate information was presented at the sentencing, and that the circuit court actually relied on this information in imposing the sentence. *State v. Travis*, 2013 WI 38, ¶¶ 21–22, 347 Wis. 2d 142, 832 N.W.2d 491.

Whether information is inaccurate is a threshold question. *Travis*, 347 Wis. 2d 142, ¶ 22. A defendant cannot show actual reliance on inaccurate information if the information is accurate. *Travis*, 347 Wis. 2d 142, ¶ 22.

Douglas failed to prove that the circuit court actually relied on any inaccurate information in sentencing him. Douglas failed to prove that the court actually took into account in fashioning his sentence any mistaken view that he could have been convicted of and sentenced for both first-degree and second-degree sexual assault of a child if he had gone to trial.

The court only mentioned the dismissed count once. Noting that Douglas should get some credit for pleading guilty, the court added, "Of course, he was faced with DNA and faced with the fact that if he goes to trial on these two counts, Count 2 is a 25-year initial confinement as part of the bifurcated sentence." (R. 56:20–21.)

The essence of what the court was attempting to articulate here was completely accurate. If Douglas had gone to trial, he would have inevitably been tried on Count 2, first-degree sexual assault of a child, regardless of any other possible charges. He would have inevitably faced a potential

sentence that included a minimum of 25 years of confinement, regardless of any other possible sentences.

Whether or not Douglas might have also been tried on Count 1, second-degree sexual assault of a child, had nothing to do with what the court was saying here. The court was not saying that Douglas faced the 25-year minimum because he would have been tried on both counts together. As the court noted in denying Douglas' postconviction motion, "at no time did the court state that it believed that the defendant could have been convicted of both counts or that he could have been sentenced to 100 years in prison." (R. 47:8.) Douglas faced the 25-year minimum because he would have been tried on Count 2, whether or not he would have been simultaneously tried on Count 1 as well.

The court may have misspoken about a trial on two counts.[1] But that mistaken remark had nothing to do with the point the court was trying to make as part of its sentencing rationale, i.e., if Douglas had not pleaded guilty he would have faced the possibility of a mandatory minimum sentence. That information was not inaccurate.

Douglas relies on some statements made by the prosecutor at the sentencing. But Douglas was not sentenced by the prosecutor. He was sentenced by the court. So it is the statements made by the court, not any statements made by the prosecutor, that are relevant in determining whether the court relied on any inaccurate information.

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[1] Under one view, a defendant is always tried on both the greater offense and any lesser included offense containing the same elements that is submitted to the jury. *See State v. Hughes*, 2001 WI App 239, 248 Wis. 2d 133, 635 N.W.2d 661 (finding harmless error where the defendant was tried on and convicted of both a greater offense and a lesser included offense).

Douglas asserts that a sentencing court cannot properly exercise its discretion if it has an incorrect understanding of the facts and the law. But the court can properly exercise its discretion if it does not rely on any incorrect understanding of either the facts or the law in imposing the sentence. *See Travis*, 347 Wis. 2d 142, ¶¶ 21–22.

Finally, while a circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive, *Travis*, 347 Wis. 2d 142, ¶ 48, here, the circuit court's postconviction statement that it did not rely on any inaccurate information (R. 47:7) comports with the record made at the sentencing showing that the court did not rely on any inaccurate information.

Douglas claims that his attorney was ineffective for not objecting to the court's statement. But there was nothing objectionable about the statement. The court correctly stated that if Douglas had not pleaded guilty he would have faced the possibility of a mandatory minimum sentence. An attorney does not perform deficiently by failing to object when there was no reason to object. *See State v. Ewing*, 2005 WI App 206, ¶ 18, 287 Wis. 2d 327, 704 N.W.2d 405.

Moreover, there was no prejudice. When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. Douglas simply speculates that his sentence might have been different if his attorney had objected to the court's remark. That is not enough to show actual prejudice. *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

In assessing the seriousness of the offense for which Douglas was being sentenced, the court could have considered the fact that Douglas was initially charged with first-degree sexual assault regardless of whether or not he was also charged with second-degree sexual assault. *See Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980) (a sentencing court may consider charges that have been dismissed.)

Douglas is not entitled to resentencing because the record conclusively shows that the circuit court did not rely on any inaccurate information in imposing his present sentence.

IV. The circuit court's new understanding that Douglas could not be convicted of both first-degree and second-degree sexual assault of a child is not a new factor that justifies modification of his sentence.

