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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

February 27, 2024

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Nicquerion J. Hardaway 559449
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

Gregory Bates
Electronic Notice

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

2023AP1374-CRNM State of Wisconsin v. Nicquerion J. Hardaway
(L.C. # 2016CF5384)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Nicquerion J. Hardaway appeals a judgment of conviction entered after he pled guilty to first-degree reckless injury by use of a dangerous weapon and as a party to a crime. He also appeals an order denying his postconviction motion for additional sentence credit. Appellate counsel, Attorney Gregory Bates, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738

(1967), and WIS. STAT. RULE 809.32 (2021-22).¹ Hardaway did not file a response. We have considered the no-merit report, and we have conducted an independent review of the record as mandated by *Anders*. We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged in a criminal complaint that Hardaway made arrangements on October 17, 2016, to buy marijuana from M.J.C. According to M.J.C., Hardaway and M.J.C. agreed to meet in an alley to complete the sale, but Hardaway arrived at the meeting place accompanied by two other men. M.J.C. handed some marijuana to Hardaway and then someone—either Hardaway or one of his companions—grabbed M.J.C. and demanded that he empty his pockets. M.J.C. complied and then began to run away. As he fled, someone shot him in the leg.

The State next alleged that on November 26, 2016, Hardaway arranged to buy marijuana from M.S. at a spot in a Milwaukee park. Hardaway and a companion met M.S. at the designated spot, and Hardaway then produced a handgun and demanded M.S.’s property. When M.S. refused to comply, Hardaway shot M.S. in the hand and chest before Hardaway and his companion fled the scene. The State further alleged that Hardaway was a convicted felon at the time of both incidents. In this case, based on these allegations, the State charged Hardaway with two counts of first-degree reckless injury by use of a dangerous weapon and as a party to a crime; possessing a firearm as a felon and as a repeat offender; armed robbery as a party to a crime; and attempted armed robbery.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The five charges proceeded to a jury trial, but on the second day of the trial, Hardaway cut off his GPS tracking device and absconded. Police took him into custody some weeks later. The State subsequently filed two additional criminal cases against him, one charging him with bail jumping and criminal damage to property, and the other charging him with battery by a prisoner.

Hardaway decided to resolve all of the charges in all of the cases pending against him with a plea agreement. Pursuant to its terms, he pled guilty to one count of first-degree reckless injury by use of a dangerous weapon, as a party to a crime. The State agreed to request a prison sentence without making a recommendation as to the length of that sentence. The State also moved to dismiss and read in all of the remaining charges pending against Hardaway. The circuit court accepted Hardaway's guilty plea in the instant case, and dismissed the other matters.

At sentencing, Hardaway faced a thirty-year term of imprisonment and a \$100,000 fine. *See* WIS. STAT. §§ 940.23(1)(a), 939.50(3)(d), 939.63(1)(b), 939.05 (2015-16). The circuit court imposed a fourteen-year term of imprisonment bifurcated as ten years of initial confinement and four years of extended supervision, and the circuit court ordered Hardaway to serve the sentence consecutive to his sentence in an unrelated case from Lincoln County. The circuit court awarded Hardaway the 906 days of sentence credit that he requested and set restitution at zero.

In postconviction proceedings, Hardaway moved for an order granting him fourteen additional days of sentence credit.² The circuit court denied the motion. The circuit court found

² Counsel filed the postconviction motion after we dismissed an earlier no-merit appeal in this matter, *State v. Hardaway*, No. 2022AP374-CRNM, unpublished op. and order (WI App June 23, 2023). During the course of that proceeding, we asked appellate counsel to file a supplemental no-merit report addressing why Hardaway could not pursue an arguably meritorious claim for additional sentence credit. Appellate counsel elected instead to file a notice voluntarily dismissing the appeal and a motion to extend the time for filing a postconviction motion in the circuit court. We granted that relief.

that the specifics of the original credit calculation were incorrect in some respects, but that Hardaway had received all of the credit to which he was entitled.

We first consider whether Hardaway could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty plea was not entered knowingly, intelligently, and voluntarily. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The record shows that at the outset of the plea hearing, the circuit court established that Hardaway had signed a plea questionnaire and waiver of rights form and addendum, that he had reviewed the form and attachments with his trial counsel, and that he understood them. *See State v. Hoppe*, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (providing that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The circuit court went on to conduct a colloquy with Hardaway that complied with the circuit court’s obligations when accepting a plea other than not guilty. *See id.*, ¶18; *see also* WIS. STAT. § 971.08. The record—including the plea questionnaire and waiver of rights form and addendum; the attached jury instructions describing the elements of the crime to which Hardaway pled guilty; and the plea hearing transcript—demonstrates that Hardaway entered his guilty plea knowingly, intelligently, and voluntarily. We agree with appellate counsel that further pursuit of a challenge to the validity of Hardaway’s guilty plea would lack arguable merit.

