STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2021AP49-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY L. BOLSTAD,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, THE HONORABLE GLORIA L. DOYLE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court erroneously exercise its discretion when imposing Defendant-Appellant Randy L. Bolstad's sentence after revocation?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

INTRODUCTION

This is a sentencing discretion case. Bolstad had already amassed an extensive criminal history spanning three decades when he confronted a man while wielding a baseball bat and demanded money on threat of bodily harm and property damage. Despite the seriousness of Bolstad's crime, the parties jointly requested that the circuit court place Bolstad on probation for his attempted robbery conviction so that he could receive care for his addictions and mental health diagnoses while remaining in the community.

The circuit court ultimately adopted the parties' recommendation while cautioning Bolstad that he needed to follow the requirements set by his probation agent and mental health treatment team. However, as he had done many times in the past, Bolstad flouted the circuit court's advice, declined treatment opportunities, violated the most basic supervision rules, and committed various new crimes, all resulting in his probation revocation less than two years later. The circuit court subsequently ordered Bolstad to serve five years' initial

confinement and two years' extended supervision for his sentence after revocation.

This Court should affirm because that was a sound exercise of sentencing discretion owed deference. The circuit court's comments revealed that it assessed various sentencing factors and concluded that prison confinement was warranted because Bolstad could not be managed in the community. That the circuit court did not explicitly recite facts surrounding Bolstad's underlying crime or justify why it was not imposing two or three years' initial confinement, as opposed to five years, does not change this simple conclusion.

SUPPLEMENTAL STATEMENT OF THE CASE

The charges

In October 2016, the State charged Bolstad with one count of attempted armed robbery with a threat of force.[1] (R. 4:1.) The State alleged that Bolstad confronted A.S., demanded A.S.'s money, and threatened to strike A.S. and his vehicle with the baseball bat he was then wielding. (R. 4:2.) Bolstad followed A.S. away from his home, swinging the bat in the air, and left only after A.S. threatened to call the police. (R. 4:2.)

Aware of Bolstad's violent history, and suspecting that Bolstad was under the influence, A.S. reported the incident to police after Bolstad's departure. (R. 4:2.) A police officer subsequently located and arrested Bolstad, who denied A.S.'s allegations. (R. 4:2–3.) Rather, Bolstad claimed that he had merely invited A.S. to play ball with him and his famous friend, Tony Danza, and left without incident when A.S. told him that he did not want company. (R. 4:3.)

[1] The State alleged that Bolstad was a repeat offender due to his 2016 felony conviction for resisting an officer causing substantial bodily harm or a soft tissue injury. (R. 4:1–2.)

According to the criminal complaint, Bolstad was on probation at the time of the offense, having been convicted of resisting an officer causing substantial bodily harm or a soft tissue injury one year earlier in La Crosse County Case No. 2015CF762. (R. 4:2.)

The plea and sentencing hearing

On February 22, 2017, Bolstad appeared before the circuit court for two matters. (R. 47:3.)

First, Bolstad's probation for his felony resisting conviction entered in Case No. 2015CF762 was revoked following his latest arrest, and the circuit court needed to impose his sentence after revocation. (R. 47:3.)

Second, Bolstad entered into a plea agreement to resolve his two pending criminal cases. (R. 47:3.) Pursuant to that plea agreement, Bolstad entered an *Alford* plea[2] to an amended charge of attempted robbery with threat of force. (R. 14:6–7; 47:4, 13.) In exchange for that plea, the State moved to dismiss the remaining charges between Bolstad's two pending cases and read them in at sentencing. (R. 14:6–7; 47:3.)

During the plea colloquy, the court cautioned Bolstad that he needed to diligently follow the terms of any anticipated probationary sentence, and Bolstad agreed. (R. 47:12–13.) The court also stressed the importance of complying with orders from his probation officer and medical professionals, and Bolstad once again expressed his understanding. (R. 47:13.) The court ultimately accepted

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[2] *North Carolina v. Alford*, 400 U.S. 25 (1970). The Wisconsin Supreme Court has defined an *Alford* plea as "a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime." *State v. Multaler*, 2002 WI 35, ¶ 4 n.4, 252 Wis. 2d 54, 643 N.W.2d 437.