A circuit court can modify a sentence when a defendant shows there is a new factor justifying modification. *Harbor*, 333 Wis. 2d 53, ¶ 35; *State v. Trujillo*, 2005 WI 45, ¶ 10, 279 Wis. 2d 712, 694 N.W.2d 933 *modified on other grounds*, *Harbor*, 333 Wis. 2d 53, ¶¶ 47 n.11, 52. A new factor is not simply a change in circumstances after the sentencing. *Trujillo*, 279 Wis. 2d 712, ¶ 13. Rather, a new factor is a fact, event or development highly relevant to the imposition of the original sentence which was not known by the sentencing court, either because it did not exist at the time or because it was unknowingly overlooked by all the parties. *Harbor*, 333 Wis. 2d 53, ¶¶ 40, 49–50; *State v. Franklin*, 148 Wis. 2d 1, 13–14, 434 N.W.2d 609 (1989).

To be highly relevant to the imposition of the original sentence a new factor must impact a factor which was considered in imposing the original sentence. *State v. Carroll*, 2012 WI App 83, ¶ 10, 343 Wis. 2d 509, 819 N.W.2d

343; *Franklin*, 148 Wis. 2d at 13–14. A new factor is highly relevant to the imposition of a sentence when, even though it may not frustrate the purpose of the original sentence, it would have made the court's approach to sentencing different. *See Harbor*, 333 Wis. 2d 53, ¶ 50.

The circuit court's recent recognition that Douglas could not have been convicted of both the greater offense of first-degree sexual assault of a child and the lesser included offense of second-degree sexual assault of a child (R. 47:5) does not qualify as a new factor because the court did not consider as a factor in sentencing Douglas its then-erroneous belief that Douglas could be convicted of both offenses.

The recognition that Douglas could not be convicted of both counts does not impact any factor considered at Douglas' sentencing because the court never considered the number of counts on which Douglas could have been convicted. And since the number of counts on which Douglas could have been convicted was never considered at Douglas' sentencing, the fact that he could be convicted of only one count would not have made the court's approach to sentencing Douglas any different.

Douglas' assertion that the number of counts charged and the resulting maximum aggregate sentence somehow directly relate to the seriousness of the offense and the protection of the public is not supported by the case he cites, i.e., *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). And even if that assertion was correct, it would be irrelevant on the question of whether there was a new factor where the circuit court never considered the number of counts charged and the resulting maximum aggregate sentence as relating to the seriousness of the offense and the protection of the public.

Finally, to reiterate, the court properly considered the dismissal of the greater charge as a benefit to Douglas when,

although he could not have been convicted of both counts, he could have been convicted of the greater offense instead of the lesser included offense to which he pleaded guilty.

Douglas is not entitled to modification of his sentence because there is no new factor that has any relevance to a factor relied on by the court in imposing his present sentence.

V. Douglas has no basis to complain about the order prohibiting him from having contact with children under the age of 16 since the order does not apply to his own children.

A court has no authority to place conditions on a sentence of incarceration. *State v. Lynch*, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (1981). A court may impose conditions on a term of extended supervision. *State v. Koenig*, 2003 WI App 12, ¶ 7, 259 Wis. 2d 833, 656 N.W.2d 499; Wis. Stat. § 973.01(5).

Therefore, the circuit court's order prohibiting Douglas from having any contact with children under the age of 16 (R. 56:30) has no effect while Douglas is in prison. The order does not prohibit Douglas' children, who were nine and four when he was sentenced July 17, 2014 (R. 56:18), from visiting him while he is incarcerated.

The no-contact order takes effect only when Douglas is released on extended supervision, which he says will be November 6, 2026. (Douglas' Br. 32 n.11) By that time, as Douglas admits, both his children will be over the age of 16 (Douglas' Br. 32 n.11), so the no-contact order will not apply to them even when it becomes effective with respect to other children.

Although Douglas contends that the no-contact order violates his constitutional right to parent his children, he seems to concede that as a practical matter the order does not have that effect. Douglas indicates that what he really

wants is to have the no-contact order modified to the extent that it might influence DOC's decision to allow him to have contact with his children while he is incarcerated. But Douglas has made no showing that DOC has placed any restrictions on visits by his children to the prison, much less that any such restrictions might have been influenced by the court's order.

Therefore, Douglas has no basis to complain that the order prohibiting him from having contact with children under the age of 16 violates any constitutional right he might have regarding his own children.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated this 16th day of May, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,231 words.

Dated this 16th day of May, 2017.

_____
THOMAS J. BALISTRERI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of May, 2017.

_____
THOMAS J. BALISTRERI
Assistant Attorney General