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COURT OF APPEALS
DISTRICT I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP1968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DION LASHAY BYRD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE DENNIS R. CIMPL, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

The State reframes and reorders the issues:¹

1. At Byrd's original sentencing and resentencing hearings, the circuit court expressed frustration that the crime of making a bomb scare was classified as a Class I felony. Did the circuit court's opinion regarding the classification of this crime constitute an improper consideration that caused the circuit court to erroneously exercise its sentencing discretion?

The circuit court answered: No.

This Court should answer: No.

2. Byrd sought resentencing based on his claim that the circuit court violated his privilege against self-incrimination at the first sentencing hearing. The circuit court granted resentencing, but on different grounds. Did Byrd prove that the circuit court actually relied on this improper sentencing factor, i.e., the circuit court's alleged prior violation of his privilege against self-incrimination, when it resentedenced Byrd?

The circuit court answered: No.

This Court should answer: No.

¹ The State reframes and reorders the issues by placing Byrd's constitutional claim last. "[T]his court will avoid deciding a constitutional question if the case can be decided on other grounds." *See State v. Halmo*, 125 Wis. 2d 369, 374 n.5, 371 N.W.2d 424 (Ct. App. 1985). If this Court decides the first issue in Byrd's favor or the second issue in the State's favor, then it need not decide whether the circuit court violated Byrd's privilege against self-incrimination at his first sentencing hearing.

3. Byrd exercised his right of allocution at his first sentencing hearing. Byrd's comments prompted the circuit court to question Byrd. Did the circuit court's questioning of Byrd after he began to address the circuit court violate Byrd's privilege against self-incrimination?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate should this Court address application of the principles of waiver of the privilege against self-incrimination during allocution.

INTRODUCTION

A jury found Byrd guilty of making a bomb threat to a Milwaukee area television station that terrorized employees and disrupted the station's operations. At his first sentencing hearing, the circuit court questioned Byrd when he exercised his right of allocution. The circuit court noted that Byrd had expressed no remorse and expressed frustration that the offense was classified as a Class I felony. The circuit court exercised its sentencing discretion and imposed the maximum sentence based on the serious nature of the crime, the need to protect the public, and the need to deter others from making bomb threats.

Byrd moved for postconviction relief. He sought a resentencing based on his claim that the circuit court violated his privilege against self-incrimination when it questioned Byrd during the sentencing hearing. Alternatively, Byrd requested sentence modification based on a new factor related to his mental health history.

The circuit court rejected Byrd's argument that it violated Byrd's privilege against self-incrimination by asking him questions when Byrd exercised his right of allocution. But the circuit court nonetheless granted Byrd a resentencing hearing because Byrd provided the circuit court with new information about his mental health. At the resentencing hearing, the circuit court again imposed the maximum sentence based on the seriousness of the crime, the need to protect the public, and general deterrence.

Following the resentencing hearing, Byrd again moved for postconviction relief. The circuit court properly denied this motion, as well. The circuit court's sentence was the product of a reasonable exercise of its sentencing discretion. The circuit court's belief that the penalties for making a bomb scare were weak did not undermine its exercise of sentencing discretion. Further, any violation of Byrd's privilege against self-incrimination that may have occurred at his first sentencing hearing was cured when the circuit court granted Byrd the relief that he requested: a resentencing hearing. Furthermore, Byrd has not proved that the circuit court actually relied on Byrd's allegedly compelled statements when it resented him.

Because the circuit court did not rely on Byrd's allegedly compelled statements when it resented him, this Court need not address whether the circuit court violated Byrd's privilege against self-incrimination at the first sentencing hearing. But should this Court reach this issue, it will find that no violation occurred because Byrd waived his privilege against self-incrimination when he exercised his right of allocution.