Bolstad's *Alford* plea and advanced to sentencing. (R. 47:13–14.)

The court began its sentencing comments by again cautioning Bolstad about his performance on probation, stating, "[Y]ou know, you not only need to follow the requirements of the probation officer, but also follow the recommendations of your mental health treatment team because, frankly, that's where you go off the rails." (R. 47:24.) The court recounted that Bolstad had appeared multiple times before the court, that his mental illness was "a big part of the problems [he] face[d]," and that his "actions and inability to follow the rules of society caused injury to an officer." (R. 47:24.) The court also noted that it previously afforded Bolstad a proverbial "get-out-of-jail-free card" in his 2015CF762 case so that he could address his issues while on probation. (R. 47:24–25.)

The court ultimately imposed a bifurcated prison sentence for Bolstad's 2015CF762 sentence after revocation, but it adopted the parties' joint recommendation to place Bolstad on probation for a period of three years for his attempted robbery conviction underlying this appeal. (R. 11:1; 47:25–26.) Among the various conditions of supervision, the court ordered that Bolstad (1) complete an Alcohol and Other Drug Abuse ("AODA") assessment and comply with any treatment recommendations, (2) abstain from alcohol or controlled substance use unless he obtained a prescription from a licensed physician, (3) undergo random drug screenings, and (4) comply with other assessments and evaluations recommended by the probation agent and satisfy any treatment recommendations. (R. 11:2; 47:26.)

Bolstad did not appeal from the judgment of conviction following his sentencing.

The probation revocation

Less than two years later, Bolstad's probation was again revoked, and the Department of Corrections ("DOC") recommended that the circuit court sentence Bolstad to five years' initial confinement and two years' extended supervision for his attempted robbery conviction. (R. 19:7.) Supporting that recommendation, the probation agent provided a detailed summary of Bolstad's poor performance on supervision:

- Days after his prison release, Bolstad was accused of stealing from his Transitional Living Placement ("TLP") roommate, (R. 19:5);

- Bolstad refused to complete his court-ordered AODA assessment or attend other treatment meetings, explaining that this programming "should be saved for 'next time,' so he could use them for an [Alternative to Revocation]," (R. 19:5);

- Bolstad repeatedly violated the curfew requirements at the TLP and twice absconded from the facility within the first month of his prison release, (R. 19:5–6);

- Shortly after DOC authorized Bolstad to live at his mother's house, his mother contacted DOC to report that she wanted Bolstad out of her home because he was "acting strange" and "going out all hours of the night," (R. 19:6);

- Police contacted or arrested Bolstad several times for various new crimes and probation violations, including (1) knocking on a woman's door in the middle of the night, (2) trying to enter an apartment complex where he did not live, (3) walking around a parking garage and looking into cars at Mayo Clinic Health Systems, and

(4) drunkenly passing out in a Western Technical College administrative building elevator, (R. 19:5–6);

- In another incident, Bolstad called dispatch indicating that he lost his money in the hallway of a King Street building and intended to break into the building if he did not receive help. Bolstad had no explanation for how he entered the building, and he was later found in possession of various phones and computer-related items that were stolen from the building, (R. 19:6); and

- Bolstad failed to appear at a scheduled office visit with his probation agent only two weeks after completing an Alternative to Revocation program at the Wisconsin Resource Center, and he continued to use and possess methamphetamine in the weeks thereafter, (R. 19:2, 6).

At the sentencing after revocation, the prosecutor requested that the circuit court impose the prison sentence recommended by Bolstad's probation agent, highlighting Bolstad's lengthy criminal history, his inability to remain in the community without committing new crimes, the fact that Bolstad was previously sentenced to prison for another robbery conviction, and his poor probation performance almost every time he was supervised in the community. (R. 48:4–5.)

