COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP1500-CR
2009AP1501-CR

Cir. Ct. Nos. 2006CF3596
2006CF3597

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES J. DEHLER,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. James J. Dehler appeals from judgments of conviction entered after probation revocation and from orders denying his

postconviction motion in part.[1] Dehler claims he was denied the right to represent himself in sentencing-after-revocation proceedings and received ineffective assistance of counsel in those proceedings. Dehler also alleges the circuit court erroneously exercised its discretion when resentencing him. We reject these arguments and affirm the judgments and orders.

BACKGROUND

¶2 In July 2006, Dehler was housed in the Criminal Justice Facility while awaiting proceedings on pending misdemeanor charges not related to this appeal. On July 1, Dehler got into an argument with a corrections officer over the contents of his lunch tray. He asked to speak to a supervisor, sticking his arms out of his cell through the food slot in the door. According to Dehler, one of the deputies handcuffed his right arm to a railing outside the slot, then returned with a second officer, Deontay Earl. The deputy and Earl attempted to force Dehler's arms back into the cell. Earl sustained scratches from Dehler, for which he received medical attention.[2] Dehler was charged with battery by a prisoner for Earl's injuries.

¶3 On July 10, 2006, Dehler requested water so he could finish a meal. There was no water available in his cell because the plumbing to the cell had been shut off. Dehler held his empty milk carton outside the cell "to show them" he needed more liquid. When the request was not granted, Dehler filled the carton with toilet contents and threw the carton onto the floor outside his cell. Earl, on

[1] The judgment of conviction in Milwaukee County case No. 2006CF3596 was later amended to reflect 668 days' sentence credit rather than 637 days' credit.

[2] Officer Earl testified that Dehler was actually handcuffed to stop his scratching.

the lower-tier floor, felt something hit his head and arm. A yellow substance, believed to be urine, was on the floor outside Dehler's cell. Although Dehler would not have been able to see Earl on the floor below, he was charged with assault by a prisoner by expelling bodily fluids.

¶4 Dehler initially pled not guilty by reason of mental disease or defect. That plea was withdrawn after the initial doctor's report found no support for such a plea. However, Dehler's attorney, Stephen Sargent, requested another competency evaluation. Attorney Sargent told the court that Dehler had refused to meet with him. Further, Dehler had been placed in the "special needs" section of the jail, and counsel had observed what "appeared to be urine all over the floor" of the cell. Guards reported that Dehler had been naked, urinating and throwing the urine at them. The State joined in Attorney Sargent's request, given the already-pending bodily fluid charge. Dehler was again found to be competent to proceed to trial, and, at the second report return hearing, he did not wish to challenge the competency examination.

¶5 Dehler attempted to have counsel withdraw; the request was denied for multiple reasons. At a later date, counsel tendered two signed guilty plea forms. Under a plea agreement with the State, the two felony charges would be amended to three misdemeanors. However, the plea colloquy failed: Dehler told the court he was "forced to sign [the plea forms] … considering the circumstances." The court thus rejected the plea for lack of voluntariness and told the parties to prepare for jury selection following the lunch recess.

¶6 After the recess, Dehler waived a jury, and a court trial proceeded instead. The court found Dehler guilty on both counts, withheld sentence, and

placed Dehler on three years' probation. Approximately two weeks after his release from custody, Dehler's probation was revoked.

¶7 According to a January 8, 2008 docket entry, Dehler initially refused Office of the State Public Defender representation for the sentencing-after-revocation proceedings. On February 7, two attorneys, including Attorney Sargent, appeared in court to express doubt about Dehler's competency. The court ordered a competency evaluation; Attorney Sargent stated he would be the attorney of record.

¶8 Dehler refused to speak with Attorney Sargent or the competency examiner. The court issued a new order for a competency evaluation, also requesting a determination as to whether Dehler was competent to refuse medication or treatment. Two doctors prepared a joint evaluation, concluding Dehler was competent to proceed with sentencing. At an April 9, 2008 hearing, Dehler concurred with their conclusion.

¶9 Dehler then asked the court to let him proceed *pro se*. The court refused, stating it did not believe that was advisable given Dehler's background, information in the doctors' reports, and the observations the court had made earlier in the case. Dehler objected, but the court refused to remove Attorney Sargent.

