OFFICE OF THE CLERK
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 IV

March 14, 2024

To:

Hon. Nicholas J. Brazeau Jr.
Circuit Court Judge
Electronic Notice

Kimberly Stimac
Clerk of Circuit Court
Wood County Courthouse
Electronic Notice

Thomas J. Erickson
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Darryl E. Mathews 685885
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2022AP935-CRNM State of Wisconsin v. Darryl E. Mathews (L.C. 2020CF283)

Before Kloppenburg, P.J., Graham, and Taylor, 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).

Darryl Mathews appeals a judgment of conviction for conspiracy to possess more than 50 grams of methamphetamine with intent to deliver, and false imprisonment as a party to a crime. Attorney Thomas Erickson has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22).[1] The no-merit report addresses whether there would be arguable merit to a challenge to Mathews' pleas or sentencing. Mathews has responded to the report, and Attorney Erickson has filed a supplemental no-merit report. Having reviewed the no-

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

merit report, response, and supplemental no-merit report, as well as having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we agree that there are no issues of arguable merit. We summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Mathews with multiple drug-related offenses, one count of false imprisonment by use of a dangerous weapon as a party to a crime, and one count of aggravated battery by use of a dangerous weapon and as a party to a crime. Pursuant to a plea agreement, Mathews pled guilty to conspiracy to possess more than 50 grams of methamphetamine with intent to deliver, and false imprisonment as a party to a crime but without the dangerous weapon enhancer. One count of conspiracy to possess more than 50 grams of heroin with intent to deliver was dismissed outright, and the remaining counts were dismissed and read in for sentencing purposes. Additionally, in exchange for Mathews' pleas, the State agreed to cap its sentencing recommendation to a total of nine years of initial confinement and eight years of extended supervision, concurrent to a sentence Mathews was then serving. The circuit court followed the State's sentencing recommendation. The court also found Mathews ineligible for early release programming.

The no-merit report addresses whether there would be arguable merit to a challenge to the validity of Mathews' pleas. We agree with counsel's assessment that a challenge to Mathews' pleas would be wholly frivolous. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Mathews signed, satisfied the court's mandatory duties to personally address

Mathews and determine information such as Mathews' understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering his pleas, and the direct consequences of his pleas. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. A valid guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court's exercise of its sentencing discretion. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Mathews was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offenses, Mathews' rehabilitative needs, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Mathews faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)). We discern no non-frivolous basis to challenge the court's exercise of its sentencing discretion.

Mathews filed a response raising three additional issues. First, Mathews asserts that the circuit court erred by denying him eligibility for early release programming. Mathews argues that he is statutorily eligible for the programs and that the court therefore lacked authority to find him ineligible. He contends that, because a circuit court does not have the authority to specify the conditions of a defendant's confinement, *see* ***State v. Gibbons***, 71 Wis. 2d 94, 99, 237 N.W.2d 33 (1976), the court lacked authority to determine that he could not participate in early release programming. Mathews contends that circuit courts are obligated to determine whether defendants are statutorily eligible for early release programming and simply inform defendants if they are eligible. He points out that the statutes provide that, when imposing sentence, "the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible" for early release programming. *See* WIS. STAT. § 973.01(3g), (3m). Mathews contends that, under the statutes, a circuit court has no discretion to find a defendant ineligible for programming if the defendant is statutorily eligible.

Mathews appears to acknowledge this court's holding in ***State v. Lehman***, 2004 WI App 59, ¶16, 270 Wis. 2d 695, 677 N.W.2d 644, that a circuit court has discretion to find a defendant ineligible for programming even if the defendant meets the statutory criteria for eligibility. Mathews argues, however, that ***Lehman*** is contrary to the prior ruling in ***Gibbons*** that a circuit court may not place conditions on the confinement portion of a defendant's sentence.

Second, and in the alternative, Mathews contends that his trial counsel was ineffective by failing to properly object to the circuit court's decision as to Mathews' eligibility for programming. Mathews acknowledges that his trial counsel asked the court to reconsider its decision, but argues that counsel was deficient by failing to "make a formal objection." He

argues that, had his counsel formally objected and cited ***Gibbons***, the court would have had to find Mathews eligible for programming.

Third, Mathews contends that the circuit court erred by imposing DNA surcharges when Mathews has paid a DNA surcharge previously.

No-merit counsel filed a supplemental no-merit report asserting that the circuit court properly exercised its discretion by finding Mathews ineligible for programming. The report concludes that the court had the discretion to determine program eligibility under the statutes, which provide that the court shall determine eligibility "as part of its sentencing discretion." *See* WIS. STAT. § 973.01(3g) and (3m). The supplemental no-merit report asserts that the court specifically considered the early release programs and declined to make Mathews eligible. It also notes that Mathews' trial counsel asked the court to reconsider its decision as to program eligibility, and the court denied the request, explaining that if it had decided to make Mathews eligible for programming it would have imposed two additional years of initial confinement. The court determined that the longer sentence and program eligibility would not "make sense" in this case. The supplemental no-merit report concludes that Mathews' trial counsel was not ineffective because counsel did ask the court to reconsider its decision, and also because there is no arguable merit to a challenge to the court's decision.

The supplemental no-merit report also concludes that there would be no arguable merit to a challenge to the imposition of DNA surcharges. It points out that, under WIS. STAT. § 973.046(1r), a court "shall" impose a $250 surcharge for each felony conviction.

We conclude that there would be no arguable merit to any issue raised in Mathews' no-merit response. First, it is well established that a circuit court may deny a defendant eligibility

for programming even if the defendant meets all of the statutory criteria for eligibility. *See* ***Lehman***, 270 Wis. 2d 695, ¶16. That holding is not contrary to ***Gibbons***, which held that a circuit court does not have the authority to impose conditions on the initial confinement portion of a sentence. The circuit court's determination of eligibility for early release programming, which is expressly made part of the circuit court's exercise of its sentencing discretion by statute, does not impose conditions on the initial confinement portion of the sentence. The circuit court exercises its discretion to determine eligibility, but the placement into programming and the administration of the programs is left to the Department of Corrections. *See* ***Gibbons***, 71 Wis. 2d at 99 ("Under the Wisconsin penal scheme, the Department of Health and Social Services is charged with the responsibility of running the state prison. Any claim of continuing control the [circuit] court may have ceases when a defendant is sentenced and the sentence is executed.").

Second, the circuit court properly exercised its discretion by denying Mathews program eligibility on the basis that the court intended Mathews to serve the full length of initial confinement that it imposed. Mathews' trial counsel asked the court to reconsider its decision, and the court declined to do so. We discern no arguable merit to a claim that trial counsel was ineffective for failing to make a "formal objection" or failing to argue that the circuit court was required to find Mathews eligible for programming under ***Gibbons***. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) ("[T]rial counsel was not ineffective for failing or refusing to pursue feckless arguments.").

Finally, we discern no arguable merit to a challenge to the DNA surcharges imposed by the circuit court. In ***State v. Williams***, 2018 WI 59, ¶¶26, 29, 381 Wis. 2d 661, 912 N.W.2d 373, our supreme court explained that under the mandatory surcharge statute, WIS. STAT. § 973.046,

"a defendant pays a surcharge for every conviction irrespective of whether [the defendant's] DNA profile already exists in the databank and whether [the defendant] submits only one DNA sample."

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders***.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas Erickson is relieved of any further representation of Darryl Mathews in this matter pursuant to 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