We also agree with appellate counsel’s conclusion that Hardaway could not mount an arguably meritorious claim that the circuit court erroneously exercised its sentencing discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (explaining that a circuit court exercises its discretion at sentencing and appellate “review is limited to determining if discretion was erroneously exercised”). The circuit court indicated that the primary sentencing goal was Hardaway’s rehabilitation, and the circuit court discussed the factors that it viewed as

relevant to achieving that goal. *See id.*, ¶¶41-43. The circuit court’s discussion included consideration of the mandatory sentencing factors, namely, “the gravity of the offense, the character of the defendant, and the need to protect the public.” *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentence imposed was well within the maximum allowed by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and was not so excessive as to shock public sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, a challenge to the circuit court’s exercise of sentencing discretion would be frivolous within the meaning of *Anders*.

Appellate counsel last examines whether Hardaway could pursue an arguably meritorious challenge to the postconviction order denying sentence credit in addition to the 906 days granted at sentencing. We agree with appellate counsel’s conclusion that Hardaway could not do so.

Pursuant to WIS. STAT. § 973.155, a convicted offender is entitled to credit for his or her time in custody in connection with the course of conduct for which sentence is imposed. To support a claim for fourteen additional days of sentence credit here, Hardaway showed that, at sentencing, his trial counsel filed a pretrial incarceration credit request form describing various periods of time totaling 906 days that Hardaway spent in custody before his sentencing. Hardaway then showed that the credit request form did not take into account a fourteen-day period during which he remained in custody after signing a signature bond.

The circuit court agreed with Hardaway that it had awarded credit as calculated on the credit request form, and the circuit court acknowledged that the calculation did not include the fourteen days in custody that Hardaway identified in his postconviction motion. The circuit court denied relief, however, after reviewing an additional document filed during the pendency of the

postconviction proceeding, namely, a Revocation Order and Warrant, arising out of Hardaway's Lincoln County conviction.³ The document reveals that Hardaway received credit against the Lincoln County sentence for a 263-day period for which he also requested and received credit at sentencing in the instant case. The circuit court explained in the postconviction order that Hardaway was not entitled to the dual credit he received because his sentence in the instant case is consecutive to the Lincoln County sentence. *See State v. Boetcher*, 144 Wis. 2d 86, 100-01, 423 N.W.2d 533 (1988). The circuit court concluded that because it had awarded Hardaway more, not less, credit than he was entitled to receive, additional credit was not warranted.

Although the circuit court's postconviction order included a determination of the amount of excess credit reflected in the 906-day sentence credit award, the circuit court declined to act on its own motion to vacate the excess credit. The record does not reveal any arguably meritorious basis on which Hardaway could challenge the postconviction credit calculation, nor does the record suggest any arguable benefit that Hardaway could obtain by challenging the circuit court's refusal to act on its own motion to reduce the sentence credit award. *Cf. Ford Motor Credit Co. v. Mills*, 142 Wis. 2d 215, 217, 418 N.W.2d 14 (Ct. App. 1987) (holding that a person may not appeal from a judgment unless aggrieved by it). Further pursuit of this matter would lack arguable merit.

³ The Revocation Order and Warrant shows that the Division of Hearings and Appeals revoked Hardaway's extended supervision in the Lincoln County case on June 14, 2017. However, the Revocation Order and Warrant was first filed in the record of the instant matter in June 2023, a few days after Hardaway filed his postconviction motion for sentence credit. Although the circuit court's postconviction order does not discuss the procedure leading up to the filing of the Revocation Order and Warrant, the record indicates that the circuit court took judicial notice of that document. No basis exists to challenge the circuit court's action in doing so. *See* WIS. STAT. § 902.01(3) (providing that a judge may take judicial notice, whether requested or not, of a fact not subject to reasonable dispute); *see also Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶11, 313 Wis. 2d 411, 756 N.W.2d 667 (holding that a court may take judicial notice of matters of record in government files).

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction and the postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of any further representation of Nicquerion J. Hardaway in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals