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**DISTRICT III**

August 3, 2021

To:

Hon. George L. Glonek  
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Douglas County Courthouse  
Electronic Notice

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Clerk of Circuit Court  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP923-CR

State of Wisconsin v. Eugene Wearing (L. C. No. 2014CF132)

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

**Summary disposition orders 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).**

Eugene Wearing, pro se, appeals from a judgment of conviction for three counts of sexual assault of a child, and an order denying his postconviction motion for resentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we affirm. *See* WIS. STAT. RULE 809.21 (2019-20).

Wearing was charged with ten criminal counts related to sexual assaults of a fifteen-year-old victim, sex trafficking of a child, and using a computer to facilitate child sex crimes. While the State charges were pending, Wearing was prosecuted in federal court for

human trafficking. After a stipulated bench trial, he was found guilty and sentenced to fifteen years in federal prison. The judgment of conviction in federal court noted that Wearing was out on bond at the time of his federal arrest and had pending cases in Douglas County, Wisconsin, and Minnesota “for conduct related and unrelated to the instant federal offense.” The federal court also stated, “In light of the Supreme Court ruling in *Setser v. United States*, [566 U.S. 231] 132 S.Ct. 1463 (2012), I have the authority to order how any pending sentence may run with the current federal sentence. I note under [the Bureau of Prisoners] policy if the defendant is later sentenced in state court, those sentences will run consecutively to the federal sentence.” The court reasoned, “I believe this is appropriate, as the state court can best determine the sentencing issues at hand in those case[s] and adjust for my sentence accordingly, as those courts see fit.”

In the present case, Wearing pleaded guilty to three counts of sexual assault of a child, and the remaining seven counts were dismissed and read in. The circuit court imposed three concurrent sentences consisting of ten years’ initial confinement and fifteen years’ extended supervision. The court then found that Wearing’s federal sentence for human trafficking was “a separate offense than actually engaging in sexual contact or intercourse with a child.” Because the federal sentence was imposed for a distinct and separate crime from child sexual assault, the court determined that it was not appropriate for it to impose its sentences for sexual assault of a child concurrently to the federal trafficking sentence. The court therefore ordered Wearing’s three concurrent sentences “run consecutive to the federal sentence.”

Wearing, by his postconviction counsel, filed a postconviction motion for resentencing. In his motion, Wearing alleged that the circuit court erroneously exercised its discretion by imposing excessive sentences. According to Wearing, “the overall course of conduct” related to the child sexual assault charges in state court were “identical in all respects” to the facts

underlying the federal human trafficking charge. The court denied the postconviction motion following a hearing, concluding it had thoroughly discussed the proper sentencing factors, and it further explained that the federal trafficking charge “was a separate offense from the convictions in state court” because the “crimes are different from one another.” Counsel then filed a no-merit report, and Wearing informed this court that he wanted to proceed pro se in order to file another postconviction motion. We entered an order dismissing the no-merit appeal and extending the time for Wearing to file a pro se postconviction motion.

Wearing, pro se, filed a second postconviction motion, again seeking resentencing on the same basis—that his concurrent sentences for the child sexual assaults were excessive because they were imposed consecutively to the federal sentence. The circuit court concluded that the motion raised the same issues previously decided and declined to take further action on the matter.

Whether a defendant’s claims are procedurally barred because they were, or could have been, previously litigated is a question of law we review de novo. *State ex rel. Washington v. State*, 2012 WI App 74, ¶27, 343 Wis. 2d 434, 819 N.W.2d 305. Whether a defendant alleges a sufficient reason for failing to bring all available claims in a prior postconviction motion is also a question of law subject to de novo review. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. The circuit court’s sentencing decision is subject to deference, stemming from its inherent advantage in considering the relevant sentencing factors and the demeanor of the defendant. *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. We follow a consistent and strong policy against interference with the circuit court’s sentencing discretion. *Id.*, ¶¶17-18.

As an initial matter, we assume without deciding that Wearing is not procedurally barred from raising his claim for resentencing. Following our order dismissing the no-merit appeal and the circuit court's determination that it would not address the merits of Wearing's second postconviction motion because it believed all the issues had been previously addressed, we received a letter from Wearing seeking clarification of the status of his case. Wearing believed his second postconviction motion raised new issues and, if not, Wearing asked us to construe his letter as a notice of appeal. We advised Wearing that our extension of time for him to file a pro se postconviction motion "did not address what issues Wearing could raise in such a motion." We further advised Wearing that it was his burden "to show that any issues he did raise were not procedurally barred, either because they had already been litigated or because he failed to show a good reason he had not raised them previously." Additionally, we stated that whether the circuit court decided the issues in his pro se motion "is an issue that can be reviewed on appeal, assuming a timely notice of appeal is filed." We expressly declined to construe Wearing's letter as a notice of appeal.<sup>1</sup>

Wearing contends on appeal that he was "[e]ncouraged" by our response to his letter that his issues "were not dealt with in the circuit court," and he thus submitted his present appeal. Given Wearing's pro se status, we acknowledge a potential for misunderstanding following the

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<sup>1</sup> We note in this regard that rather than appealing from the circuit court's order denying his first postconviction motion, Wearing's counsel filed a no-merit appeal. Wearing's current appeal is solely from the court's order denying his second, pro se, postconviction motion.

dismissal of his counsel's no-merit report, and our subsequent orders. Accordingly, we choose to address the merits of Wearing's appeal.<sup>2</sup>

We conclude the circuit court did not erroneously exercise its sentencing discretion when it imposed Wearing's child sexual assault counts consecutively to his federal sentence for human trafficking. The record on appeal clearly reveals that before imposing sentence, the court identified the proper sentencing factors, including the gravity of the offenses, Wearing's character, and the need to protect the public. The court also considered the sentencing factors in relation to the federal sentence.

The circuit court emphasized the severity of the crimes—i.e., sexual assaults of a fifteen-year-old girl by a fifty-three-year-old family friend who “manipulate[d],” “pressure[d],” and “ultimately engag[ed] in sexual contact with her” multiple times, resulting in a “long-lasting and devastating effect on the victim.” The court also found that Wearing's crimes posed a danger to the community. The court found confinement was necessary to protect the public from Wearing's “criminal activities,” to provide Wearing with treatment in a confined setting, and to avoid “undue depreciation of the seriousness of the offense.” In this regard, the court noted Wearing's forty-year criminal history, his failure to reform, and his significant substance abuse.

Contrary to Wearing's perception, the circuit court also considered and properly weighed mitigating factors, including that Wearing had “strong family support,” was educated, maintained employment, and expressed remorse. We specifically note in this regard that the

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<sup>2</sup> Wearing purports to raise an equal protection claim on appeal, but it is undeveloped and thus forfeited. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

court also considered the presentence investigation report and the submissions of counsel, which discussed Wearing having diagnoses of Parkinson's disease and mental illness.

The circuit court then considered the same sentencing factors to determine if the state sentence should run consecutively or concurrently to the federal human trafficking sentence. The court correctly determined that human trafficking was a "separate offense than actually engaging in sexual contact or intercourse with a child." The court therefore concluded it was not "appropriate" to impose the state sentence concurrently to the federal sentence because they were distinct and "different" crimes. The record makes clear that the court imposed its sentence after specifically explaining why it imposed the state sentences consecutively to the federal sentence.

Wearing may disagree with the circuit court's rationale for imposing the child sexual assault sentences consecutively to the federal human trafficking sentence, but he establishes no reversible error. The court did not erroneously exercise its sentencing discretion, and we therefore affirm the denial of Wearing's request for resentencing, as well as the judgment of conviction.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.  
WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*