SUPPLEMENTAL STATEMENT OF THE CASE

I. Statement of facts.

On March 4, 2014 (R. 75:96), an assignment editor for a Milwaukee County television station received a telephone call. The caller said, “There’s a bomb in the building” (R. 75:98). The editor said, “Excuse me.” (*Id.*) The caller replied. “There’s a bomb in the building.” The editor asked, “Who is this?” (*Id.*) The caller hung up. The caller described the caller as a male with a low voice. (*Id.*)

The editor promptly contacted management. (R. 75:99–100.) Management decided to evacuate the building with the exception of essential personnel. (R. 75:109; 76:9.) Approximately 35 people were asked to leave the building. (R. 75:99–100.) Other people were called and told not to come to work. (R. 75:101, 109.) The police swept the building with bomb sniffing dogs. (R. 75:99–101; 76:10.)

A manager testified at trial that the threat “dramatically affected our newscast.” (R. 75:110.) It also affected the station’s ability to perform its public safety function of providing the public with information had there been an actual emergency such as an explosion, chemical release, or terrorist activity. (R. 75:110.)

Law enforcement officers determined the telephone number used to contact the station. (R. 75:112.) The number was assigned to the residence where Byrd and his mother resided in Milwaukee. (R. 76:15–16, 34–35.) According to Byrd’s mother, she and Byrd were the only people present at 7:00 a.m., when the threatening call was made. (R. (76:18, 22, 35.) Byrd’s mother did not make the call. (R. 76:17.) Byrd’s mother told an officer that something was wrong with

Byrd. (R. 76:24.) The officer recalled that Byrd's mother used words like "mental" and "crazy." (R. 76:36.)

When officers spoke to Byrd at the house, they asked him if he made a mistake or was screwing around. Byrd replied, "Yeah, something like that . . . [I] might have dialed the wrong number." (R. 76:37.) Later, he said, "Ain't no tellin,' it might not have been on the phone." (R. 76:38.) Byrd later admitted that the phone was in his robe pocket and it was just himself and his mother at the house. (R. 76:40.)

II. Procedural history.

The State charged Byrd with making a bomb scare, a Class I felony, contrary to Wis. Stat. § 947.015. (R. 1:1.) Byrd exercised his right to a jury trial, and the jury found him guilty. (R. 28:1.)

At sentencing, the president of the television network made a victim-impact statement. The president stated that the bomb threat "terrorized" his employees. (R. 77:3.) He described the editor who received the call as being startled. (R. 77:5.) "It scared the heck out of her. She was in my office in tears." (R. 77:6.)

The bomb threat had an impact on the station's operations. The station had live shows with guests ready to go on the air. The guests had to leave the station and the producers had to change the shows. (R. 77:3-4.) Other employees left the building. (R. 77:4.) In addition, the station president said that the bomb threat could have potentially interfered with the station's responsibility to notify the public about actual public safety issues. (R. 77:5.)

The station president also expressed his more general thoughts regarding the seriousness of bomb threats.

The other thing -- I don't want to blow this up, but there is a lot going on in the world right now with workplace violence and terror, bombs, gun

shootings, people dying, that I don't want to say a bomb threat is not a bomb threat -- just a bomb threat anymore, but in today's world we have to take them extremely seriously. One of the things I am here to do, I wasn't sure what the possible penalties were until I talked to the district attorney, you know, copycat is an issue out there. In my opinion, there should be some penalty to this. Because there is something -- This was discussed on the air, people know about this, this is a public record, I think there is something to be said that we need to try and get people so that they understand there is a penalty to these type of things.

(R. 77:6.) The station president described the bomb threat as "a very serious, serious threat to the station and to the community." (R. 77:7.) In a written impact statement, the president stated, "I would suggest the max penalty as he knew exactly was he was doing and was deliberate in his actions." (R. 24:1.)

The prosecutor requested a prison sentence in large part based on the need for general deterrence and punishment. "[I]t is important then that this Court send a message to the community that this is not tolerated, and to remind the would be copycatter not to do this . . . There needs to be a punitive aspect." (R. 77:9.)

The State recognized that Byrd may have mental health issues. (R. 77:9.) Byrd's counsel informed the circuit court that he had learned from Byrd that morning that Byrd had previously been diagnosed as schizophrenic and bipolar. (R. 77:16.)

When the State pondered why Byrd made the bomb scare, the circuit court replied, "He gets his chance. He can either tell us or not. It is his right." (R. 77:7.) Trial counsel informed the circuit court that the question of "why" Byrd did it would not be answered. Trial counsel advised Byrd "not to talk about the case, what happened at trial, or anything along those lines. The why itself cannot be

answered to preserve Mr. Byrd's appellate rights." (R. 77:11.)

After Byrd's counsel completed his remarks, the circuit court asked Byrd if he wanted to talk. Byrd said yes. And then engaged in the following exchange with Byrd.

THE DEFENDANT: Yes. I want to let you know that I am not a terrorist to society. I am not a threat to society.

THE COURT: Then why did you do this?

[Byrd's counsel]: Your Honor

THE COURT: Wait a second. He has the right to talk. If he exercises that right, I got the right to ask questions. Why did you do this?

THE DEFENDANT: Your Honor, actually, I really can't answer it, sir.

(R. 77:17.) The circuit court and Byrd went back and forth. When Byrd said that this was not his character, the circuit court replied, "What do you want to say?" (R.77:18.) Byrd replied, "That is really not me, your honor." (R. 77:18.) After the circuit court presented Byrd with some of the evidence against him, it asked Byrd, "What else do you want to say?" (R. 77:19.)

THE DEFENDANT: I apologize to the courts.

THE COURT: What are you apologizing for? You didn't do anything wrong.

THE DEFENDANT: Just for being here and putting, you know, my mother through this situation, and, you know, [station] or what not, just having people here, period.

THE COURT: Why would you apologize? You didn't do anything wrong, according to you. You are a good character. You didn't do anything. You didn't do this. So if you didn't do it, then you wouldn't apologize, right? That is logical.

THE DEFENDANT: I wouldn't of went to trial, your Honor.

(R. 77:19.)

The circuit court noted the bomb threat's impact on the station's operations and the fear it induced among its employees. (R. 77:20.) The circuit court specifically noted the fear that the editor experienced, reliving the experience as she testified. (R. 77:21.)

The circuit court discussed the seriousness of the crime and the need to protect the public. (R. 77:21.) It expressed its frustration with the penalties for the offense.

Shocking that somebody can throw a bomb scare anywhere, shut down any business, shut down the court system, shut down a television station, shut down the mayor's office and the city business, and all they face is \$10,000 in fines and a year and a half in jail upfront with two years of extended supervision.

(R. 77:21–22.)

The circuit court imposed the maximum sentence. It explained that there needed to be consequences so that others do not copy this behavior. (R. 77:22.) The circuit court expressed the need to send a message that “we, as a community, will not tolerate this stuff. Especially from somebody that shows absolutely no remorse.” (R. 77:22.)

Byrd moved for postconviction relief. He sought resentencing on the ground that the circuit court improperly imposed a harsher sentence based on his exercise of his privilege against self-incrimination. (R. 31:6–9.) Alternatively, Byrd also sought sentence modification based on a new factor, i.e., the production of mental health records that documented his mental health issues. (R. 31:9–12.)

At a hearing on December 1, 2016, the circuit court informed the parties that it was inclined to resentence Byrd because the circuit court did not have adequate information

about Byrd's mental health. (R. 78:3.) The circuit court also determined that it did not violate Byrd's privilege against self-incrimination. It noted that it informed Byrd that he had the right not to tell the circuit court anything. But the circuit court also stated that it was allowed to ask Byrd questions once Byrd started making statements. (R. 78:4.) The circuit court also determined that it did not rely on its assessment that Byrd lacked remorse when it sentenced him. (R. 78:4–5.)

On December 14, 2016, the circuit court conducted a resentencing hearing. Byrd's counsel suggested that because the circuit court had denied Byrd's Fifth Amendment challenge, the matter was properly before the circuit court as a sentence modification hearing. (R. 78:2–3.) The circuit court stated that it would conduct a resentencing hearing. (R. 79:3.) After listening to the comments of the parties and Byrd's comments, the circuit court again imposed the maximum sentence. (R. 79:13.)

Byrd again moved for postconviction relief. He again asserted that the circuit court violated his privilege against self-incrimination at the original sentencing. He also argued that resentencing did not remedy the circuit court's violation of his rights at his first sentencing hearing. (R. 60.)