In that regard, the prosecutor identified various instances in which Bolstad failed to comply with the supervision conditions ordered in this case. (R. 48:6–8.) The prosecutor also challenged Bolstad's post-sentencing efforts to contest his guilt in this case, pointing out the absurdity of Bolstad's story when he was interviewed about the attempted robbery. (R. 48:7.) Finally, the prosecutor argued that Bolstad had plagued the community by victimizing individuals and not complying with his conditions of supervision. (R. 48:7.)

The court began its sentencing comments by recalling its prior directives to Bolstad at his original sentencing hearing, noting that it had advised him that he could not "keep going like this," that he needed to take responsibility for his actions, that he needed to comply with various conditions geared towards maintaining sobriety, and that he needed to do what his probation agent told him to do. (R. 48:18.) The court stressed to Bolstad that all he had to do to avoid prison and stay in the community was follow those rules for three years. (R. 48:18.) The court also explained that it had believed, despite Bolstad's lack of accountability and refusal to take responsibility for his actions, that he could work with DOC and never return to prison. (R. 48:18–19.)

The court opined that DOC "gave it a good run," but Bolstad could not be managed in the community. (R. 48:19.) The court explained to Bolstad that he could not blame DOC for his own inaction, and it identified various community activities in which Bolstad could have engaged to remain law-abiding. (R. 48:19.) The court also suggested that Bolstad was not helpless, that he had the ability to help himself, and that he was not entitled to a babysitter, particularly when he rejected DOC's help. (R. 48:19.)

The court concluded by expressing its view that DOC looked at Bolstad's case and determined there were no additional alternatives, leaving the court to impose sentence. (R. 48:20.) The court reiterated that Bolstad proved that he could not be managed in the community before it imposed the exact prison sentence that DOC recommended in the revocation summary: five years' initial confinement and two years' extended supervision. (R. 19:7; 40:1; 48:20.)

The motion for resentencing

Bolstad subsequently filed a section 809.30 motion for postconviction relief, claiming that the circuit court failed to (1) "acknowledge, during either the initial sentencing or the

sentencing after revocation, its duty to consider any of the three primary sentencing factors, let alone the 'gravity of the offense' when calculating Bolstad's sentence," (2) "make any comments that could be considered an indirect reference to the gravity of Bolstad's offense," (3) "explain why five years was the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant," and (4) "acknowledge Bolstad's successes, or the difficulties finding programs that would treat both of his issues." (R. 45:11–12 (internal quotation marks and citations omitted).)

The circuit court denied Bolstad's motion in a written order. (R. 46.) The court referenced the nature of Bolstad's conviction, the maximum sentence he faced, and the ultimate sentence it imposed. (R. 46:1.) The court also acknowledged that it had considered not only the parties' sentencing arguments but also DOC's 16-page revocation summary. (R. 46:2.) The court went on to explain that it had originally withheld sentence and placed Bolstad on probation with "the ability to avoid a prison sentence entirely." (R. 46:2.) The court recognized that it later followed DOC's prison recommendation when Bolstad's probation was revoked, further noting that Bolstad was previously sentenced to five years' prison for another robbery. (R. 46:2.)

The court also noted that Bolstad's argument seemed to suggest that the court should not have imposed a sentence invoking the charged sentence enhancer.[3] (R. 46:2–3.) However, the court noted that Bolstad's criminal record was "much lengthier and more serious than that of other offenders

[3] In context, it appears that the circuit court was referencing Bolstad's status as a repeat offender when referencing the "sentence enhancer" in its order.

where the court would not include enhanced prison time in the order." (R. 46:3.)

The court concluded by noting that "[t]he gravity of the offense and protection of the public are both issues to be considered as is the inability to manage the defendant in the community. Supervision in the community was the court's first choice in sentencing as the court's remarks at the sentencing after revocation show." (R. 46:3.)

Bolstad appeals. (R. 49.)

STANDARD OF REVIEW

This Court reviews a circuit court's sentencing decision under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Even when a circuit court fails to properly exercise its sentencing discretion, reversal is not necessarily warranted; instead, this Court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). In that regard, it is this Court's "duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act." *Id*.

ARGUMENT

Bolstad is not entitled to resentencing.

Bolstad argues that the circuit court erroneously exercised its sentencing discretion in two ways. First, he argues that the court "erroneously failed to consider the 'gravity of the offense.'" (Bolstad's Br. 12.) Second, he argues that the court "erroneously failed to consider the minimum amount of confinement necessary to meet its sentencing goals." (Bolstad's Br. 16.)

He is wrong on both counts. The only sentencing decision properly before this Court is Bolstad's sentence after revocation, and given the nature of Bolstad's conviction, his lengthy criminal history, his propensity to commit new crimes every time he was released, and his refusal to engage in treatment designed to tend to his addiction and mental health diagnoses, the record supports the court's decision to incapacitate Bolstad by way of a lengthy prison sentence. This Court should therefore affirm.

A. Circuit courts have broad discretion at sentencing that cannot be reversed unless a defendant proves that it was erroneously exercised.

It is well established that a circuit court imposing sentence must consider three main factors: "(1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public." *State v. Williams*, 2018 WI 59, ¶ 46, 381 Wis. 2d 661, 912 N.W.2d 373. "The weight given each of these factors lies within the trial court's discretion, and the court may base the sentence *on any or all of them*." *State v. Odom*, 2006 WI App 145, ¶ 7, 294 Wis. 2d 844, 720 N.W.2d 695 (emphasis added).

A circuit court may also consider several secondary factors, including: the defendant's past criminal record; his "history of undesirable behavior pattern"; his personality and character traits; the results of any PSI; the viciousness of the offense; the defendant's culpability; the defendant's demeanor and expression of remorse or repentance; the defendant's age, education, and employment background; the rights of the public; and length of any pre-trial detention. *Williams*, 381 Wis. 2d 661, ¶ 46 (citation omitted).

A circuit court also has considerable discretion in determining the length of the sentence within the permissible statutory range. *Hanson v. State*, 48 Wis. 2d 203, 207,

179 N.W.2d 909 (1970). A sentencing court "must provide an explanation for the general range of the sentence imposed, not for the precise number of years chosen, and it need not explain why it did not impose a lesser sentence." *State v. Davis*, 2005 WI App 98, ¶ 26, 281 Wis. 2d 118, 698 N.W.2d 823 (citing *Gallion*, 270 Wis. 2d 535, ¶¶ 49–50, 54–55).

When reviewing a court's exercise of sentencing discretion, this Court starts with the presumption that the sentencing court acted reasonably. *State v. Lechner*, 217 Wis. 2d 392, 418–19, 576 N.W.2d 912 (1998) (citation omitted). Due to the presumption of reasonableness, the burden to prove an erroneous exercise of sentencing discretion is a heavy one and must be established by clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶¶ 30, 34, 326 Wis. 2d 685, 786 N.W.2d 409.

Finally, as referenced above, should this Court decide that the circuit court failed to properly exercise its sentencing discretion, Bolstad is not automatically entitled to resentencing. *See McCleary*, 49 Wis. 2d at 282. Rather, if this Court can find from the facts of record that Bolstad's sentence is sustainable as a proper discretionary act, it will nevertheless affirm. *See id*.

B. Any challenges to the circuit court's exercise of discretion at Bolstad's original sentencing hearing are not properly before this Court.

As a preliminary matter, Bolstad appears to lob some criticism at the circuit court for its original sentencing analysis, arguing that it inadequately assessed the gravity of his offense or the facts underlying it when placing him on probation in February 2017. (*See* Bolstad's Br. 6, 13–14.) However, any claims surrounding Bolstad's original sentencing are not properly before this Court because Bolstad

did not appeal from his original sentence or judgment of conviction.

Bolstad is unquestionably entitled to a direct appeal from the judgment of conviction entered after he was sentenced following his probation revocation, even though he did not appeal his original sentence or judgment of conviction. *See State v. Scaccio*, 2000 WI App 265, ¶¶ 6, 10–12, 240 Wis. 2d 95, 622 N.W.2d 449. However, when challenging his subsequent sentencing after revocation, Bolstad is not entitled to review of his original judgment of conviction (or the court's original sentencing decision). *See id.* ¶ 10.

Here, the circuit court placed Bolstad on probation at his initial sentencing hearing on February 22, 2017. (R. 47:1, 3, 26.) Nothing prevented Bolstad from filing a notice of appeal at the time if he felt the circuit court erred at his original sentencing hearing. The reason Bolstad did not lodge any complaints at the time is rather obvious: the circuit court placed him on probation for his attempted robbery conviction—the exact outcome he bargained for when he entered a plea agreement with the State.

Because Bolstad did not pursue postconviction relief following his initial sentencing, he was not entitled to wait several years—until after his probation was revoked—to raise issues that go back to whether the circuit court sufficiently supported its decision to place him on probation years earlier. *See Scaccio*, 240 Wis. 2d 95, ¶ 10. Thus, the scope of the issue before this Court is limited solely to whether the circuit court erroneously exercised its discretion at Bolstad's sentencing after revocation. *See id.*

C. Bolstad's prison sentence is sustainable as a proper exercise of discretion.

Bolstad first argues that the circuit court "erroneously failed to consider 'the gravity of the offense'" when it imposed his sentence. (Bolstad's Br. 12.) In support, he points to the

fact that the court did not vocalize that it had considered the gravity of his attempted robbery when it pronounced his sentence, nor did the court comment on specific facts from Bolstad's attempted robbery. (Bolstad's Br. 13–14.)

Bolstad reads *Gallion* and his cited authority too rigidly. He offers a string-cite of supreme court cases for an oft-cited principle, which the State does not challenge, that a sentencing court must consider the gravity of the offense when imposing a defendant's sentence. (Bolstad's Br. 12.) However, there is nothing to show that the circuit court actually failed to consider the gravity of Bolstad's criminal conduct as he now alleges.

Indeed, *none* of the cases cited by Bolstad established an unyielding rule that a circuit court must orally and methodically articulate the three *Gallion* factors at each sentencing hearing, describe how the perceived facts fit each *Gallion* factor, and affirmatively declare that a specific *Gallion* factor drove its sentence. To the contrary, this Court has previously held, in no ambiguous terms, that "[t]he weight given each of these factors lies within the trial court's discretion, and the court may base the sentence *on any or all of them*." *Odom*, 294 Wis. 2d 844, ¶ 7 (emphasis added).

In this case, although the circuit court did not reference any specific *Gallion* factor by name, it is evident from the court's comments that it ultimately based Bolstad's sentence after revocation on the need to protect the public, Bolstad's character, his criminal history, and his pattern of undesirable behavior in the community. (*See* R. 48:18–20.) These are all appropriate sentencing considerations. *See Williams*, 381 Wis. 2d 661, ¶ 46.

Concerning the need to protect the public, the court repeatedly explained that Bolstad could not be managed in the community, (R. 48:19–20), which was a sound assessment. Recall that Bolstad committed the attempted robbery when

he was already on probation for injuring a police officer during a prior altercation. (*See* R. 4:2; 19:3, 5.) Additionally, the revocation summary detailed copious incidents where Bolstad disturbed the community during his latest stint of probation. (R. 19:5–6.) This included allegedly stealing from his roommate at the TLP, casing vehicles in a public parking garage, trying to enter apartment complexes where he did not live, drunkenly passing out in public elevators, stealing computer hardware and phones from a building, and threatening to unlawfully force his way back into the same building to recover his own property. (R. 19:5–6.)

These same facts also weighed on Bolstad's character, criminal history, and his pattern of undesirable behavior in the community. *See Williams*, 381 Wis. 2d 661, ¶ 46. The court recounted how it had previously advised Bolstad that he could not keep engaging in the same behavior, that he needed to take responsibility for his actions, and that he had to comply with various conditions to avoid prison. (R. 48:18.) Yet within the first month of probation, Bolstad disregarded that advice and continued on the same path that landed him in trouble so many times in the past, including stealing from his roommate, refusing treatment that was offered to him, and absconding from the TLP. (R. 19:5–6.) And the court's negative character determinations did not end there; the court also noted Bolstad's perceived lack of accountability or willingness to take responsibility for his actions at his earlier plea and sentencing hearing, and it reminded him that he could not blame DOC for his own failure to help himself. (R. 48:18–19.)