¶10 The sentencing-after-revocation hearing proceeded on May 22, 2008. The State recommended a total of four and one-half years' initial confinement and five years' extended supervision. Attorney Sargent did not recommend a specific sentence but noted that Dehler had some treatment needs to be addressed. The court ultimately imposed a total of three and one-half years' initial confinement and five years' extended supervision, noting among other things that probation had been attempted and failed.

¶11 Dehler filed a postconviction motion. Except for an adjustment giving Dehler additional sentence credit, the motion was denied. Dehler appeals.[3] On appeal, Dehler makes three challenges—he claims that: (1) he was denied the right to represent himself at sentencing after revocation; (2) the circuit court erroneously exercised its discretion when imposing sentence; and (3) Attorney Sargent provided ineffective assistance.

DISCUSSION

I. Whether Dehler Was Denied the Right of Self-Representation

¶12 Criminal defendants have the seemingly contradictory rights to be represented by counsel and to represent themselves.[4] *See* ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). "'When a defendant seeks to proceed pro se, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se.'" ***State v. Ruszkiewicz***, 2000 WI App 125, ¶26, 237 Wis. 2d 441, 613 N.W.2d 893 (citations omitted).

¶13 If these conditions are not satisfied, the circuit court must deny the request to proceed *pro se*; to do otherwise deprives the defendant of the right to

[3] An appeal from the original judgments of conviction was never commenced. When sentence is withheld and a defendant is placed on probation, challenges to that conviction must be made at that time. *See* ***State v. Tobey***, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996). A postconviction motion for relief following imposition of sentence following probation revocation may only raise issues related to the sentence. *See* ***id.*** Thus, the current appeal is not concerned with the original adjudications of guilt.

[4] Of course, these rights generally cannot be exercised simultaneously. *See* ***State v. Debra A.E.***, 188 Wis. 2d 111, 137-38 n.27, 523 N.W.2d 727 (1994) (citing ***Moore v. State***, 83 Wis. 2d 285, 297-302, 265 N.W.2d 540 (1978)).

counsel. If both conditions are fulfilled, the court must allow the defendant to represent himself; to do otherwise deprives the defendant of the right to self-representation. Whether Dehler has been denied a constitutional right is a question of constitutional fact that we review as a question of law. *See* ***Klessig***, 211 Wis. 2d at 204.

¶14 When a defendant expresses a desire to proceed *pro se*, we expect the circuit court will engage him or her in a colloquy regarding waiver of the right to counsel. *See* ***id.*** at 206. Nonwaiver is presumed. ***Ruszkiewicz***, 237 Wis. 2d 441, ¶27. Here, the circuit court never engaged Dehler in a colloquy regarding waiver of the right to counsel because, after Dehler asked if he could proceed *pro se*, the court explained it did not believe Dehler was competent to do so.

¶15 Dehler thus contends that the court's failure to *first* conduct the waiver colloquy requires remand. No case stands for such a proposition. Although ***Klessig*** stated, "we mandate the use of a colloquy" when a defendant seeks to proceed *pro se*, the colloquy is required only to the extent necessary to later "prove knowing and voluntary waiver of the right to counsel." *See* ***id.***, 211 Wis. 2d at 206. However, because there must be a knowing, intelligent, and voluntary waiver of the right to counsel *and* competency before a defendant can proceed *pro se*, we see no reason to require the court to analyze the waiver element when it is clear the defendant cannot prevail on the competency element. *See*, *e.g.*, ***id.*** at 214 n.9.

¶16 We thus review whether the court made the required determination on Dehler's competency. *See* ***id.*** at 212. We also review whether the court's decision is properly supported. *See* ***Pickens v. State***, 96 Wis. 2d 549, 570, 292 N.W.2d 601 (1980) (competency decision will be upheld unless totally

unsupported by facts of record) *overruled in part on other grounds by* ***Klessig***, 211 Wis. 2d at 206; *see also* ***State v. Marquardt***, 2005 WI 157, ¶21, 286 Wis. 2d 204, 705 N.W.2d 878 ("clearly erroneous" standard of review applies to competency determinations).

¶17 In Wisconsin, the level of competency required for a defendant to represent himself is higher than the standard required for a defendant to stand trial. *See* ***Klessig***, 211 Wis. 2d at 212. The court is to consider factors such as a "'defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect [the defendant's] ability to communicate a possible defense to a jury.'" ***Id.*** (citation omitted). A competency determination should not be used to "prevent persons of average ability and intelligence from representing themselves unless 'a specific problem or disability can be identified[.]'" ***Id.*** (citing ***Pickens***, 96 Wis. 2d at 569).

