COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2074-CR **Cir. Ct. No. 2012CF58**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLAYTON M. MILLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Clayton Miller, pro se, appeals an order denying his motion for sentence modification. Miller argues: (1) the circuit court relied on inaccurate information when sentencing him; (2) fifteen new factors warrant sentence modification; (3) four conditions of his extended supervision are

unconstitutional; (4) the circuit court erroneously exercised its sentencing discretion with respect to the conditions of extended supervision; and (5) the circuit court was obligated to grant his sentence modification motion because the State did not oppose it. We reject Miller's arguments and affirm.

BACKGROUND

¶2 In June 2012, the State charged Miller with five counts of possession of child pornography, contrary to WIS. STAT. § 948.12(1m); one count of exposing a child to a harmful description, contrary to WIS. STAT. § 948.11(2)(am); and one count of causing a child over the age of thirteen to view or listen to sexual activity, contrary to WIS. STAT. § 948.055.[1] The charges stemmed from online communications Miller had with a fourteen-year-old girl, in which she sent sexually explicit images and video of herself to Miller and the two of them discussed sexual matters. According to the criminal complaint, Miller and the victim met online through the website "My Yearbook." The victim's profile stated she was nineteen years old. At some point, the victim told Miller she was only fourteen. Miller admitted to police that he retained the sexually explicit images of the victim even after he learned her actual age.

¶3 Miller pled no contest to two of the possession-of-child-pornography charges and the exposing-a-child-to-harmful-description charge. The remaining charges were dismissed and read in. The circuit court sentenced Miller to four years' initial confinement and seven years' extended supervision on each of the possession counts and one year of initial confinement and one year of extended

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

supervision on the exposure count, all counts concurrent to each other and to a sentence Miller was then serving. The court imposed several conditions of extended supervision, including: (1) prohibiting Miller from consuming or possessing alcohol or illegal substances, and allowing him to take medication only as prescribed by a physician; (2) prohibiting unsupervised contact with persons under the age of eighteen without prior agent approval; (3) prohibiting computer or internet access without prior agent approval, including use of a cell phone with camera or internet capability; and (4) prohibiting Miller from possessing sexually explicit materials.

¶4 In July 2015, Miller moved for sentence modification. The circuit court denied his motion in a written decision, and Miller now appeals.

DISCUSSION

I. Inaccurate information

¶5 Miller first argues the circuit court relied on inaccurate information when sentencing him.[2] "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right is a question of law that we review independently. ***Id.*** To establish he is entitled to relief on this basis, Miller must prove both that there was inaccurate

[2] The State argues Miller forfeited his right to raise this argument by failing to object to the allegedly inaccurate information during sentencing. However, the forfeiture rule is a rule of judicial administration, not jurisdiction. ***LaBeree v. LIRC***, 2010 WI App 148, ¶33, 330 Wis. 2d 101, 793 N.W.2d 77. In this case, we exercise our discretion to address the merits of Miller's inaccurate-information argument. *See* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702.

information before the court at sentencing and that the court actually relied on the inaccurate information when imposing sentence. *See* ***id.***, ¶26.

¶6 Miller has failed to show that any information before the circuit court at sentencing was inaccurate. Miller first argues the court erroneously believed he knew the victim was fourteen when she sent him sexually explicit pictures of herself. During its sentencing remarks, the court noted Miller "was somebody who was in his 20s communicating with this 14-year-old girl, and he was able to entice her to send some naked photographs of herself." This is an accurate statement of the facts alleged in the criminal complaint. The court did not state that Miller *knew* the victim was fourteen when he enticed her to send the pictures. Moreover, Miller concedes he maintained contact with the victim and retained the pictures she had sent even after he found out she was only fourteen.

¶7 Miller's next inaccurate-information argument is difficult to follow. In his postconviction motion, Miller argued his postsentencing diagnosis of "hypersexuality" was a new factor warranting sentence modification. He now contends that, in rejecting that argument, the circuit court inaccurately stated it was aware of his hypersexuality diagnosis at sentencing. He argues the court's "premising its discretion on the erroneous belief that it had discussed Miller's symptoms, including hypersexuality, and their role in the offense at sentencing constitutes an error of discretion."

