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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

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To:

Hon. Rebecca F. Dallet
Circuit Court Judge, Br. 40
821 W. State St
Milwaukee, WI 53233

Urszula Tempska
Law Office of Urszula Tempska
P.O. Box 11213
Shorewood, WI 53211-0213

John Barrett
Clerk of Circuit Court
821 W. State Street, Rm. 114
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Bobbie J. Moore 331207
Taycheedah Corr. Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2013AP382-CRNM State of Wisconsin v. Bobbie J. Moore (L.C. # 2011CF2864)

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

Bobbie J. Moore pled guilty to one count of second-degree reckless homicide. The circuit court imposed an eighteen-year term of imprisonment, bifurcated as ten years of initial confinement and eight years of extended supervision. The state public defender appointed Urszula Tempska, Esq., to represent Moore in postconviction and appellate proceedings. Tempska filed a postconviction motion on Moore's behalf, challenging the sentence on various grounds. The circuit court rejected the claims. Tempska next filed a notice of appeal and a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Moore filed a response. This court has considered the no-merit report and Moore's response,

and we have independently reviewed the Record. We conclude that no arguably meritorious issues exist for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Moore and her boyfriend, Shelton Atterberry, were arguing on June 16, 2011. Moore told police that Atterberry punched her during the argument, and she "ran into the kitchen and grabbed a knife." Moore said that Atterberry hit her again, and she stabbed him. The complaint further reflects that a medical examiner conducted an autopsy and determined that Atterberry died from a single stab wound that passed through his lung and into his aorta.

The State charged Moore with first-degree reckless homicide by use of a dangerous weapon. She disputed the charge for some time, but eventually she decided to resolve the case with a plea bargain.

We first consider whether Moore could pursue a meritorious challenge to her guilty plea. At the start of the plea proceeding, the State filed an amended information charging Moore with second-degree reckless homicide. The State then described the terms of the parties' plea bargain, explaining that Moore would plead guilty to the amended charge, and the State would recommend "substantial prison confinement" and would request restitution. The State was free to "comment [at sentencing] on the facts of the case, the defendant's record, and any factors the [S]tate believes mitigate[] or aggravate[] the offense." Additionally, the victim's family members were free to make sentencing recommendations. Moore said that she understood the terms of the plea bargain.

The circuit court explained that Moore faced a twenty-five year term of imprisonment and a $100,000 fine upon conviction of the amended charge. *See* WIS. STAT. §§ 940.06(1),

939.50(3)(d). The circuit court told Moore that it could impose the maximum statutory penalties if it chose to do so and that it was not bound by the terms of the plea bargain or by any party's sentencing recommendation. Moore said that she understood. The circuit court explained the elements of the crime on the Record. Moore said that she had discussed the elements with her lawyer and that she understood them.

The Record contains a signed guilty plea questionnaire and waiver of rights form with a signed addendum. The questionnaire reflects that Moore understood the charge she faced, the rights she waived by pleading guilty, and the penalties that the circuit court could impose. The addendum reflects Moore's acknowledgment that by pleading guilty she would give up her opportunity to raise defenses, to challenge the validity of her arrest, and to seek suppression of her statements and other evidence. Moore told the circuit court that she had reviewed the questionnaire and the addendum with her lawyer and that she understood them.

The circuit court told Moore that by pleading guilty she would give up the constitutional rights listed on the guilty plea questionnaire, and the circuit court reviewed her rights. Moore said that she understood. Additionally, the circuit court explained that, by pleading guilty, Moore would give up her defenses to the charge. Moore said that she understood. Moore told the circuit court that she had not been promised anything to induce her guilty plea and that she had not been threatened.

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. §971.08(1)(b). Here, Moore confirmed on the Record that she had read the criminal complaint and that the facts in it were true. Additionally, Moore's trial lawyer and the State agreed that the circuit court could rely on

the facts alleged in the criminal complaint. The circuit court found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 138, 624 N.W.2d 363, 369.

The Record reflects that Moore entered her guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266–272, 389 N.W.2d 12, 23–25 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 180, 765 N.W.2d 794, 803 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The Record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider an issue discussed by both Tempska and Moore in their submissions to this court, namely, whether Moore could mount an arguably meritorious challenge to the order denying her postconviction motion for relief from her sentence. We agree with Tempska that such a challenge would lack arguable merit.