The circuit court issued a written decision and order denying Byrd's motion for postconviction relief. (R. 61.) The circuit court rejected Byrd's argument that it violated his privilege against self-incrimination when it first sentenced Byrd. (R. 61:2.) The circuit court also rejected Byrd's argument that it improperly converted Byrd's sentence modification motion to a resentencing hearing. (R. 61:3–4.)

Byrd appeals.

ARGUMENT

I. The circuit court properly exercised its discretion when it imposed the maximum sentence.

A. General legal principles.

This Court generally reviews a circuit court's sentencing decisions under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. When the record demonstrates an exercise of discretion, an “appellate court follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *Id.* ¶ 18 (citations omitted). “Accordingly, the defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion.” *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409.

Sentencing is committed to the trial court's discretion. *Gallion*, 270 Wis. 2d 535, ¶ 17. In exercising its sentencing discretion, the circuit court must identify the objectives of its sentence, including protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.* ¶ 40. Circuit courts should impose the minimum amount of confinement consistent with the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* ¶ 44. Circuit courts may consider a variety of factors in making this assessment. *Id.* ¶ 43 n.11. The circuit court decides which factors are relevant and how much weight to give to any particular factor. *State v. Stenzel*, 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20. A circuit court may further clarify its sentence when a defendant raises a postconviction challenge to its exercise of sentencing discretion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

A circuit court erroneously exercises its sentencing discretion when it relies on inaccurate information or an improper factor. *State v. Alexander*, 2015 WI 6, ¶ 17, 360 Wis. 2d 292, 858 N.W.2d 662. This Court uses a two-step framework to determine whether the circuit court erroneously exercised its discretion based on inaccurate information or an improper factor. *Id.* ¶¶ 17–18. First, it must decide whether the information was inaccurate or an improper factor. Second, it must decide whether the circuit court actually relied on inaccurate information or the improper factor. *Id.* “A defendant bears the burden of proving, by clear and convincing evidence, that the [circuit] court actually relied on irrelevant or improper factors.” *Id.* ¶ 17.

B. The circuit court properly exercised its discretion when it resentenced Byrd.

The circuit court properly exercised its discretion when it resentenced Byrd. In arriving at its sentence, the circuit court stated that it considered the serious nature of Byrd’s crime, the need to protect the public, and Byrd’s character when it assessed the goals of punishment, deterrence, rehabilitation, and restitution. (R. 79:11.)

With respect to Byrd’s character, the circuit court readily acknowledged that Byrd had serious mental illness issues. (R. 79:11–12.) It recognized that Byrd’s mental health records told it “a lot more about Mr. Byrd than I knew when I originally sentenced him.” (R. 79:2.) When the circuit court asked Byrd if he recalled making the telephone call, Byrd responded that he was “so hallucinatal [sic] around that time where I just really can’t recall that.” (R. 79:11.) Unlike the first sentencing hearing when the circuit court challenged Byrd’s comments (R. 77:17–18), the circuit court accepted Byrd’s answer and asked Byrd why he did not get treatment (R. 79:11). Byrd candidly responded,

“I just thought I can carry this out on my own, but I see I can’t.” (R. 79:11.)

With a better understanding of Byrd’s character, the circuit court then addressed whether this information changed its sentencing calculus. (R. 79:11.) It reaffirmed its original sentencing comments regarding the seriousness of the crime. While acknowledging the severity of Byrd’s mental illness, the circuit court noted that Byrd’s crime scared people. It noted its effect on the editor who took the bomb threat. “And I recall sitting in the courtroom and how she was shaking when she was testifying. She was that scared.” (R. 79:12.) In its order denying postconviction relief, it noted the station president’s comment that Byrd’s threat “terrorized” the station’s employees. (R. 61:5; 77:3.)

The circuit court also noted the impact that the bomb threat had on the station’s operations. (R. 79:12.) Witnesses testified at trial that the bomb threat disrupted the station’s operations. Employees were evacuated from the building and other employees were told not to report to work. (R. 75:99–101.) At sentencing, the station president noted the disruption to station’s operations, including the evacuation of guests who were there for programming. (R. 77:3–4.) Both a manager and the station president testified that Byrd’s threat could have affected the station’s ability to perform its public safety function of providing information to the public about emergencies. (R. 75:110; 77:5.)