¶8 This argument fails for three reasons. First, Miller asserts he had not been diagnosed with hypersexuality at the time of sentencing. Thus, he cannot claim that the circuit court relied on inaccurate information *at sentencing* by failing to consider a hypersexuality diagnosis. Second, contrary to Miller's suggestion, the circuit court never referred to hypersexuality in its decision

denying his postconviction motion. Rather, the court stated, "[Miller] indicates that he has bi-polar disorder and that evaluation at the prison since the sentencing has recognized this. However, this information and diagnosis was discussed and considered by the court in sentencing, so it's not a new factor." Third, the record item Miller cites does not establish that he has hypersexuality or that hypersexuality played a role in his offenses. Miller cites a prison form, entitled "Psychological Service Request," which he used to request "information on hypersexuality." On the "Response" portion of the form, a staff member wrote, "[C]ertainly appreciate your interest in topics relating to your criminal offense[,] but you will need to seek this type of information from the library and or other sources." This is a far cry from a diagnosis of hypersexuality or a formal determination that hypersexuality played a role in Miller's offenses.

¶9 Lastly, Miller argues the circuit court erroneously believed he would need two years of treatment in prison, when, in actuality, the treatment programming recommended by the Department of Corrections (DOC) takes only six to twelve months. At sentencing, the court explained its "reason" for sentencing Miller to four years' initial confinement, stating, "[k]nowing that he's got just over two years left in the prison system [on another sentence], this will give him, it being a concurrent sentence, a little bit more time in—in the prison system to avail himself of the treatment programming." The court further stated, "He does have significant issues that he needs to deal with, and I don't think that it's realistic to assume that that's going to be completed in two years."

¶10 Miller has not met his burden to show that the circuit court's belief his treatment would take at least two years was inaccurate. Miller cites two documents in support of his claim that he needs only six to twelve months of treatment. One of those documents, an inmate classification form, indicates Miller

was on a waiting list for both Alcohol and Other Drug Abuse (AODA) treatment and "Sex Offender Treatment SO-2." The second document—which appears to be a single page of an unidentified, longer document—describes SO-2 as "a short term treatment program, lasting six to 12 months." However, Miller has not explained how long it will take him to complete any other treatment programs besides SO-2, including AODA treatment. Moreover, Miller does not provide any information about how long he will be on the waiting list for SO-2 or AODA treatment. On this record, we cannot conclude the circuit court's belief regarding the time needed for treatment was inaccurate.

II. New factors

¶11 Miller next argues fifteen new factors warrant sentence modification. 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.

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The defendant bears the burden of demonstrating the existence of a new factor by clear and convincing evidence. ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451. Whether the defendant has met his or her burden to show the existence of a new factor is a question of law that we review independently. ***Harbor***, 333 Wis. 2d 53, ¶33.

¶12 "The existence of a new factor does not automatically entitle the defendant to sentence modification." ***Id.***, ¶37. If the circuit court determines a

new factor exists, it must then decide whether sentence modification is justified. ***Id.*** Whether to modify a sentence based on the existence of a new factor is committed to the circuit court's discretion. ***Id.***

¶13 Miller's first claimed new factor is that he was "found to be disabled due to mental illness by the SSA [Social Security Administration] during the period of the offense." In his postconviction motion, Miller asserted he was "found to meet the SSA's standard of disability as a result of … suffering from Bipolar, PTSD, and Identity Disorder" on three dates: November 26, 2006, December 8, 2010, and August 4, 2012. However, Miller's sentencing occurred in June 2013. Accordingly, the SSA's disability finding is not a new factor because it was known to Miller at the time of sentencing, but he failed to bring it to the circuit court's attention. *See* ***id.***, ¶40 (new factor is fact or set of facts not known to sentencing judge either because it was not in existence or was *unknowingly overlooked by all of the parties*). Moreover, during the sentencing hearing, Miller's attorney stated several times that Miller had been diagnosed with bipolar disorder, posttraumatic stress disorder, and identity disorder. Because the circuit court was aware Miller had been diagnosed with those disorders, the diagnoses themselves do not constitute new factors. *See* ***id.***, ¶57 ("[A]ny fact that was known to the court at the time of sentencing does not constitute a new factor.").

¶14 Miller next argues his "[b]ipolar symptoms of hypersexuality influencing his offense" is a new factor. However, as explained above, Miller has not met his burden to show that he has been diagnosed with hypersexuality or that it played a role in his offenses. *See supra*, ¶8. Consequently, Miller's alleged hypersexuality does not constitute a new factor.

¶15 Miller next identifies ten alleged new factors related to his rehabilitation:

- His "attempt to obtain resources and pursuit of counseling and mood stabilizing medications";
- His "pursuit of a support network";
- His "being [grateful] for an opportunity to and working his supervision caseplan";
- His "desire to and attempt to obtain an AODA assessment and treatment";
- His "agreement to a Community Corrections Employment Program referral";
- His "full time employment";
- His "pursuit to add goals to his supervision caseplan";
- His "pursuit of his education and acceptance into the Human Services program at North Central Technical College";
- His "payment towards legal obligations"; and
- His "volunteering in the community and considering doing more."

However, "courts of this state have repeatedly held that rehabilitation is not a 'new factor' for purposes of sentence modification." ***State v. Kluck***, 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). Further, in his reply brief, Miller concedes all of the factors listed above refer to "conduct Miller engaged in prior to committing the crime." As such, those factors were in existence at the time of sentencing. They were known to Miller, and therefore not unknowingly overlooked by all the

parties. *See* ***Harbor***, 333 Wis. 2d 53, ¶40. Consequently, they cannot, as a matter of law, constitute new factors warranting sentence modification.[3]

¶16 Miller's next claimed new factor is that he voluntarily reported to the police and assisted with their investigation, "even reaching out to the detective to provide assistance after recalling the victim[']s last name." This information is not a new factor because it was in existence at the time of sentencing and was known by both Miller and the State. *See* ***id.***

¶17 Miller also argues it is a new factor that "[t]he sentencing goals of mental health treatment and sex offender treatment … will not be met while he is incarcerated." We reject this argument because Miller has failed to establish by clear and convincing evidence that the treatment programs available to him in prison are inadequate to meet his needs. Miller contends the DOC's SO-2 sex offender treatment is insight-oriented treatment, and he is not a good candidate for that type of therapy. In a similar vein, Miller argues he will be "inhibited" by the "social setting" of SO-2 treatment, which is conducted in groups of ten to fifteen offenders. However, the only evidence Miller cites in support of these contentions is a 2004 report from Winnebago Mental Health Institute, which stated Miller was "a poor candidate for insight-oriented therapy" and was "quite shy and inhibited in social situations." A report authored over ten years ago is not sufficient to show that the insight-oriented, group therapy offered by the DOC is inadequate to meet Miller's current treatment needs. Moreover, Miller's concerns relate only to the

[3] In addition, many of the rehabilitative factors Miller cites are not new because the circuit court was aware of them at the time of sentencing. *See* ***State v. Harbor***, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828. For instance, the court knew Miller wanted to pursue counseling, was "working a full-time job," had "good support," and had been accepted into a technical college.

SO-2 treatment program. He does not explain whether there are other prison treatment programs available to him that are either not insight-oriented or not performed in group settings.

¶18 Miller also contends his mental health treatment goals will not be met in prison because the DOC "has refused to provide Miller with pharmacological treatment for his mental health issues." Again, the record item Miller cites does not support that assertion. Miller cites the presentence investigation report (PSI), in which Miller reported to the author that he had been taken off his medications by a counselor when he was transferred to Jackson Correctional Institution. However, the PSI author confirmed with prison staff that Miller "was on meds primarily for sleep and voluntarily went off them." Prison staff further reported Miller "chose to go off his medications and has not reported any mental health symptoms." Thus, the PSI does not support Miller's claim that the DOC has "refused" to provide him with pharmacological treatment. Furthermore, the PSI was presented to the circuit court prior to sentencing. Accordingly, information contained in it cannot constitute a new factor, as a matter of law. *See* ***id.***

¶19 Miller's final new-factor argument is that new information about his risk of reoffending justifies sentence modification. The COMPAS evaluation relied on by the circuit court at sentencing classified Miller as a medium risk to reoffend and a high risk for violent recidivism. Miller claims he has since been "found to be a low risk rating by the Program Review Committe[e]." However, Miller has not proven by clear and convincing evidence that his risk of reoffending is different from that set forth in the COMPAS evaluation. Miller cites page four

of an "Inmate Classification Report," pertaining to Miller's custody classification under WIS. ADMIN. CODE § DOC 302.04 (Dec. 2014).[4] "The purpose of a custody classification is to determine the appropriate placement of an inmate in order to regulate the supervision and movement of inmates among institutions, and between institutions and community programs." WIS. ADMIN. CODE § DOC 302.04(1). Miller does not explain why a recommendation regarding his custody classification within the prison system bears on his risk of reoffending once released from prison. Consequently, he has failed to demonstrate the new information was "highly relevant" to his sentence. *See* ***Harbor***, 333 Wis. 2d 53, ¶40.

¶20 Moreover, in the "Staff Appraisal and Recommendations" section of the classification report, the author, a prison social worker, stated Miller was "low in the risk rating and would normally be minimum appropriate except for the need of the sex offender treatment." The author noted Miller's current classification was "medium appropriate." A "medium" classification meant that Miller "require[d] moderate monitoring of his conduct, behavior and activities." WIS. ADMIN. CODE § DOC 302.05(2). Miller does not provide any evidence that his custody classification was actually changed to low risk based on the social worker's comments, or that the change was upheld on administrative review. *See* WIS. ADMIN. CODE §§ DOC 302.13, 302.18.

¶21 Miller also asserts the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R), an actuarial risk assessment, has predicted he has a "0%

[4] All references to WISCONSIN ADMIN. CODE ch. DOC 302 are to the December 2014 version.

chance to reoffend within a 6[-]year period." However, unlike the COMPAS evaluation, which estimated Miller's risk of reoffending in general and his risk of engaging in violent behavior, the MnSOST-R predicts an offender's risk of committing a future act of sexual violence. *See* ***State v. Richard***, 2014 WI App 28, ¶2, 353 Wis. 2d 219, 844 N.W.2d 370. Thus, Miller's MnSOST-R results are not necessarily inconsistent with the COMPAS evaluation.

¶22 In addition, contrary to Miller's assertion, the MnSOST-R did not determine that he personally had a zero percent chance of reoffending within six years. Instead, it determined his "score," based on certain traits, and then stated zero percent of studied convicts who shared his score were arrested for committing an act of sexual violence within six years of being released into society. Moreover, although zero percent of convicts who shared Miller's score were arrested for committing an act of sexual violence, some were arrested for nonsexual offenses. Further, actuarial instruments like the MnSOST-R underestimate the risk of sexually reoffending because they do not consider lifetime risk or offenses that fail to result in arrests or convictions. *See* ***State v. Sugden***, 2010 WI App 166, ¶¶23-25, 330 Wis. 2d 628, 795 N.W.2d 456. For these reasons, Miller's MnSOST-R results do not show by clear and convincing evidence that his risk of reoffending differs from the risk assessment set forth in the COMPAS evaluation.

III. Conditions of extended supervision

¶23 Miller next argues four conditions of his extended supervision are unconstitutional.[5] Whether a condition of extended supervision violates a defendant's constitutional rights is a question of law that we review independently. *See* ***State v. Stewart***, 2006 WI App 67, ¶12, 291 Wis. 2d 480, 713 N.W.2d 165.[6]

¶24 "Sentencing courts have wide discretion and may impose any conditions of probation or supervision that appear to be reasonable and appropriate." ***Id.***, ¶11. Conditions of extended supervision "may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation." ***Id.***, ¶12. "A condition is reasonably related to the person's rehabilitation 'if it assists the convicted individual in conforming his or her conduct to the law.'" ***State v. Rowan***, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854 (quoting ***State v. Oakley***, 2001 WI 103, ¶21, 245 Wis. 2d 447, 629 N.W.2d 200). "It is also appropriate for circuit courts to consider an end result of encouraging lawful conduct, and thus increased protection of the public, when determining what individualized probation conditions are appropriate for a particular person." ***Id.***

[5] The State argues Miller forfeited this argument by failing to object to the conditions at the time of sentencing. Even if Miller forfeited this issue, we exercise our discretion to address it on the merits. *See* ***Kaczmarski***, 320 Wis. 2d 811, ¶7.

[6] ***State v. Stewart***, 2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165, and some of the other cases cited in this section, deal with conditions of probation, rather than extended supervision. However, "authority relating to the propriety of conditions of probation is applicable to conditions of extended supervision." ***State v. Koenig***, 2003 WI App 12, ¶7 n.3, 259 Wis. 2d 833, 656 N.W.2d 499 (WI App 2002); *see also* ***State v. Rowan***, 2012 WI 60, ¶10, 341 Wis. 2d 281, 814 N.W.2d 854 ("While probation, parole and extended supervision are not the same in all respects, it is appropriate to analyze the condition of extended supervision at issue in this case under the … test we have used previously to analyze the constitutionality of probation conditions.").

¶25 Here, the circuit court ordered Miller "to not consume or possess any alcohol or illegal substances, to take medication only as prescribed by a physician and taken as directed, and to notify [his] agent of all prescriptions that are prescribed to him." Miller asserts this condition is unconstitutional because it is overly broad. He asserts it prevents him from using any over-the-counter medications, including toothpaste, without a prescription.

¶26 We reject this argument for two reasons. First, Miller does not identify any specific constitutional right that this condition allegedly violates. "We do not decide the validity of constitutional claims that are broadly stated but not specifically argued." ***State v. Nienhardt***, 196 Wis. 2d 161, 168, 537 N.W.2d 123 (Ct. App. 1995); *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

¶27 Second, it is clear from context that, when the circuit court stated Miller could not take medications except as prescribed by a physician, it was referring to prescription medications. The court never mentioned over-the-counter medications in its remarks. Instead, immediately before discussing medications, the court stated Miller was prohibited from consuming or possessing "illegal substances." The only reasonable reading of the court's subsequent statement that Miller could take medications only as prescribed by a physician is that the court was clarifying Miller was allowed to take prescription medications, the possession of which can be illegal without a valid prescription, as long as he had a valid prescription for them. *See* WIS. STAT. § 961.41(3g) (prohibiting possession of controlled substances without a valid prescription); *see also* ***State v. Lo***, 228 Wis. 2d 531, 538-39, 599 N.W.2d 659 (Ct. App. 1999) (supervision conditions interpreted to avoid absurd or unreasonable results and will not be construed in derogation of common sense).

¶28 In addition, the record shows that the extended supervision condition regarding alcohol and illegal substances is reasonably related to Miller's rehabilitation. *See* ***Stewart***, 291 Wis. 2d 480, ¶12. At the sentencing hearing, Miller stated his legal troubles have been "acutely affected by, if not a direct result of, [his] alcoholism." He further stated sobriety was "vital for [his] success, not only in society, but in life, period." In its sentencing remarks, the circuit court noted Miller had been "in treatment numerous times for alcohol and drug issues," but he continued to use drugs and alcohol. The court also noted Miller had multiple convictions for operating while intoxicated. On this record, it is clear the extended supervision condition prohibiting Miller from consuming or possessing alcohol and illegal substances is reasonably related to his rehabilitation and will increase protection of the public. *See* ***Rowan***, 341 Wis. 2d 281, ¶10.

¶29 Miller next challenges the extended supervision condition prohibiting him from having unsupervised contact with persons under eighteen without prior agent approval. Miller claims this condition violates his constitutionally protected parental rights, as well as other unspecified constitutional rights. We disagree.

¶30 The condition restricting Miller's contact with minors is not overly broad. It simply prohibits him from having contact with a minor unless the contact is supervised or his agent gives prior approval. Thus, if Miller wishes to have contact with a minor, there are two avenues available for him to do so. Miller's interpretation of the condition—namely, that it prevents him from leaving his home and going out into public because he might incidentally encounter minors at places like banks or grocery stores—is unreasonable. *See* ***Lo***, 228 Wis. 2d at 538-39 (supervision conditions interpreted to avoid absurd or unreasonable results).

¶31 The condition preventing unsupervised contact with minors without prior agent approval is also not overly broad when considered through the lens of Miller's constitutionally protected parental rights. Miller does not allege that he has any children. The condition does not prevent him from having children. At most, it prohibits him from having unsupervised contact with his future children without prior agent approval during his extended supervision. Wisconsin courts have upheld supervision conditions that are far more restrictive of defendants' parental rights than this. *See, e.g.*, ***Oakley***, 245 Wis. 2d 447, ¶¶6, 20 (upholding a probation condition prohibiting the defendant from having more children unless he could demonstrate he had the ability to support them and was supporting the children he already had).

¶32 Further, the condition restricting Miller's contact with minors is reasonably related to his rehabilitation. Miller was convicted of two counts of possession of child pornography and one count of exposing a child to a harmful description. The record contains printouts of online communications Miller had with an adult woman, L.Z. In those communications, Miller told L.Z. that, when he was twenty-one,[7] he had forceful anal and oral sex with a fifteen-year-old girl while she "cried silently."[8] Miller also told L.Z. he was "really disap[p]ointed" he would not be able to anally "rap[e]" her while her fourteen-year-old daughter watched and then do the same to L.Z.'s daughter. Miller later told L.Z. he would be "on fire with lust and desire" if he could rape "an extremely innocent virgin

[7] Miller was twenty-four years old when he committed the offenses charged in the instant case.

[8] Miller denied to police that he had sex with any underage person. He told police he described the incident with the fifteen-year-old girl "to [elicit] a response" from L.Z.

girl, the younger the better, as young as say 13 years old." Among other things, Miller wrote he would like to tie that girl to a chair, videotape the incident, and have her "bawling her eyes out begging to be let go." Miller also told L.Z. there was "a 14[-]year[-]old girl that wants [him] to come rape her." The fourteen-year-old victim in this case told police Miller "told her that he wanted to 'rape' her[,] which she stated scared her." On these facts, there can be no doubt that the condition limiting Miller's contact with minors is reasonably related to his rehabilitation, in that it will assist him in conforming his conduct to the law. *See* ***Rowan***, 341 Wis. 2d 281, ¶10. The condition will also increase protection of the public. *See* ***id.***

¶33 Miller also challenges the extended supervision condition prohibiting him from having computer or internet access without prior agent approval, including access to a cellphone with a camera or internet capability. Although Miller argues this condition is unconstitutional, he again fails to identify any specific constitutional right he believes it violates. His argument therefore fails for lack of specificity. *See* ***Nienhardt***, 196 Wis. 2d at 168; ***Pettit***, 171 Wis. 2d at 646.

¶34 In any event, we agree with the circuit court that the condition is not unconstitutional. Contrary to Miller's assertion, the condition is not overly broad. It does not completely prohibit Miller from using computers or the internet; it merely bans him from doing so without prior agent approval. *See* ***State v. Simonetto***, 2000 WI App 17, ¶8, 232 Wis. 2d 315, 606 N.W.2d 275 (WI App 1999) (concluding an exception for prior agent approval was one reason a supervision condition was not overly broad); ***State v. Miller***, 175 Wis. 2d 204, 212, 499 N.W.2d 215 (Ct. App. 1993) (same). Miller nevertheless argues the condition is overly broad because it prohibits him from "using modern cars,

microwaves, television sets, phones and even washing machines," all of which may incorporate computers. However, Miller's interpretation again defies common sense. *See* ***Lo***, 228 Wis. 2d at 538-39 (supervision conditions interpreted to avoid absurd or unreasonable results). Interpreting the condition to prevent Miller from using a car, microwave, television, or washing machine is simply not reasonable, particularly when we consider the manner in which Miller committed the instant offenses—via the internet through the use of a computer, and not through the use of a microwave, television, or washing machine.

¶35 In support of his overbreadth argument, Miller relies heavily on ***United States v. Voelker***, 489 F.3d 139 (3d Cir. 2007), a federal case that struck down a condition of supervised release restricting the defendant's computer usage. However, ***Voelker*** is distinguishable in several respects. In ***Voelker***, the district court sentenced the defendant to seventy-one months' incarceration, followed by a lifetime of supervised release. ***Id.*** at 143. As a condition of his supervised release, the court prohibited him from "accessing any computer equipment or any 'on-line' computer service at any location, including employment or education." ***Id.*** In contrast, the restriction on Miller's computer and internet use will last only seven years, and the circuit court specifically restricted Miller's access to computers, the internet, and cell phones, rather than using the more amorphous term "computer equipment." Moreover, unlike the condition in this case, the condition at issue in ***Voelker*** did not allow the defendant to use computers with agent approval. *See* ***id.*** Further, unlike the defendant in ***Voelker***, Miller contacted and exploited a minor over the internet. ***Voelker*** expressly distinguished another federal case that upheld a supervision condition restricting computer use, noting that, unlike Voelker, the defendant in that case had contacted and exploited a child using the internet. *See* ***id.*** at 145-46.

¶36 Perhaps most importantly, the ***Voelker*** court applied a test that is inconsistent with Wisconsin law. It determined the restriction at issue was invalid because it was not "narrowly tailored" and therefore failed to meet the requirements of a federal statute governing conditions of supervised release. ***Id.*** at 144-46. In Wisconsin, supervision conditions are not subject to strict scrutiny and, as such, need not be "narrowly tailored" to serve a compelling state interest. *See* ***Oakley***, 245 Wis. 2d 447, ¶16 & n.23; ***State v. Fisher***, 2005 WI App 175, ¶17, 285 Wis. 2d 433, 702 N.W.2d 56. ***Voelker*** therefore does not persuade us the condition of extended supervision limiting Miller's computer use is overly broad.[9]

¶37 The restriction on Miller's computer and internet use is also reasonably related to his rehabilitation. As noted above, Miller was convicted of possessing child pornography and exposing a child to a harmful description. It is undisputed he committed those crimes by engaging in sexually explicit communications over the internet with a minor and by receiving sexually explicit images and video of her. Miller retained the images and video after learning the victim was only fourteen. He also admitted to destroying evidence that was present on his cell phone. Given that Miller used a computer and the internet to commit the charged offenses, the condition restricting his computer and internet

[9] ***United States v. Voelker***, 489 F.3d 139 (3d Cir. 2007), is not binding on this court. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993) ("[D]eterminations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts."). In addition, we observe that several other federal courts have upheld conditions of supervised release prohibiting defendants from using computers and the internet without prior agent approval in cases involving child pornography. *See, e.g.*, ***United States v. Rearden***, 349 F.3d 608, 620-21 (9th Cir. 2003); ***United States v. Ristine***, 335 F.3d 692, 695-96 (8th Cir. 2003); ***United States v. Zinn***, 321 F.3d 1084, 1092-93 (11th Cir. 2003); ***United States v. Walser***, 275 F.3d 981, 987-88 (10th Cir. 2001).

usage is reasonably related to his rehabilitation and will increase protection of the public.[10] *See* ***Rowan***, 341 Wis. 2d 281, ¶10.

¶38 Miller lastly argues the extended supervision condition prohibiting him from possessing "sexually explicit materials" is unconstitutional. He argues this condition is unconstitutionally vague and violates his First Amendment rights to expression and to the free exercise of religion.

¶39 We reject Miller's vagueness argument. A condition of extended supervision must be sufficiently precise for the defendant to know what conduct is required of him or her. ***Lo***, 228 Wis. 2d at 535. In other words, a condition is unconstitutionally vague if it "either fails to afford proper notice of the prohibited conduct or fails to provide an objective standard for enforcement." ***Id.***

¶40 Miller asserts the term "sexually explicit materials" is insufficiently precise. Admittedly, the circuit court did not explain what it meant by that term. However, a supervision condition is not unconstitutionally vague if its terms may be "made reasonably certain by reference to other definable sources." ***Id.*** at 535-36 (quoting ***People v. Lopez***, 78 Cal. Rptr. 2d 66, 76 (Cal. Ct. App. 1998)). Here, the term "sexually explicit materials" can be defined by reference to the statutory definition of the related term "sexually explicit conduct." *See* ***State v. Koenig***, 2003 WI App 12, ¶¶12-14, 259 Wis. 2d 833, 656 N.W.2d 499 (consulting statutory definition of "dating relationship" to resolve vagueness challenge to a

[10] Miller also appears to argue this condition is unconstitutional because it grants too much discretion to his agent. However, this court rejected an identical argument in ***State v. Miller***, 175 Wis. 2d 204, 212, 499 N.W.2d 215 (Ct. App. 1993), stating, "It is sufficient for constitutional purposes that a criminal defendant has judicial protection from the arbitrary administration of a condition of probation."

condition requiring defendant to introduce anyone she was "dating" to her agent); ***Lo***, 228 Wis. 2d at 536-37 (consulting statutory definitions of "criminal gang member" and "criminal gang" to resolve vagueness challenge to a condition prohibiting contact with "gang members").

¶41 Under Wisconsin law,

> "Sexually explicit conduct" means actual or simulated:
>
> (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
>
> (b) Bestiality;
>
> (c) Masturbation;
>
> (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
>
> (e) Lewd exhibition of intimate parts.

WIS. STAT. § 948.01(7).[11] When considered in light of this definition, the supervision condition prohibiting Miller from possessing "sexually explicit materials" is not unconstitutionally vague. It prevents Miller from possessing materials that depict the conduct described in § 948.01(7). The statutory definition

[11] The term "sexually explicit conduct" is used in several Wisconsin statutes, including the two under which Miller was convicted. WISCONSIN STAT. § 948.12(1m) prohibits possession of a visual depiction of "a child engaged in sexually explicit conduct." WISCONSIN STAT. § 948.11(2)(am) prohibits communication of "a harmful description or narrative account to a child." The term "harmful description or narrative account" means "any explicit and detailed description or narrative account of … sexually explicit conduct … that, taken as a whole, is harmful to children." Sec. 948.11(1)(ag).

therefore provides Miller with fair notice of what conduct the condition prohibits and provides an objective standard for enforcement. *See* ***Lo***, 228 Wis. 2d at 535.

¶42 We also conclude the condition prohibiting Miller from possessing sexually explicit materials does not violate his First Amendment rights. Miller contends the condition is overbroad and should apply only to child pornography. However, the record shows that the violent sexual fantasies Miller communicated to L.Z. involved nonconsensual sex with both adults and children. In addition, Miller told police he thought the victim in this case was an adult when he received sexually explicit pictures and video of her. Despite that alleged belief, the images turned out to be child pornography. On these facts, the circuit court did not overreach by prohibiting Miller from possessing all sexually explicit materials, rather than limiting the prohibition to child pornography. *See* ***United States v. Daniels***, 541 F.3d 915, 927-28 (9th Cir. 2008) (upholding a supervision condition prohibiting the defendant, who was convicted of possessing child pornography, from possessing materials depicting or describing sexually explicit conduct, even though the condition would bar him from possessing legal adult pornography).

¶43 Miller also argues the condition prohibiting him from possessing sexually explicit materials is overbroad because it would prohibit him from possessing materials such as the Bible, the writings of Walt Whitman, and depictions of the Sistine Chapel. Again, however, we construe supervision conditions in a commonsense manner, so as to avoid absurd or unreasonable results. When construed reasonably, and in light of the statutory definition of "sexually explicit conduct," the condition at issue here plainly does not apply to the Bible, literature, or fine art. *See* ***United States v. Phipps***, 319 F.3d 177, 192-93 (5th Cir. 2003) (construing a supervision condition prohibiting possession of "sexually oriented or sexually stimulating materials" in a "commonsense way" so

as not to apply to newspapers or magazines containing lingerie advertisements or the Biblical "Song of Solomon").

¶44 The condition is also reasonably related to Miller's rehabilitation. Again, it is undisputed Miller engaged in sexually explicit communications over the internet with a fourteen-year-old girl, which involved receiving sexually explicit images and video of her. Miller retained the images on his computer even after he learned the victim was a minor. Miller and the victim also live streamed video of their "[p]rivate areas" to each other using Skype. In addition, Miller sent online messages to an adult woman describing violent sexual fantasies involving both underage girls and adult women. The condition prohibiting Miller from possessing sexually explicit materials is plainly related to preventing him from repeating the behavior underlying his convictions, and it will therefore both aid Miller's rehabilitation and increase protection of the public. *See* ***Rowan***, 341 Wis. 2d 281, ¶10. Accordingly, the condition is not unconstitutional.

IV. Sentencing discretion

¶45 Miller also argues the circuit court erroneously exercised its discretion with respect to the conditions of his extended supervision. "It is a well-settled principle of law that a circuit court exercises discretion at sentencing." ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We will affirm a sentence imposed by the circuit court if the record indicates the court "engaged in a process of reasoning based on legally relevant factors." ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695 (quoting ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984)).

¶46 A sentencing judge must exercise his or her discretion on a rational and explainable basis and must provide a statement detailing the reasons for the

particular sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶22. However, "[h]ow much explanation is necessary … will vary from case to case." ***Id.***, ¶39. Moreover, if a sentencing court fails to specifically explain the reasons for the sentence imposed, we will search the record to determine whether it supports the sentence. ***State v. Leighton***, 2000 WI App 156, ¶52, 237 Wis. 2d 709, 616 N.W.2d 126.

¶47 Here, the circuit court properly exercised its discretion with respect to the conditions of extended supervision. During its sentencing remarks, the court appropriately considered Miller's character, the gravity of his crimes, and the need to protect the public. *See* ***Fisher***, 285 Wis. 2d 433, ¶20. The court focused on the seriousness of child pornography offenses, the depravity of Miller's online communications, his continuing mental health issues, his continuing alcohol and drug problems, and his need for treatment.

¶48 The circuit court did not expressly tie these factors to the conditions of extended supervision that it imposed. However, it is not difficult to see how they are related. By prohibiting Miller from consuming alcohol and illegal substances, the court addressed the fact, conceded by Miller, that his criminal behavior was motivated or exacerbated by his drug and alcohol use. By restricting Miller's contact with minors and limiting his computer and internet use, the court attempted to close the avenues Miller used to commit the offenses charged in this case, thereby protecting the public and fostering Miller's rehabilitation. Similarly, the condition prohibiting Miller from possessing sexually explicit materials was clearly motivated by a desire to aid Miller's rehabilitation and protect the public.

The record therefore supports the extended supervision conditions imposed by the court.[12]

V. State's failure to oppose Miller's motion for sentence modification

¶49 Finally, Miller argues the circuit court should have granted his postconviction motion to modify his sentence because the State "made no objections to the relief sought." That assertion is false. Although the State did not file a written response to Miller's sentence modification motion, it appeared at the motion hearing and argued the court should not grant the motion. While the State did not raise all of the specific arguments it now raises on appeal, it did, as a general matter, object to "the relief sought."

¶50 More importantly, Miller does not cite any authority supporting his claim that a circuit court must grant a postconviction motion if the State fails to oppose it. Instead, citing ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979), Miller simply notes that unrefuted arguments are deemed conceded. However, ***Charolais*** held that arguments advanced *on appeal* are deemed conceded if they are not refuted *in the opposing party's appellate brief.* It did not hold that arguments unrefuted in the circuit court are deemed conceded on appeal. Moreover, it is well established

[12] Miller also contends, for various reasons, that the postconviction court erred by declining his request to modify the conditions of his extended supervision. However, our task on appeal is to determine whether the sentencing court erroneously exercised its discretion by imposing those conditions. In addition, we have already determined the challenged conditions are constitutional, which is a question of law that we review independently. *See* ***Stewart***, 291 Wis. 2d 480, ¶12. Accordingly, any alleged mistakes by the postconviction court in declining to modify the conditions of Miller's extended supervision are irrelevant and do not prevent us from affirming the order denying Miller's sentence modification motion. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (court of appeals "may affirm on grounds different than those relied on by the trial court").

that a respondent may raise any ground on appeal that would support the circuit court's ruling, even if that ground was not raised in the circuit court. *See* ***State v. Kiekhefer***, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997). We therefore reject Miller's argument that the circuit court was required to grant his postconviction motion due to the State's alleged failure to oppose it.

By the Court.—Order affirmed.

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