Moore alleged in her postconviction motion that the circuit court relied on inaccurate information about her relationship with Atterberry when imposing sentence. "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, 185, 717 N.W.2d 1, 3. To earn resentencing based on a violation of this right, a defendant has the burden to '"show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing.'" ***Id.***, 2006 WI 66, ¶17, 291 Wis. 2d at 188, 717 N.W.2d at 5 (citation omitted). On appeal, our review is *de novo*. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

At sentencing, Moore submitted information to the circuit court in support of her position that she should be treated leniently because she endured years of physical and verbal abuse from

Atterberry before she stabbed him during the couple's final altercation. By contrast, Atterberry's relatives, including the mother of two of his children, sought a maximum sentence for Moore. Atterberry's bereaved family members portrayed Moore as an aggressor in the domestic violence that marked her lengthy relationship with Atterberry, and they offered information that he had complained over the years about Moore's violence and threats against him. In postconviction proceedings, Moore argued that she was entitled to resentencing because the victim's friends and family provided "misinformation" that "was much less firmly supported by the [R]ecord than Moore's account." She further asserted that the State's sentencing arguments were incorrect because the State drew on information provided by the victim's family. The circuit court rejected Moore's contentions, explaining that it "understood ... that there were competing inferences to be drawn about the relationship between the victim and the defendant as well as the incident that occurred, which is so often the situation in domestic violence cases."

We agree with Tempska that Moore cannot pursue an arguably meritorious claim on appeal that she was sentenced based on inaccurate information. Although Moore offered information in her sentencing presentation to show that Atterberry was violent during the relationship, this information did not prove that his complaints about Moore's behavior were untrue. Additionally, the question of whether the circuit court actually relied on incorrect information at sentencing turns on "whether the [circuit] court gave 'explicit attention' or 'specific consideration' to [the information], so that the misinformation 'formed part of the basis for the sentence.'" ***Tiepelman***, 2006 WI 66, ¶14, 291 Wis. 2d at 187, 717 N.W.2d at 5 (citation omitted). Here, Moore argued that the circuit court received inaccurate information about her long relationship with Atterberry, but the Record supports the circuit court's determination that "[a]t sentencing, the court focused primarily on the crime itself and [Moore's] choice to use a

knife when there were other options available to her to diffuse the argument with the victim." Tempska notes—and the Record confirms—that "Moore has always admitted, and taken responsibility for, choosing to get and use the knife." Thus, as Tempska maintains, Moore cannot pursue a claim that the circuit court relied on incorrect information, because "the [circuit] court did not actually rely on [allegedly] incorrect information in sentencing her."

In Moore's response to the no-merit report, Moore asserts that the circuit court "misconstrued what happen[ed]" on the day of the homicide and incorrectly believed Atterberry "was packing his clothes and was tryin[g] to leave but [Moore] fuel[ed] the ar[gu]ing" instead of allowing him to leave the home. Moore complains now that the circuit court incorrectly summarized the events and that Atterberry's "clothes were already packed sittin[g] on the bed when [she] returned home.... He was there destroying [her] house." The circuit court's description of the events, however, simply echoed the information that Moore provided to the author of the presentence investigation report, specifically, that when Moore returned to her home on the day of the crime, "[t]he victim was packing up his things and so she confronted him about the damage [in the home] and asked why he could not just pack his things and leave." The circuit court asked the parties about corrections they wished to make to the presentence investigation report, and neither Moore nor her trial lawyer disputed the description of the events leading up to the stabbing. "Where the facts stated in a presentence report are not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider them." ***State v. Mosely***, 201 Wis. 2d 36, 46, 547 N.W.2d 806, 810 (Ct. App. 1996).

Moore also points to the State's assertion at sentencing that nothing she submitted showed she was hospitalized for any injuries that Atterberry allegedly inflicted upon her, and she asserts that in fact she "did go to the hospital in 2003" after Atterberry bit her. The materials

Moore filed at sentencing revealed that she "went to Mount Sinai on August 1, 2003 and they gave [her] some stitch tape and antibiotic cream." Her description of being treated with tape and cream does not reveal any inaccuracies in the State's sentencing remarks. More importantly, however, the sentencing court explicitly recognized that Atterberry "used violence against [] Moore" and said nothing to suggest that Moore never required medical treatment as a result of that violence. Because Moore does not show any actual reliance on allegedly inaccurate information about her medical treatment, the information cannot support further postconviction or appellate challenges to her sentence. *See* ***Tiepelman***, 2006 WI 66, ¶14, 291 Wis. 2d at 187, 717 N.W.2d at 5.

Moore next complains in her response that the assistant district attorney with primary responsibility for her prosecution, Dennis Stingl, Esq., was unavailable on the day of sentencing and that a different assistant district attorney appeared instead. She contends that "the case should [ha]ve been rescheduled" to permit the State to appear by Stingl. Moore, however, did not move to adjourn the sentencing hearing, so she would be required to pursue this issue on appeal as a claim of ineffective assistance of counsel. *See* ***State v. Jones,*** 2010 WI App 133, ¶25, 329 Wis. 2d 498, 513, 791 N.W.2d 390, 398 (in the absence of an objection, we address claims of error under the ineffective-assistance-of-counsel rubric).

