

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 9, 2026**

Samuel A. Christensen  
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. 2025AP2018  
STATE OF WISCONSIN**

Cir. Ct. No. 2020CF117

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TYRONE L EMIG, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Green Lake County:  
MARK T. SLATE, Judge. *Affirmed.*

Before Lazar, P.J., Gundrum, and Grogan, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Tyrone L. Emig, Jr. appeals, pro se, from a circuit court order denying his second postconviction motion for new factor sentence

modification, and allegation that he was sentenced on inaccurate information, and ineffective assistance of counsel claims without a hearing. Based upon our review of the briefs and Record, we affirm the circuit court's order.

## **BACKGROUND**

¶2 In 2021, Emig pled no contest to armed robbery with threat of force, as a repeater. The circuit court ordered a Presentence Investigation Report (PSI). The PSI author reported that Emig had previously been diagnosed with post-traumatic stress disorder (PTSD), an unspecified cognitive disorder, premorbid attention deficit disorder, and “Polysubstance Dependence.” The PSI also reported that Emig told the PSI author that he suffered from depression. At sentencing, the court asked defense counsel whether he had received the PSI and whether it required any corrections, additions, or deletions.<sup>1</sup> Defense counsel replied that he did and that he reviewed it “verbatim” with Emig over the phone.

¶3 The State recommended 14 years of initial confinement and 6 years of extended supervision, consecutive to the revocation sentence Emig was already serving. Emig asked for a 16-year sentence concurrent to his revocation sentence. The circuit court pointed to Emig's “life-long” criminal history and the seriousness of the offense, which traumatized the victim and the community. It explained that the “most important” sentencing consideration to it was the protection of the public and that it believed that if Emig were not incarcerated for a significant time, he would “only go onto [sic] traumatize and terrorize other people.” The court

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<sup>1</sup> Defense counsel only corrected the PSI with respect to Emig's current incarceration location.

sentenced Emig to 15 years of initial confinement and 5 years of extended supervision, consecutive to any other sentence.

¶4 Emig filed a postconviction motion, arguing for resentencing on three claims: (1) counsel failed to fully disclose the PSI to him prior to sentencing and thus violated his due process rights; (2) the sentence was based on inaccurate information in the PSI; and (3) the circuit court erroneously exercised its sentencing discretion. At a nonevidentiary hearing on Emig’s motions, the court rejected his claim that it had erroneously exercised its discretion in imposing sentence. The court construed the first two issues in Emig’s motion as ineffective assistance of counsel claims that his attorney failed to fully review the PSI with him and point out inaccuracies in the PSI at sentencing. It scheduled an evidentiary hearing on those two issues.

¶5 After the evidentiary hearing, the circuit court denied Emig’s motion in a written order. The court found that trial counsel had in fact read the PSI to Emig verbatim and that Emig “had ample time to listen, understand and ask questions of [counsel] about the PSI.” The court further found that after being read the PSI prior to sentencing, Emig did not identify any inaccuracies, and thus, he could not claim that his attorney was ineffective for failing to point out inaccuracies. Finally, the court found that the alleged inaccuracies in the PSI were simply the opinions of the author, rather than facts that could “be right or wrong[,]” and that Emig had not shown that he was prejudiced.

¶6 Emig appealed, raising two issues: (1) his attorney failed “to fully disclose inaccurate reporting in the [PSI] to him prior to sentencing”; and (2) the circuit court erroneously exercised its discretion at sentencing. *State v. Emig*,

No. 2022AP1365-CR, unpublished op. and order at 1-2 (WI App Mar. 13, 2024). This court affirmed. *Id.* at 2.

¶7 Later, Emig filed a pro se “Motion For Sentence Modification / Post conviction Relief.” The postconviction motion raised two claims: (1) sentence modification based on a new factor, alleging that the new factor was “the new diagnosis of depression” as derived from a trauma assessment report from his commitment to the Wisconsin Resource Center (WRC); and (2) ineffective assistance of his postconviction counsel, for his failure to provide Emig the PSI and his failure to object to the circuit court’s characterization of Emig’s due process claim as an ineffective assistance of counsel claim.

¶8 The circuit court denied Emig’s motion in a written order.<sup>2</sup> As to his new factor claim, the court found that “none of the reasons given is a reason for the [c]ourt to modify the sentence.” As to his ineffective assistance of counsel claim, the court determined that Emig had misread the case he relied upon, *State v. Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989), and that *Skaff*’s requirements were fulfilled when trial counsel read the PSI verbatim to Emig.<sup>3</sup>

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<sup>2</sup> The circuit court stated in its written order, “The second issue raised, that appellate counsel was deficient in his argument to the court of appeals, this court takes no action on.”

<sup>3</sup> The circuit court also stated:

The defendant also makes some additional arguments for ineffective assistance of counsel, namely[:] counsel had not hired defense experts, [did not] bring to court statistical data on sentencing, [did not] bring[] forth the defendant’s mental health diagnoses, failed to research the law, failed to do a reasonable investigation, failed to use reasoned strategic judgment, and more.

However, just because the defendant throws out a lot of accusations, with little factual basis, does not mean the court has to address those issues.

¶9 Emig appeals.

## DISCUSSION

¶10 In this appeal, Emig reiterates the claims from his second postconviction motion: (1) the trauma assessment report constitutes a new factor that justifies sentence modification; and (2) ineffective assistance of counsel in prior proceedings denied him due process, because counsel did not object to the circuit court’s characterization of two of his claims as ineffective assistance of counsel claims. Emig raises a third issue, that he was sentenced on inaccurate information in the PSI.

### I. Sentence modification

¶11 To prevail on a motion for sentence modification, Emig must demonstrate both the existence of a new factor by clear and convincing evidence and that the new factor justifies modification of the sentence. *See State v. Harbor*, 2011 WI 28, ¶¶36, 38, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). We review this issue de novo because “[w]hether the fact or set of facts put forth by the defendant constitutes a ‘new factor’ is a question of law.” *Harbor*, 333 Wis. 2d 53, ¶36.

¶12 It is Emig’s responsibility in his appellate briefing to set out “the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on[.]” *See* WIS. STAT. RULE 809.19(1)(e)

(2023-24).<sup>4</sup> While we acknowledge that Emig is a pro se litigant for whom “some leniency may be allowed,” *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992), pro se litigants “are bound by the same rules that apply to attorneys on appeal[,]” *id.*, and “we will not abandon our neutrality to develop arguments,” *Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. Where Emig’s arguments are not supported by legal authority, we need not address them. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”). We briefly address his arguments.

¶13 Essentially, Emig’s argument is that the trauma assessment report evidences a diagnosis of depression, which, according to him, is a new factor that justifies sentence modification. He does not explain why the alleged new factor constitutes a new “fact or set of facts highly relevant to the imposition of sentence[.]” See *Rosado*, 70 Wis. 2d at 288. He suggests that the trauma assessment report demonstrates that he had “a conscience of remorse for his actions[.]” but he does not explain how it does so or why that would be highly relevant to the imposition of his sentence. He argues that “the new factor [i]nvolving this report, was not only about believing [Emig’s] allocution, but also his overall attitude.” However, “[t]he credibility of ... witnesses is properly the function of the jury or the trier of fact, in this case the [circuit] judge.” *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). “[An appellate] court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the

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<sup>4</sup> All references to the Wisconsin Statutes are to the 2023-24 version.

laws of nature or with fully-established or conceded facts.” *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (1990).

¶14 Emig cites to *State v. Schueller*, 2024 WI App 40, 413 Wis. 2d 59, 10 N.W.3d 423, without elaboration. *Schueller* involved a veteran appellant who sought postconviction relief in the form of a sentence modification based on the new factor that there were new, highly effective treatments for PTSD in veterans. *Id.*, ¶1. Here, the circuit court was not focused on the curability of Emig’s mental conditions, nor does Emig allege that there was any treatment developed after sentencing that would cure any of his mental conditions.

¶15 Emig fails to provide the reasons for his new factor claim contrary to WIS. STAT. RULE 809.19(1)(e) and provides an undeveloped argument. *See Pettit*, 171 Wis. 2d at 646. Thus, we decline to consider his argument further.<sup>5</sup>

## II. Ineffective assistance of counsel

¶16 Emig argues that he received ineffective assistance of counsel because his postconviction counsel did not object to the circuit court’s decision to evaluate Emig’s claim regarding PSI access through the lens of ineffective assistance of counsel.

¶17 To succeed on an ineffective assistance of counsel claim, Emig must establish both that counsel’s performance was deficient, and that the deficiency was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove that counsel’s performance was deficient, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 687-88.

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<sup>5</sup> We further note that the circuit court knew from the PSI that Emig had reported to the PSI writer that he suffered from depression.

To constitute deficient performance, counsel’s specific acts or omissions must fall “outside the wide range of professionally competent assistance.” *Id.* at 690. A lawyer’s performance is not deficient unless he or she “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. To prove prejudice, the defendant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶18 Whether counsel rendered ineffective counsel is a mixed question of fact and law. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. A circuit court’s findings of fact are upheld unless clearly erroneous. *Id.* We review de novo whether the facts satisfy either the deficiency or the prejudice prong of the ineffective assistance of counsel analysis. *Id.* “If the defendant fails to satisfy either prong, we need not consider the other.” *State v. Breitzman*, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93.

¶19 In his first postconviction motion, Emig claimed that he had a right to personally access his PSI and the failure to grant him direct access violated his due process rights. The circuit court evaluated this claim as an ineffective assistance claim. Emig now contends that his counsel was ineffective for failing to object to the court’s analysis of the PSI issue as an ineffective assistance of counsel claim, as opposed to a directly reviewable error.

¶20 Emig’s claim fails because his attorney had access to the PSI, and neither Emig nor his attorney objected at sentencing to claim that Emig needed to view the PSI personally. Thus, there is no relevant circuit court decision that can be directly challenged or reviewed. Emig could only challenge his lack of personal

access to the PSI by alleging that his counsel was ineffective, such as by failing to provide him a physical copy of the PSI.

¶21 Emig’s reliance on *Skaff*, 152 Wis. 2d 48, is misplaced as the case does not provide grounds for an independent due process claim where the defendant does not request personal access to the PSI. In *Skaff*, the defendant attempted to access the PSI but was denied access because the circuit court categorically prohibited defendants from reading their PSIs. *Id.* at 56-58. The *Skaff* court found that the imposition of this sweeping rule was a due process violation. *Id.* at 58. We further made clear in *State v. Thompson*, 158 Wis. 2d 698, 700, 463 N.W.2d 402 (Ct. App. 1990), that *Skaff* did not impose an affirmative duty on the court to provide the defendant access to the PSI.

¶22 Therefore, Emig’s counsel had no reason to object, and his counsel did not perform deficiently in failing to object. Counsel cannot be deficient for failing to press a meritless claim. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶23 To the extent Emig makes other arguments that counsel was ineffective, they are underdeveloped; thus, we decline to consider them. *Pettit*, 171 Wis. 2d at 646.

### III. Inaccurate information

¶24 Finally, Emig claims that he was sentenced based on inaccurate information in his PSI. He made that claim in his first postconviction motion. The State argues that Emig’s claim is procedurally barred.

¶25 “Whether a defendant’s appeal is procedurally barred is a question of law that we review *de novo*.” *State ex rel. Washington v. State*, 2012 WI App 74,

¶27, 343 Wis. 2d 434, 819 N.W.2d 305. A postconviction motion for relief under WIS. STAT. § 974.06 must meet the requirements of subsection (4), which provides that “[a]ny ground finally adjudicated ... may not be the basis for a subsequent motion[.]” Sec. 974.06(4).

¶26 We need not address the merits of Emig’s claim because we conclude that his claim is procedurally barred, as he raised it in his first postconviction motion, and on appeal we affirmed the circuit court’s denial of his claim. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (1991) (“A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”); *see also State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (holding that claims that could have been raised on direct appeal or in an earlier postconviction proceeding are barred from a subsequent WIS. STAT. § 974.06 motion absent a sufficient reason for failing to raise them earlier).

*By the Court.*—Order affirmed.

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