¶18 At the doctors' report return hearing in April 2008, Dehler said to the court, "I would like to continue this myself without an attorney present." The court rejected the request, stating:

> Well, based upon the history and circumstances in this case, I don't believe that that would be wise on your part and I don't believe I could with the knowledge I have about the case and particularly about you allow you to represent yourself.…
>
> …
>
> I think based upon your educational background, your history at school, the observations I have made of you throughout this case and the information I have been provided within these reports, clearly causes me to conclude that I don't think that is it [sic] first advisable that you present yourself; *nor do I believe that you're really capable to do that effectively.*

(Emphasis added.) We conclude that the circuit court's determination of incompetency—which is what the court's statement is, despite lack of the word "incompetent"—is well-supported by the facts of record.

¶19 Two doctors prepared a joint report just before Dehler's sentencing-after-revocation hearing.[5] The report explains that Dehler has suffered from a seizure disorder almost since birth. In 1997, he had neurosurgery to remove a portion of his brain in an attempt to control his symptoms. The doctors opine that Dehler has "poor coping, problem-solving, and stress management skills." He has a tendency to fixate on subjects or topics, regardless of their actual overall significance. Further, the doctors noted, Dehler has deficits in "attention, concentration, working memory, judgment and planning." This report alone is sufficient for us to conclude the circuit court properly deemed Dehler incompetent to represent himself.

¶20 Additionally, despite Dehler's argument to the contrary and the language of ***Klessig***, the circuit court was not required to "make an express finding as to which specific problem or disability prevented [Dehler] from being able to meaningfully represent himself[,]" only that such problem or disability existed. *See* ***Marquardt***, 286 Wis. 2d 204, ¶68. If Dehler was not competent to represent himself, the circuit court was not permitted to discharge counsel and allow Dehler to proceed *pro se*.

[5] Robert Vickrey, M.D., gave his title as Forensic Psychiatry Fellow. Brad R.E. Smith, M.D., gave his title as Forensic Clinical Director, Mendota Mental Health Institute.

II. Sentencing

¶21 Dehler was sentenced to two years' initial confinement for the battery and one and one-half years' initial confinement for the assault. The sentences were set to run consecutively. Dehler complains the circuit court erroneously relied on a calculation of presentence credit in order to set his final sentence. He also complains the circuit court failed to explain why it imposed consecutive over concurrent sentences, and that it reached conclusions unsupported by the record.

A. Whether Dehler was Improperly Sentenced Based on Available Credit

¶22 Contrary to Dehler's assertions, the court is actually not always barred from considering available sentence credit when fashioning sentence. *See* ***State v. Fenz***, 2002 WI App 244, ¶¶10-12, 258 Wis. 2d 281, 653 N.W.2d 280. The court's first obligation is to fashion an *appropriate* sentence, which sometimes necessitates consideration of credit. ***Id.***, ¶11.

¶23 In any event, Dehler's claim that the court in this case calculated his sentence based on the available sentence credit is unsupported by the record. Dehler first asserts the court relied on the credit because the State's argument addressed his credit. However, we review the court's sentencing discretion, not the State's, and the State's comments do not become the court's rationale simply upon their utterance. Second, although the court interrupted Attorney Sargent's remarks after he commented on the credit, making a comment on the total available, the fact the court was aware of the credit when counsel raised it does not mean it was used to calculate the sentence. Finally, the court's observation at the end of sentencing, that the credit would "deal with one of the sentences," is only a statement of fact—it does not indicate the court used the credit to craft the

sentence. Instead, the record reveals that the court pronounced sentence after articulating its reasoning, then awarded the sentence credit. We discern no impropriety from this sequence.[6] *See* ***Klimas v. State***, 75 Wis. 2d 244, 252, 249 N.W.2d 285 (1977).

B. Whether the Circuit Court Sufficiently Explained the Sentence

¶24 Dehler asserts that the court was required to explicitly articulate why consecutive, rather than concurrent, sentences were imposed. *See* ***State v. Hall***, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41. However, ***Hall*** simply emphasizes defendants' well-settled right to have their sentences adequately explained on the record. *See* ***State v. Berggren***, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110. Here, the circuit court's rationale satisfactorily supports the sentence and accurately reflects appropriate sentencing concerns. *See* ***State v. Ziegler***, 2006 WI App 49, ¶¶21-25, 289 Wis. 2d 594, 712 N.W.2d 76.