The circuit court also considered general deterrence. “A message has to be sent to people that you can’t call in bomb scares to the television stations” and other institutions “without some consequences.” (R. 79:12.) At the initial sentencing hearing, the station president expressed concern regarding the need to make sure that potential copycats understand that there are penalties for making bomb scares. (R. 77:6.) The station president believed that the maximum penalty was appropriate. (R. 24:1.)

The circuit court determined that the additional information that it had received about Byrd's character would not change its sentence. (R. 79:12.) As the circuit court later explained, it based Byrd's sentence on "the seriousness of the defendant's conduct and the massive consequences it had for the victim and its employees." (R. 61:5.) While acknowledging Byrd's mental health issues, the circuit court determined that "the need for punishment and strong deterrence so far outweighed that factor that the court determined that only a maximum sentence was sufficient to achieve those sentencing goals." (R. 61:5.)

Because the circuit court fashioned an individualized sentence based on considerations relevant to Byrd's case, the circuit court properly exercised its sentencing discretion.

C. Byrd has not demonstrated that the circuit court relied on an improper factor when it sentenced him.

Byrd contends that the circuit court's "belief that the legislature provided an inadequate punishment" for making a bomb threat drove its sentencing determination. (Byrd's Br. 19.) As a result, he asserts that the circuit court relied on an improper sentencing consideration and erroneously exercised its sentencing discretion. (Byrd's Br. 19.) But Byrd has failed to demonstrate that the circuit court's comment about the penalties for bomb threats constituted an improper factor, much less one that it actually relied on when it sentenced him.

The circuit court's observation regarding the laxness of the penalties for making a bomb threat did not run afoul of its obligation "to find rationality in legislative enactments where possible" and to reserve maximum sentences for an "aggravated breach of the statutes." *See McCleary v. State*, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). A circuit court's observation that a penalty scheme does not

adequately reflect the potential seriousness of a particular crime does not transform its observation into an improper factor. But even if it did, the circuit court's opinion is not a factor that it actually relied on when it sentenced Byrd.

The circuit court explained that its general comments about the penalty classification for making a bomb threat did not play a role in its decision to impose the maximum sentence. (R. 61:4–5.) As the circuit court explained, it tailored its sentencing decision to the individual sentencing factors in Byrd's case. (R. 61:4.) In Byrd's case, the "seriousness" of Byrd's crime and "the massive consequences it had for the victim and its employees" drove the circuit court's sentencing decision. (R. 61:5.) Indeed, as the State noted in the preceding section, the circuit court's sentence was the product of an individualized sentencing determination that considered Byrd's character, the seriousness of the crime, and the need to deter others from engaging in this conduct.

On this record, Byrd has failed to demonstrate by clear and convincing evidence that the circuit court erroneously exercised its discretion by actually relying on its general opinion about the classification of the bomb threat crime when it sentenced Byrd.

II. Byrd failed to prove that the circuit court actually relied on improper information, i.e., Byrd's allegedly compelled statements during the first sentencing hearing, when it resentenced Byrd.

A. The circuit court did not actually rely on Byrd's allegedly compelled statements when it resentenced him.

"The Fifth Amendment privilege against self-incrimination continues after a plea and through sentencing." *Alexander*, 360 Wis. 2d 292, ¶ 24. "[A] circuit

court employs an improper factor in sentencing if it actually relies on compelled statements” *Id.* (e.g., compelled statement to a probation agent).

As the State argued in Section I.B. above, the circuit court properly exercised its sentencing discretion when it resentenced Byrd. It based its second sentence primarily on the seriousness of Byrd’s offense, the need to protect the public, and general deterrence rather than his character. (R. 79:11–13.) Thus, even assuming that the circuit court compelled Byrd to make a statement at his first sentencing hearing, he has not proved by clear and convincing evidence that the circuit court actually relied on Byrd’s compelled statements when it resentenced him.