To establish ineffective assistance of counsel, a defendant must show that the lawyer's representation was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." ***Id.*** at 694. Moore fails to show that the sentencing proceeding would have unfolded any differently if Stingl had appeared on behalf of the State. Stingl responded to her postconviction motion and noted that the arguments presented at sentencing "accurately and fully developed the State's position" in a manner that was "consistent with [Stingl's] view of the relevant facts, evidence and law."[1] Accordingly, no arguably meritorious claim exists that Moore's trial lawyer was prejudicially deficient by failing to seek an adjournment of the sentencing because Stingl was unavailable.

We next consider whether Moore could present an arguably meritorious claim that the circuit court erroneously exercised its sentencing discretion. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 231, 688 N.W.2d 20, 23. The circuit court must consider the primary sentencing factors of "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, 606, 712 N.W.2d 76, 82. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606–607, 712 N.W.2d at 82.

[1] Stingl offered these comments in response to assertions in Moore's postconviction motion that the prosecutor who appeared at sentencing "was unfamiliar with the case" and made arguments that lacked evidentiary support.

The sentencing court must also "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207. Our review of a defendant's sentence encompasses "the entire record, including any postconviction proceedings and ... the totality of the court's remarks." ***Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d at 233, 688 N.W.2d at 24.

Moore contended in her postconviction motion that the circuit court erroneously exercised its sentencing discretion. She pointed to the information that she offered in support of her contention that she should receive a three-year term of imprisonment because Atterberry physically abused her during their relationship, and she asserted that the sentencing court should have given this information greater weight when fashioning her sentence. The circuit court rejected her arguments, concluding that it appropriately considered the sentencing factors.

Further pursuit of a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit. The sentencing court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d at 237, 688 N.W.2d at 26. The sentencing court properly exercised that discretion here.

The circuit court described the homicide as a "tragedy" and as a "really serious offense." Turning to Moore's character, the circuit court observed that Moore had only a limited criminal record, that it was "not terrible," and that it consisted of property offenses committed some years previously. The circuit court noted Moore's history of substance abuse and her struggles to complete the steps required of her when she lost custody of her children and sought to have them

returned to her care. The circuit court placed primary emphasis on the need to protect the public, emphasizing that Moore made poor decisions and that her choices resulted in the loss of a life. While the sentencing court took into account that Atterberry had hit Moore and "us[ed] fists" on the day of the crime, the circuit court was particularly concerned that Moore "r[an] into the kitchen and g[o]t a knife" when "there [were] other options, other things" to do. The circuit court observed that "there [wa]s a phone. There's people around..... [But] the choice that Ms. Moore made that day was to get the knife and to use the knife."

The circuit court selected punishment and rehabilitation as the primary goals of sentencing. The circuit court explained that the homicide called for a "serious consequence" that would sufficiently punish Moore for her actions. The circuit court also observed that she required rehabilitation to assist her with managing her anger and with controlling her use of alcohol and drugs.

The Record shows that the circuit court identified the various factors that it considered in fashioning the sentence. The factors were proper and relevant. Although the circuit court did not balance the sentencing factors in the manner that Moore had hoped, the choice of how to balance the relevant factors lies with the circuit court. *See* ***State v. Berggren,*** 2009 WI App 82, ¶49, 320 Wis. 2d 209, 241, 769 N.W.2d 110, 125.

Further, the sentence imposed was not unduly harsh. A sentence is unduly harsh "'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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 651, 648 N.W.2d 507, 517 (citation omitted). The penalty selected here was

well below the maximum permitted by law. A sentence well within the maximum lawful sentence is presumptively not unduly harsh. *See* ***id.***, 2002 WI App 106, ¶32, 255 Wis. 2d at 651, 648 N.W.2d at 517. We cannot say that the sentence imposed in this case is disproportionate or shocking. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411, 417–418 (Ct. App. 1983).

Last, we conclude that Moore could not mount an arguably meritorious challenge to the order that she pay $2,564 as restitution. Moore stipulated to the amount of restitution ordered, and she is bound by her concession. *Cf.* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759, 762 (Ct. App. 1989) (defendant may not attack a disposition that he or she affirmatively approved). An appellate challenge to the restitution order would lack arguable merit.

Based on our independent review of the Record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Urszula Tempska, Esq., is relieved of any further representation of Bobbie J. Moore on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals