

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2245-CR

Cir. Ct. No. 2003CF770

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNSON CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY E. GRAU, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Johnson Carter, pro se, appeals an amended judgment of conviction that commuted a part of his sentence pursuant to WIS. STAT. § 973.13,¹ reducing the term of his extended supervision for one offense

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

from three years to two years. Although Carter raises four issues on appeal, only two of the issues are properly before this court: (1) whether the circuit court judge should have recused himself; and (2) whether Carter is entitled to resentencing on all of the charges against him, rather than commutation of the excessive sentence for one count. We affirm the amended judgment.

¶2 In 2003, Carter was sentenced for multiple charges. In 2014, the Department of Corrections notified the circuit court that the sentence imposed for one of the violations, stalking, exceeded the maximum term of extended supervision permitted by statute by one year. Thereafter, Carter requested disqualification of the circuit court judge presiding over his case and filed a motion opposing the commutation of his stalking sentence, requesting instead that he be resentenced on all of the charges. The circuit court commuted the excessive portion of Carter’s extended supervision pursuant to WIS. STAT. § 973.13.

¶3 When a court imposes a penalty in excess of that permitted by the law, the excess portion of the sentence is void. *State v. Wilks*, 165 Wis. 2d 102, 112, 477 N.W.2d 632 (Ct. App. 1991). In such a case, WIS. STAT. § 973.13 provides that “the sentence shall be commuted without further proceedings to the maximum permitted by the law.” *Id.* However, “when a sentence is commuted pursuant to § 973.13, Stats., the sentencing court may, in its discretion, resentence the defendant if the premise and goals of the prior sentence have been frustrated.” *State v. Holloway*, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996).

¶4 As an initial matter, Carter’s contention that the circuit court judge should have recused himself, although identified as an issue on appeal, is not addressed in the argument portion of Carter’s brief. Therefore, we conclude the

issue was abandoned. *See Eklund v. Koenig & Assocs.*, 153 Wis. 2d 374, 380-81, 451 N.W.2d 150 (Ct. App. 1989).

¶5 Carter cites *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, as authority for the proposition that resentencing on all counts is required to cure the excessive sentence on one count. *Volk* does not stand for that proposition. In *Volk*, remand for resentencing was necessary because the court's error in applying a penalty enhancer to a term of extended supervision affected the entire sentencing structure. *Id.*, ¶¶47-48. Here, the relatively minor error of imposing one more year of extended supervision than is permitted by statute can be addressed, in the circuit court's discretion, by either commutation under WIS. STAT. § 973.13 or by resentencing. *See Holloway*, 202 Wis. 2d at 700. The error in the sentence did not frustrate or otherwise affect the premise and goals of the sentencing court, *see id.*, and the court did not erroneously exercise its discretion by ordering commutation under § 973.13.

¶6 The remaining issues raised in Carter's appeal (i.e., his motion for plea withdrawal and his motion for resentencing due to an "invalid" sentence) are not properly before this court. Those motions were filed on the day of the commutation hearing, and the circuit court had not ruled on those motions prior to Carter filing his notice of appeal. A circuit court must be given an opportunity to correct any alleged error before the matter can be raised in this court. *State v. Walker*, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