At the original sentencing hearing, the circuit court suggested that Byrd showed “absolutely no remorse.” (R. 77:22.) Even assuming that the circuit court’s assessment of Byrd’s remorsefulness was based on his allegedly compelled statements, Byrd cannot show the circuit court’s prior assessment of his remorsefulness played a role when it resentenced him. To the contrary, at the resentencing hearing, the circuit court acknowledged that it now had access to information about Byrd’s mental health that it did not have when it first sentenced him. (R. 79:2.) The circuit court agreed that Byrd had a serious mental illness. (R. 79:11.)

Further, the circuit court’s questioning of Byrd about his crime was substantively different at the resentencing hearing.² At the first sentencing hearing, Byrd made statements that apparently led the circuit court to believe that Byrd denied making the threat and did not accept

² Byrd exercised his right of allocution at the resentencing hearing and did not object to the questions that the circuit court posed to Byrd. (R. 79:10–11.)

responsibility for his conduct. (R. 77:17–19.) In contrast, at the resentencing hearing, the circuit court did not challenge Byrd’s assertion that he could not recall making a threat because of his hallucinations. (R. 79:11.) The circuit court and Byrd then candidly discussed Byrd’s failure to get treatment. Byrd acknowledged, “I just thought I can carry this out on my own, but I see I can’t.” (R. 79:11.) The circuit court later explained, “I can understand now why you don’t recall it . . . I was pretty harsh with you in my sentencing remarks because I didn’t know the severity of your mental illness.” (R. 79:12.)

The circuit court’s comments reflect its understanding that Byrd’s inability to recall making the threat was the product of Byrd’s mental illness rather than an unwillingness to accept responsibility. The circuit court simply did not rely on Byrd’s allegedly compelled statements from the first sentencing hearing when it resentenced him. The circuit court’s comments at the resentencing hearing and in its decision denying postconviction relief reflect that the circuit court relied on proper sentencing factors at Byrd’s resentencing. These factors included the seriousness of the offense, the need to protect the public, and general deterrence. (R. 61:2; 79:12.)

Based on this record, Byrd has not proved that the circuit court actually relied on an improper factor when it resentenced him.

B. Byrd’s arguments notwithstanding, the circuit court did not rely on his prior statements when it resentenced him.

Without citation to authority, Byrd asserts that the resentencing did not remedy the circuit court’s prior violation of Byrd’s Fifth Amendment rights because the circuit court never acknowledged that it compelled Byrd to make statements at the first sentencing hearing. (Byrd’s

Br. 17.) This Court should decline to consider this argument because Byrd did not support it by reference to legal authority. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Further, whether the circuit court acknowledged that it violated Byrd's privilege against self-incrimination is not the standard that this Court applies when it considers whether the circuit court relied on an improper factor when it imposed a sentence. Rather, this Court must determine whether the factor is an improper factor and whether the circuit court actually relied on it. *Alexander*, 360 Wis. 2d 292, ¶¶ 18–19. And as the State argued in the preceding section, Byrd has failed to clearly and convincingly prove that the circuit court actually relied on the allegedly improper factor when it resentenced him.

Relying on *State v. Wood*, 2007 WI App 190, 305 Wis. 2d 133, 728 N.W. 2d 81, Byrd also suggests that the circuit court erred when it granted resentencing rather than sentence modification based on the additional mental health information. (Byrd's Br. 16–17.) While a motion for sentence modification and a motion for resentencing are different, *Wood*, 305 Wis. 2d 133, ¶¶ 5–6, this Court need not address this argument. First, because Byrd received the maximum sentence, Byrd's postconviction counsel acknowledged that the distinction between the two motions was "probably a distinction without a real difference." (R. 79:3.) Second, before this Court, Byrd "acknowledges that it is arguable that he received the remedy he sought—resentencing—for the Fifth Amendment violation." (Byrd's Br. 17.) Based on this record, this Court need not address whether resentencing was a proper remedy. But if it is inclined to do so, then the State relies on the circuit court's reasoning that it applied when it denied this postconviction claim. (R. 61:3–4.)

III. Because Byrd waived the privilege against self-incrimination by exercising his right of allocution, the circuit court’s questioning of Byrd did not infringe on his Fifth Amendment rights.

A. General legal principles.

Standard of review. Whether the circuit court violated Byrd’s “constitutional right against self-incrimination presents a question of constitutional fact.” *State v. Sabs*, 2013 WI 51, ¶ 40, 347 Wis. 2d 641, 832 N.W.2d 80. When this Court reviews a question of constitutional fact, it will uphold the circuit court’s findings of historical fact unless they are clearly erroneous. This Court applies the “constitutional principles independently of the circuit court . . . but benefitting from [its] analys[i]s. *Id.*

The privilege against self-incrimination. “Both the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution provide that a person may not be compelled in any criminal case to be a witness against himself or herself.” *State v. Peebles*, 2010 WI App 156, ¶ 10, 330 Wis. 2d 243, 792 N.W.2d 212. Wisconsin courts have normally construed the right against self-incrimination under the Wisconsin Constitution consistent with the Supreme Court’s interpretation of the federal right. *State v. Stevens*, 2012 WI 97, ¶ 40, 343 Wis. 2d 157, 822 N.W.2d 79.

“The Fifth Amendment privilege against self-incrimination continues after a plea and through sentencing.” *Alexander*, 360 Wis. 2d 292, ¶ 24. A circuit court may not impose a harsher sentence because a defendant asserts his Fifth Amendment right and refuses to admit guilt after a guilty finding. *Scales v. State*, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974). “If the defendant exercises that right, he may not be penalized for it, even after a jury’s

determination of guilt.” *Id.* at 496. The supreme court reasoned that when a defendant is sentence following a trial, the defendant retains the right to appeal and “could not be compelled to pay a price for the retention of his Fifth Amendment rights.” *Id.* While a circuit court may not compel a defendant to admit guilt, it may still consider the defendant’s remorse, repentance, and cooperativeness when it exercises its sentencing discretion. *Williams v. State*, 79 Wis. 2d 235, 239, 255 N.W.2d 504 (1977).

The right of allocution at sentencing. A defendant has a statutory right of allocution before the circuit court pronounces a sentence. Wis. Stat. § 972.14(2). The right of allocution includes the right “to make a statement with respect to any matter relevant to the sentence.” *Id.* The supreme court has recognized that the right to allocution is a due process right afforded to a defendant at sentencing. *State v. Borrell*, 167 Wis. 2d 749, 482 N.W.2d 883 (1992), *but see State v. Greve*, 2004 WI 69, ¶¶ 29–34, 272 Wis. 2d 444, 681 N.W.2d 479 (plurality opinion questioning whether right of allocution is merely a statutory right).

The waiver of the privilege against self-incrimination and sentencing allocution. A defendant may waive his privilege against self-incrimination by testifying about a matter. “[A] defendant who testifies is deemed to have waived the privilege, at least with respect to matters reasonably related to the subject matter of his direct examination, and the state is entitled to subject his testimony to adverse cross-examination.” *Neely v. State*, 97 Wis. 2d 38, 49, 292 N.W.2d 859 (1980).

A defendant may waive his Fifth Amendment right at sentencing. “[I]n the expectation of leniency, [a defendant] may waive that right and acknowledge his guilt and express his contrition and remorse.” *Scales*, 64 Wis. 2d at 496. As the Tenth Circuit has explained, “A defendant’s choice to exercise his right to allocution, like the choice to exercise the

right to testify, is entirely his own; he may speak to the court, but he is not required to do so.” *Harvey v. Shillinger*, 76 F.3d 1528, 1535 (10th Cir. 1996). “Once a defendant chooses to testify, though, he waives his privilege against compelled self-incrimination with respect to the testimony he gives and the testimony is admissible in evidence against him in later proceedings.” *Id.*

B. Byrd’s exercise of his right of allocution constituted a waiver of his privilege against self-incrimination.

The circuit court did not compel Byrd to make a statement at the sentencing hearing. The circuit court recognized Byrd had the right to remain silent at sentencing. When the prosecutor wondered why Byrd made the threat, the circuit court responded: “He gets his chance. He can either tell us or not. It is his right.” (R. 77:7) Byrd was also aware of his right not to say anything at sentencing. His trial counsel explained that he would not answer the “why” question because Byrd planned to appeal and trial counsel advised him not to talk about the case. (R. 77:11.)

After trial counsel finished his sentencing comments (R. 77:11–16), the circuit court addressed Byrd. “You have the right to tell me whatever you want to tell me. Do you want to talk?” (R. 77:17.) Byrd replied that he was not a “terrorist” or “threat” to society. (R. 77:17.) When the circuit court asked Byrd why he did it, trial counsel interjected. The circuit court responded, “He has the right to talk. If he exercises that right, I got the right to ask questions.” (R. 77:17.) The circuit court and Byrd then engaged in a discussion in which the circuit court questioned why Byrd was apologizing if he did not commit the crime. (R. 77:18–20.)

Byrd elected to allocute even though he was under no obligation to do so. When Byrd allocuted, the circuit court had the right to question him and test the sincerity of his statements. Based on this record, Byrd waived his privilege against self-incrimination when he exercised his right of allocution.

C. Even if the circuit court's questions infringed on Byrd's Fifth Amendment rights, they did not actually influence its exercise of sentencing discretion.

Relying on several cases, including *Scales* and *Williams*, Byrd contends that the circuit court improperly attempted to coerce an admission from Byrd and placed undue and overwhelming consideration on Byrd's refusal to admit guilt. (Byrd's Br. 14–16.) For several reasons, Byrd misplaces his reliance on these cases.

First, while *Scales* and *Williams* recognized that a circuit court may not impose a harsher sentence on a defendant who fails to acknowledge guilt, those cases do not address the current framework for reviewing claims that the circuit court relied on an improper factor at sentencing. Because Byrd alleges that the circuit court improperly relied on compelled evidence at sentencing, Byrd must prove by clear and convincing evidence that the circuit court actually relied on this improper factor when it sentenced him. *Alexander*, 360 Wis. 2d 292, ¶¶ 17–18, 24. As the State demonstrated in Section II above, the circuit court did not actually rely on Byrd's allegedly compelled statements when it resentenced him.

Second, Byrd still cannot demonstrate error under the standard that the supreme court applied in *Williams*. There, the supreme court held that a sentencing court did not erroneously exercise its sentencing discretion because there was no evidence that the defendant's failure to confess guilt

“materially influenced the trial court’s discretion.” *Williams*, 79 Wis. 2d at 239–40. A sentencing court’s mere acknowledgement that a defendant lacked remorse and refused to admit guilt does not otherwise constitute an erroneous exercise of sentencing discretion if the sentencing court otherwise relied on proper sentencing factors. *State v. Baldwin*, 101 Wis. 2d 441, 457–59, 304 N.W.2d 742 (1981).

At the first sentencing hearing, the circuit court referenced Byrd’s lack of remorsefulness. (R. 77:22.) But this was not a factor that “materially influenced” the circuit court’s sentence. Instead, the circuit court based its sentence primarily on the serious nature of Byrd’s crime, the need to protect the public, and general deterrence. (R. 77:21–22.) The circuit court did not make the kind of statement that the supreme court found objectionable in *Scales*. There, Scales’s failure to express remorse and accept responsibility was the factor that almost single-handedly drove the sentencing court to sentence Scales to prison. *See Scales*, 64 Wis. 2d at 494–95.

But even if this Court finds the circuit court’s questions were impermissibly coercive at the first sentencing hearing, Byrd has not demonstrated that they “materially influenced” the circuit court’s exercise of sentencing discretion at his resentencing. The circuit court did not rely on its prior assessment that Byrd completely lacked remorse when it resentenced him. To the contrary, the record demonstrates that the circuit court recognized that Byrd’s difficulties in responding to its questions at the first sentencing hearing resulted from his mental illness. (R. 79:12.) Instead, the circuit court properly exercised its discretion by sentencing Byrd based on the seriousness of his crime, protection of the public, and general deterrence. (R. 79:11–13.)

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm Byrd's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 8th day of March, 2018.

Respectfully submitted,

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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 5,926 words.

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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 8th day of March, 2018.

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