¶25 The court considered Dehler's crime to be serious, noting that "correctional officers should not be exposed to what took place here" and that Dehler, who had been in the system previously, "should know better at this point." The court noted Dehler's epileptic and mental health issues, observing that "by way of a defense mechanism, I think he acts out the way he does." The court also commented that Dehler's health status "doesn't excuse it, however, and he's going to continue to get himself into trouble unless he adapts and acts in a way that

[6] Indeed, this case is not at all like ***Struzik v. State***, 90 Wis. 2d 357, 279 N.W.2d 922 (1979). There, the court gave Struzik a sentence of five years and fourteen days, then awarded fourteen days of sentence credit. ***Id.*** at 367. The supreme court noted that the "peculiar length of the sentence transparently reveals that the trial court added to the appropriate sentence the time already served, so that the sentence after the application of the credit would still constitute the sentence originally determined." ***Id.*** No such transparent peculiarity exists here.

conforms to the norms." The court further stated that Dehler had to recognize he must "abide by the rules and regulations that exist" in a confinement setting.

¶26 The court told Dehler it "was very sensitive to the circumstances[,]" which is why it initially withheld sentences and put Dehler on probation. However, that scenario failed, and, consequently, the court chose imprisonment for the sentence after revocation. The record reflects an appropriate exercise of sentencing discretion.[7]

C. Whether the Court Relied on Erroneous, Unsupported Conclusions

¶27 Dehler's third sentencing complaint is that the court relied on conclusions not supported by the record. This complaint is baseless. Dehler complains the court assumed, based on the probation revocation summary, that Dehler's probation failures were entirely his fault, even though Dehler suggests his agent played a role and implies that he has explanations for his violations.[8] However, Dehler declined to appear at the revocation hearing before the administrative law judge, foregoing the opportunity to provide explanations or evidence that countered the revocation summary. The administrative law judge concluded the agent's allegations in the memo had been proven, and, between the

[7] The circuit court also expressed a need to protect the community. Dehler takes issue with this: given that his crimes were against his jailers while he was confined in the jail, he appears to suggest that the "community" at large is not endangered. While community protection might not have been a significant factor at Dehler's original sentencing, the fact is that the sequence of events culminating in Dehler's revocation began when he was on probation in the community. The court observed that society expects there will be consequences for people who continue to cause trouble or reoffend and who refuse to follow the rules. The court's observations are accurate.

[8] For instance, Dehler claims he refused to sign the rules for probation because they required him to maintain employment, but his seizures prevent him from holding a job.

summary and the judge's opinion, there was sufficient evidence for the court to place responsibility for the probation failures squarely on Dehler.

III. Whether Dehler Received Ineffective Assistance of Counsel

¶28 Dehler has a laundry list of allegations against Attorney Sargent for his representation at the sentencing after revocation but argues facts relating only to two of them: that Attorney Sargent failed to object to inaccuracies in the probation revocation report and failed to object to the State's use of sentence credit in its argument. We limit ourselves to these two issues. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to review inadequately briefed issues and will not abandon its neutrality to develop a party's arguments).

¶29 Dehler shows no prejudice from either alleged error. As to the revocation report, the only specific error Dehler identifies is the agent's representation that he transported Dehler to a Salvation Army shelter: Dehler claims the agent did not transport him. Dehler suggests that if this error had been pointed out to the court, it would have given the probation memo less weight. However, none of the alleged probation violations for which Dehler was revoked has anything to do with how he did or did not get to the shelter.[9] Further, the administrative law judge had ruled that the alleged violations had been proven, in effect ratifying the substantive portions of the memo. It is implausible to suggest that the single identified error would undermine the memo's credibility.

[9] The four alleged violations were failure to follow direct orders from staff at the Milwaukee Secure Detention Facility (MSDF), arguing with MSDF staff in a disruptive manner, refusing to take medication, and creating a risk of injury to himself by attempting to hang himself in the MSDF showers.

¶30 As to Attorney Sargent's failure to object to the State's mention of sentence credit, we have already explained that the court's sentence was not fashioned based on available credit. Thus, the State's mention of credit and Attorney Sargent's failure to object to that comment are harmless errors, if errors at all. A failure to demonstrate prejudice is fatal to an ineffective assistance of counsel claim. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).