These were all valid points gleaned from Bolstad's revocation summary, and the court was entitled to base its sentence after revocation entirely upon the need to protect the public and Bolstad's negative character attributes if deemed appropriate. *See Odom*, 294 Wis. 2d 844, ¶ 7. After recognizing that it had tried Bolstad on probation, declaring that DOC had "looked at everything else possible to do with

[Bolstad] and decided there weren't any alternatives," and reaffirming that Bolstad could not be managed in the community, the court clearly saw no other viable option but incapacitation, so it sentenced him to prison. (*See* R. 48:19–21.) Because that was a sound exercise of sentencing discretion based on the facts before the circuit court, this Court should affirm. *See McCleary*, 49 Wis. 2d at 282.

Nevertheless, in challenging the circuit court's sentencing discretion, Bolstad contends that the circuit court should have allocated more weight to the gravity of his offense, which, in his view, would have decreased his culpability in the court's eyes. (Bolstad's Br. 15.) In support, he attempts to minimize his own conduct by (1) suggesting that he was experiencing a schizophrenic or drug-induced episode during the attempted robbery, and (2) downplaying his attempted robbery simply because he did not actually swing the baseball bat at his victim. (Bolstad's Br. 15.)

But even accepting as true that Bolstad was experiencing a mental breakdown when he confronted A.S.—a fact that was hardly established by the facts in this case—and conceding that Bolstad did not swing the bat directly at A.S. but only threatened to harm him and his property, Bolstad seems to ignore that a sentencing court maintains wide discretion to afford lesser weight, or no weight at all, to any specific aggravating or mitigating factor. *See State v. Salas Gayton*, 2016 WI 58, ¶ 22, 370 Wis. 2d 264, 882 N.W.2d 459. Simply put, the circuit court was not required to give Bolstad a more favorable sentence just because he wanted to blame his behavior on his mental health or addictions.

In sum, the question before this Court is not whether it would have crafted Bolstad's sentence differently based on aggravating and mitigating factors but whether the circuit court's sentencing decision could be sustained as a proper discretionary act based on the facts of record. *See McCleary*, 49 Wis. 2d at 282. Because the facts contained in the criminal

complaint and revocation summary told the story of a defendant with an extensive criminal history who attempted to rob someone using a baseball bat, only to refuse treatment while in the community and commit new crimes, this Court should affirm the circuit court's sentencing decision as a proper discretionary act. *See id*.

D. Bolstad's sentence was warranted under the circumstances, and the circuit court had no duty to explain why it did not sentence him to less imprisonment.

Bolstad also argues that the circuit court erroneously exercised its discretion "when it gave [him] a maximum sentence simply because he could not abide by his obligations to treat his mental health and substance abuse issues." (Bolstad's Br. 18.) Ignoring Bolstad's dramatic hyperbole (the circuit court clearly did not impose its sentence to punish him for his mental health and substance abuse diagnoses), his argument fails because the circuit court's sentence was appropriate under the facts presented to the court, the court was under no obligation to explain the precise number of years it chose, and the court was not required to explain why it elected not to impose the lesser sentence recommended by defense counsel. *See Davis*, 281 Wis. 2d 118, ¶ 26.

For starters, it appears that everyone—the prosecutor, defense counsel, DOC, Bolstad's appellate counsel, and Bolstad himself—have at one time or another agreed that Bolstad should have received a prison sentence for his conviction in this case. (R. 19:7; 48:9, 16–17; Bolstad's Br. 17.) Nevertheless, Bolstad now argues that the circuit court improperly took an "all-or-nothing approach" when sentencing him without determining that five years was "the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." (Bolstad's Br. 16–17 (quoting *Gallion*, 270 Wis. 2d 535, ¶ 44).)

But Bolstad's impression that the circuit court took an "all-or-nothing approach" is just that—his impression. Nothing in the record suggests that the court felt compelled to choose only between (1) the maximum initial confinement *or* (2) two years' initial confinement recommended by defense counsel.

Moreover, imposing a maximum term of initial confinement after Bolstad's probation revocation was logical based on the court's conclusion that Bolstad could not be managed in the community. Indeed, through his extensive criminal history and perennially poor performance on supervision, Bolstad demonstrated that he was unwilling or incapable of complying with rules and laws while in the community. So, the only option left for the court was to confine Bolstad. Imposing anything less than the maximum term of initial confinement would have undermined any incapacitation goal by releasing Bolstad early and allowing him to resume his criminal acts and create more victims.

Still, Bolstad argues that a lesser term of confinement was appropriate given his rehabilitative needs, "other legal remedies, besides incarceration, for dealing with a person with mental health and substance abuse issues," and what he deems insufficient credit afforded to his purported successes or "difficulties finding programs that would treat both of his issues." (Bolstad's Br. 17–18.)

But the circuit court *did* consider Bolstad's rehabilitative needs by placing him on probation in the first place. (*See* R. 48:18–19.) However, just over a week after Bolstad's probation began, he had already declined to attend meetings or complete an AODA assessment, all so he could save that programming to justify an Alternative to Revocation. (R. 19:5.) In other words, Bolstad seemingly recognized, less than two weeks into his three-year probation term, that he planned to engage in conduct that would result in his probation revocation.

Bolstad's other arguments also beg several questions. First, why would the circuit court assume that Bolstad would take advantage of community services and programming and comply with conditions of an earlier extended supervision when Bolstad had already refused those same services and programming and violated court and department-ordered conditions in connection with his probation? Second, why would the court expect that an involuntary commitment, guardianship, or protective placement would be successful when Bolstad was unwilling to abide by DOC supervision or even his own mother's house rules? Third, which of Bolstad's purported successes warranted a lesser sentence when Bolstad only engaged in treatment during his confinement and resumed his criminal behavior and probation violations immediately following release?

Ultimately, while Bolstad may now maintain that he is amenable to treatment and would have taken supervision more seriously if given a shorter prison sentence, the circuit court was aware from the revocation summary that Bolstad only complied with treatment in a confined setting, that he failed to carry that positive adjustment into the community, and that he posed a safety concern to himself and others in the community. (R. 19:7.) Simply put, Bolstad left the court with no other option but to confine him for an extended period to protect the community and ensure he received the treatment he so evidently required.

In sum, even if this Court were to hold that the circuit court failed to sufficiently explain "the general range of the sentence imposed," *see Davis*, 281 Wis. 2d 118, ¶ 26, it should nevertheless affirm because the facts of record support the court's discretionary sentencing decision to impose a five-year term of initial confinement, *see McCleary*, 49 Wis. 2d at 282.

E. This Court should affirm regardless of any perceived errors in the circuit court's order denying postconviction relief.

In a last-ditch effort, Bolstad argues that the circuit court's order denying postconviction relief "did not address the issues Bolstad raised in his motion." (Bolstad's Br. 18.) However, as Bolstad correctly observes, when a circuit court fails to decide a postconviction motion within the statutory timeframe, this Court effectively views any untimely order as a "nullity" while retaining jurisdiction to consider claimed sentencing errors on appeal. (Bolstad's Br. 19 (citing *State v. Scherreiks*, 153 Wis. 2d 510, 516–17, 451 N.W.2d 759 (Ct. App. 1989).)

As the State has explained, Bolstad is entitled to no relief because the facts in the record support the circuit court's discretionary sentencing decision. *See supra* pp. 12–18. Thus, regardless of whether this Court takes issue with the circuit court's stated rationale for denying Bolstad's postconviction motion, he is still not entitled to resentencing. *See State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (if circuit court's decision is supportable by the record, the court of appeals will not reverse even if circuit court gave the wrong reason—or no reason at all—for its decision).

For all these reasons, this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 3rd day of May 2021.

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 5,320 words.

Dated this 3rd day of May 2021.

Electronically signed by:

/s/ John W. Kellis
JOHN W. KELLIS
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 the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 3rd day of May 2021.

Electronically signed by:

/s/ John W. Kellis
JOHN W. KELLIS
Assistant Attorney General