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September 19, 2013

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

2013AP965-CRNM State of Wisconsin v. Lamar Antwan Washington
(L.C. #2012CF427)

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

Lamar Antwan Washington pled guilty to one count of possessing with intent to deliver more than 2500 grams but not more than 10,000 grams of tetrahydrocannabinols (marijuana). *See* WIS. STAT. § 961.41(1m)(h)4. (2011-12).[1] The circuit court imposed a forty-two-month term

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

of imprisonment, bifurcated as eighteen months of initial confinement and twenty-four months of extended supervision. He appeals.

Appellate counsel, Carl W. Chesshir, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Washington did not file a response to the no-merit report, but he earlier filed several unsuccessful *pro se* postconviction motions seeking sentence modification. This court has considered the no-merit report and independently reviewed the record, including the proceedings to address Washington's *pro se* postconviction motions. We conclude that no arguably meritorious appellate issues exist, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, representatives of a local parcel delivery service contacted police and reported receipt of a suspicious package. Detective Chris Ederesinghe determined that the package contained approximately nine pounds of marijuana. Police arrested Washington after he accepted delivery of the package. Washington then consented to a search of his home, where police found, among other items, a quantity of a substance that appeared to be marijuana, a loaded handgun, and two digital gram scales. The State charged Washington with possessing with intent to deliver more than 2500 grams but not more than 10,000 grams of marijuana. Washington disputed the charge for some time, but he decided to accept a plea bargain after the circuit court denied his motion to suppress the evidence found when police searched his home.

We first conclude that Washington could not mount an arguably meritorious challenge to his guilty plea. At the outset of the plea proceeding, the State described the terms of the plea bargain: Washington would plead guilty as charged, and the State would recommend that the

circuit court impose a bifurcated sentence comprised of eighteen months of initial confinement and twenty-four months of extended supervision. Washington confirmed that the State correctly described the terms of the plea bargain.

The circuit court explained to Washington that it was not bound by the terms of the plea bargain or the recommendations of the parties. The circuit court described the maximum penalties that it could impose upon conviction of the charge, and the circuit court told Washington that it was free to impose the penalties that it deemed appropriate. Washington said he understood.

The record includes a signed guilty plea questionnaire and waiver of rights form and an attached signed addendum. Washington told the circuit court that he had reviewed the guilty plea questionnaire and the addendum with his trial counsel and that he understood them. The questionnaire reflects that Washington had not been promised anything outside of the terms of the plea agreement to induce his guilty plea and that he had not been threatened. Washington confirmed that he was entering his guilty plea freely and voluntarily and that he did so because he was guilty of the offense.

The circuit court explained to Washington that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire, and the circuit court reviewed those rights. Washington said that he understood. The circuit court also explained that by pleading guilty, Washington would give up the defenses and claims that are listed on the signed addendum to the guilty plea questionnaire, and the circuit court reviewed those defenses and claims with Washington. Washington said that he understood. The circuit court reviewed the elements of the offense on the record, and Washington said that he understood the elements.

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, Washington told the circuit court that the facts in the criminal complaint were true. The circuit court found a factual basis for the guilty plea.

The record reflects that Washington entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (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.

Washington could not mount an arguably meritorious challenge to the order denying his motion to suppress evidence.[2] Washington moved to suppress the evidence found in his home on the grounds that he did not consent to the search, and, alternatively, that any consent he gave was invalid because it followed his unlawful arrest. At the suppression hearing, the State presented testimony from two police officers, and Washington testified on his own behalf.

Detective Steve Dettman testified that, on December 15, 2011, he put on a FedEx uniform and delivered a box to the main entrance serving the three apartments at 7504 West Hampton Avenue, Milwaukee, Wisconsin. A man subsequently identified as Washington answered the door. Dettman said that he had a package addressed to M.D.S., LLC, in apartment

[2] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10).

number two, and Washington responded that the package was for him. Dettman handed the box to Washington, and three police officers who had concealed themselves nearby then emerged and arrested Washington.

Ederesinghe testified next. He said that he tested the contents of a suspicious package received by a local package delivery company. He determined that the contents contained marijuana. According to Ederesinghe, he and several other officers then accompanied Dettman, who was wearing a FedEx uniform, to 7504 West Hampton Avenue. There, the police arrested Washington after he accepted the package. Ederesinghe testified that Washington was "nervous" but "very cooperative." He acknowledged that he lived in the building, in apartment number three, and he agreed that the officers could search the unit. Ederesinghe told the circuit court that, upon searching the apartment, the officers found a gun, some marijuana, and "receipts and tracking numbers affiliated with the parcel" that Dettman had just delivered.

Washington then testified. He said that in December 2011 he lived at 7504 West Hampton Avenue, in apartment number three. He told the circuit court that when he opened the door of the building on December 15, 2011, the person he saw was not wearing a FedEx uniform but was "dressed in plain clothes." He said that the person asked if he lived in the apartment "upstairs," then tried to push a box into his hands while three police officers rushed in to arrest him. Washington said that the police did not ask if they could search his home, and he did not consent to a search.

Washington admitted that police found documents in his apartment related to the box of marijuana and that some of these documents had been ripped to pieces and were in his trash. He explained that "there were ladies" living in apartment number two who had attended a party at

his home the previous night, and, "for all [he] kn[e]w," they had brought the documents to his home, torn them up, and put them in his trash.

Consent to search is a well-established exception to the requirement that police conduct searches pursuant to a search warrant. ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385. The consent exception is satisfied when consent is given in fact, and the consent given is voluntary. *See* ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430. The burden of proof rests with the State. *See* ***id.***, ¶32. Whether consent was voluntarily given is a question of constitutional fact to which we apply a two-step standard of review. *See* ***id.***, ¶23. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, and we independently apply those historical facts to constitutional principles. *See* ***id.***

Here, the circuit court found that the officers testified credibly and that Washington was "wholly incredible." The circuit court further found that the officers advised Washington that he was under arrest and asked for permission to search his home. The circuit court went on to find that the police were not threatening or intimidating, that Washington cooperated with the officers, and that he agreed to the search without objection or resistance.

The circuit court's factual findings are supported by the testimony of the police officers and are not clearly erroneous. Washington disputed the officers' version of events, but the circuit court is "the sole judge of the credibility of the witnesses testifying at the suppression hearing." ***State v. Harrell***, 2010 WI App 132, ¶8, 329 Wis. 2d 480, 791 N.W.2d 677. The totality of the circumstances supports the circuit court's determination that Washington voluntarily consented to the search of his home. Although Washington was in custody at the time, '"the fact of custody alone has never been enough in itself to demonstrate a coerced ...

consent to search.'" ***State Hartwig***, 2007 WI App 160, ¶10, 302 Wis. 2d 678, 735 N.W.2d 597 (citation omitted, ellipsis in ***Hartwig***).

An unlawful arrest, however, may vitiate the arrested person's consent to search. *See* ***State v. Phillips***, 218 Wis. 2d 180, 204-05, 577 N.W.2d 794 (1998). Washington asked the circuit court to conclude that the police arrested him without probable cause.

A police officer has probable cause to arrest when he or she has information "sufficient to warrant a reasonable person to conclude that the defendant has committed or is in the process of committing an offense. The information available to the officer must lead a reasonable police officer to believe that 'guilt is more than a possibility.'" ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

The circuit court concluded here that the police had probable cause to arrest Washington because the officers "had a box of marijuana that was being shipped to ... M.D.S., LLC." Washington "answered the door.... [H]e was advised that the package was for a business." Washington "said that [the package] was for him, and he was expecting the package, and he took it." We agree that these facts present "more than a possibility" that Washington knowingly possessed contraband. *See* ***id.*** Further appellate proceedings to challenge the order denying the motion to suppress would be frivolous within the meaning of ***Anders***.

We next consider whether Washington could raise an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "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, 688 N.W.2d 20. 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, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id***. The circuit 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***, 276 Wis. 2d 224, ¶16.

The sentencing court must "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***, 270 Wis. 2d 535, ¶40.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court determined that Washington committed a serious offense that involved a substantial quantity of an illegal substance. The circuit court considered the need to protect the public, pointing out that the flow of illegal drugs into a community exacts a heavy toll on the children and families who live there. The circuit court placed greatest emphasis, however, on Washington's character. While the circuit acknowledged that he had no prior record and that he had taken steps towards self-improvement by enrolling in school and securing employment while awaiting resolution of the charge against him, the circuit court noted that he had admitted a past history of drug dealing and marijuana use. Further, the circuit court weighed heavily against him the testimony that he gave at the suppression hearing, and the circuit court reiterated its conclusions that his testimony was "just incredible" and that he had lied under oath.

The circuit court selected punishment and deterrence as the primary sentencing objectives. The circuit court explained that it viewed punishment as essential, and the circuit court further explained that it intended to "send a message to [Washington] and then to others in the community that this type of drug trafficking cannot be tolerated."

The circuit court appropriately considered probation as the first alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The circuit court concluded however, that probation would unduly depreciate the seriousness of the offense. Further, the circuit court emphasized that Washington had substantial rehabilitative needs, and the circuit court expressed its hope that he would take advantage of the opportunities in prison for education, training, and self-improvement.

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, 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, 648 N.W.2d 507 (citation omitted). The penalty selected here was well below the maximum penalties of twelve years and six months of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 961.41(1m)(h)4., 939.50(3)(f). A sentence well within the maximum sentence permitted by statute is presumptively not unduly harsh. *See* ***Grindemann***, 255 Wis. 2d 632, ¶32. We cannot say that the sentence imposed in this case is disproportionate or shocking.

The circuit court declared Washington eligible for the Challenge Incarceration Program but ineligible for the Wisconsin Substance Abuse Program.[3] *See* WIS. STAT. §§ 302.045, 302.05. An inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* §§ 302.045(3m)(b)1., 302.05(3)(c)2. At sentencing, a circuit court must decide, as part of its exercise of discretion, whether the defendant is eligible to participate in these programs. *See* WIS. STAT. §§ 973.01(3m), 973.01(3g). When deciding eligibility for the Substance Abuse Program, the circuit court is not required to make "completely separate findings ... so long as the overall sentencing rationale also justifies the [eligibility] determination." *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. A challenge to the circuit court's discretionary decision denying Washington eligibility for the Substance Abuse Program would lack arguable merit.

The Wisconsin Substance Abuse Program and the Challenge Incarceration Program both encompass substance abuse treatment, but the programs are not identical. *See* WIS. STAT. §§ 302.05, 302.045. Unlike the Wisconsin Substance Abuse Program, the Challenge Incarceration Program includes statutory mandates for exercise, manual labor, personal development counseling, and military drill and ceremony. *See* §§ 302.05, 302.045(1). When

[3] The Wisconsin Substance Abuse Program was formerly called the Wisconsin Earned Release Program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. Both names are used to refer to the program in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05, 973.01(3g). The circuit court referred to the program by its former name during the sentencing proceeding here. For the sake of clarity, we refer to the program by its current name.

declaring Washington eligible for the Challenge Incarceration Program but ineligible for the Substance Abuse Program, the circuit court emphasized the difficulty of completing the Challenge Incarceration Program. The circuit court's concerns about Washington's character reflect why the circuit court declared him ineligible to participate in the Substance Abuse Program and tied his eligibility for early release from prison to completion of a program that emphasizes personal development and rigorous self-discipline.

The record reveals no arguably meritorious basis for Washington to challenge the circuit court order that he pay a DNA surcharge. A sentencing court must order a defendant convicted of a felony to provide a DNA sample pursuant to WIS. STAT. § 973.047. Pursuant to WIS. STAT. § 973.046(1g), however, the circuit court has discretion to impose a DNA surcharge when sentencing a defendant for any felony that does not involve certain sex crimes. *See* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. Here, the circuit court explained that Washington had not previously donated a DNA sample, and the circuit court determined that he must therefore pay the DNA surcharge, because "it's appropriate that [Washington] bear the cost of collecting and analyzing the sample." The cost of collecting and analyzing a DNA specimen "is a proper consideration in imposing a surcharge—if a surcharge has not previously been paid based on those same costs." ***State v Simonis***, 2012 WI App 84, ¶23, 343 Wis. 2d 663, 819 N.W.2d 328. Accordingly, a challenge to the DNA surcharge would be frivolous within the meaning of ***Anders***.

We next consider whether the circuit court properly denied Washington's several *pro se* postconviction motions asking the circuit court to declare him eligible to participate in the

Substance Abuse Program.[4] In support of the motions, Washington asserted that he wanted to participate in a substance abuse treatment program, but he believed that his high blood pressure and other medical conditions would preclude his admission to the Challenge Incarceration Program, the only program for which the circuit court had found him eligible. The motions were, in effect, claims that a new factor warranted sentence modification. A challenge to the orders denying the motions would lack arguable merit.

A new factor is '"a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Here, as the circuit court pointed out, Department of Corrections personnel had not evaluated Washington for admission to the Challenge Incarceration Program when he moved to modify his sentence on the ground that he might be found unfit to participate in that program. Accordingly, he did not support his motions with any new facts showing his ineligibility for that program.

Washington also moved to modify his sentence based on his progress in prison. The circuit court did not err by denying sentence modification on this basis. "While encouraging rehabilitation is laudable, it is not the purpose of sentence modification. The purpose of sentence modification is to correct 'unjust sentences.'" ***State v. Kluck***, 210 Wis. 2d 1, 8-9, 563 N.W.2d

[4] The circuit court's order denying Washington's first motion for sentence modification also directed entry of a corrected judgment of conviction to reflect Washington's eligibility for the Challenge Incarceration Program.

468 (1997) (citation omitted). Further pursuit of sentence modification based on Washington's alleged rehabilitation would lack arguable merit.

No other issues warrant discussion. Based on our independent review of the record, 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 and the postconviction orders denying sentence modification are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of any further representation of Lamar Antwan Washington on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals