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

2013AP420-CRNM State of Wisconsin v. Marquis D. Hart (L.C. #2011CF297)
2013AP636-CRNM State of Wisconsin v. Marquis D. Hart (L.C. #2011CF296)

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

Marquis D. Hart appeals from judgments of conviction, entered upon his guilty pleas, on one count of possession of cocaine as a second or subsequent offense and one count of delivery of less than one gram of cocaine as a repeater. Appellate counsel, Hannah B. Schieber, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Hart has filed a response, and counsel submitted a supplemental report.

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

Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Hart's response, we conclude that there is no issue of arguable merit that could be pursued on appeal. Subject to correction of a scrivener's error upon remittitur, we therefore summarily affirm the judgments.

On July 3, 2011, a Lake Geneva police officer observed Hart at the top of a parking structure, shouting obscenities with thirty to fifty people nearby on the sidewalk below. As the officer approached, Hart began to curse and yell at her, approaching her in a physically threatening way. The officer handcuffed Hart and arrested him for disorderly conduct. The officer noticed a plastic bag sticking out of Hart's pocket and, during a search incident to arrest, recovered a baggie containing a single pill of clonazepam and a bag containing a substance that tested positive for cocaine. In Walworth County Circuit Court case No. 2011CF296 (case 296), the State charged Hart with one count of possession of cocaine as a second or subsequent offense and one count of disorderly conduct as a repeater.

In light of the filing of those charges, the Walworth County Sheriff referred additional potential charges to the district attorney for prosecution. In Walworth County Circuit Court case No. 2011CF297 (case 297), Hart was charged with two counts of delivery of less than one gram of cocaine, both as a repeater, based on information from a confidential informant regarding two controlled drug buys in June 2011. Later, another referral was sent to the district attorney, recommending Hart be charged with another disorderly conduct count for a fight in the jail.

On March 30, 2012, Hart entered pleas pursuant to a plea agreement. He intended to enter no-contest pleas, but the circuit court explained that it only accepted guilty pleas. After consulting with counsel, Hart agreed to continue. In exchange for his guilty pleas to the

possession count in case 296 and one delivery count in case 297, the State would dismiss and read in the other two charges and would not pursue the disorderly conduct referral. The parties also made a joint sentencing recommendation totaling four years' initial confinement and four years' extended supervision, consecutive to a revocation sentence out of Milwaukee County. The circuit court accepted the guilty pleas and imposed the jointly recommended sentence of one and one-half years' initial confinement and two years' extended supervision for the possession, plus two and one-half years' initial confinement and two years' extended supervision for the delivery, to be served consecutively to each other and the revocation sentence.

Counsel identifies two potential issues: whether there is any arguable basis for a challenge to the validity of Hart's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. Hart complains that the circuit court "forced" guilty pleas when he wanted to plead no contest, and he has several additional complaints that categorize as an ineffective-assistance claim. Ultimately, however, we conclude that there are no pursuable issues of arguable merit.

There is no arguable basis for challenging whether Hart's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Hart completed a plea questionnaire and waiver of rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The circuit court also engaged Hart in a plea colloquy. *See* WIS. STAT. § 971.08; *see also* ***Bangert***, 131 Wis. 2d at 260, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. This is not to say, however, that the colloquy was ideal.

In ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, the supreme court summarized the duties required of a circuit court when accepting a plea in order to ensure that the plea passes constitutional muster. A plea questionnaire and waiver of rights form may be used by the circuit court in aid of its discharge of those duties, but the plea questionnaire may not substitute for a substantive, personal circuit court colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-31, 317 Wis. 2d 161, 765 N.W.2d 794.

First, we note with approval that the circuit court properly ascertained whether a factual basis for the pleas existed, *see* WIS. STAT. § 971.08(1)(b), and it did inform Hart of the constitutional rights being surrendered with his pleas, *see* ***Hampton***, 274 Wis. 2d 379, ¶24.[2] The circuit court did not personally ascertain Hart's level of education or comprehension, but the questionnaire contains that information, *see* ***Moederndorfer***, 141 Wis. 2d at 827-28, and the record of Hart's interactions with the circuit court suggest a generally sufficient understanding of the proceedings. The circuit court also inquired whether any threats had been made to secure Hart's pleas, *see* ***Bangert***, 131 Wis. 2d at 262, though we note that counsel answered on Hart's behalf.

The remainder of the circuit court's colloquy, though, is either inadequate or nonexistent. The circuit court did not establish whether Hart understood the nature of the offenses to which he was pleading. *See* ***id.***; *see also* WIS. STAT. § 971.08(1)(a). The closest the circuit court comes to such an inquiry is asking Hart whether he reviewed the plea questionnaire with counsel and

[2] Appellate counsel points out that the circuit court did not explain that Hart was giving up the right to testify on his own behalf, but she notes that this right was listed on the plea questionnaire form. This slight omission does not give us pause; not "every small deviation from the circuit court's duties" requires an evidentiary hearing. *See* ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64.

whether he understood it. However, the plea questionnaire does not directly list the elements of the offenses but, rather, only indicates that the jury instructions for the two charges to which Hart was pleading were attached. The circuit court did not acknowledge the instructions' presence, much less confirm whether Hart had also reviewed and understood them. The circuit court also failed to establish whether Hart understood that the circuit court was not bound by the parties' plea agreement, *see* ***Hampton***, 274 Wis. 2d 379, ¶20; failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c); and failed to explain to Hart the nature of read-in offenses, *see* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835.[3] Despite these deficiencies, appellate counsel indicates there is no arguable merit to a challenge to the plea, and we are compelled to agree.

First, to bring a motion to withdraw a plea because of a faulty colloquy, the defendant must file a motion that both identifies the deficiency *and* alleges that the defendant did not know or understand the omitted information. *See* ***Hoppe***, 317 Wis. 2d 161, ¶4 n.5; *see also* ***Bangert***, 131 Wis. 2d at 274. Counsel explains that based on the record and her conversations with Hart, she could not satisfactorily allege that he failed to understand the nature of the offenses to which he pled.

Second, even if the circuit court fails to ensure that the defendant understands that it is not bound by the terms of any agreement between the parties, if, as here, the circuit court follows the recommendation, then there is no manifest injustice warranting plea withdrawal. *See* ***State v. James Lee Johnson***, 2012 WI App 21, ¶¶10-13, 339 Wis. 2d 421, 811 N.W.2d 441. Further,

[3] We note, however, that ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835, only suggests that a circuit court provide such an explanation.

any error in failing to caution the defendant that the circuit court is not bound by the parties' sentencing recommendation is harmless if the circuit court follows the recommendation. *See* ***id.***, ¶¶14-15.

Third, to withdraw a plea based on a lack of the required immigration warning, Hart would have to show that his plea was likely to result in his deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶¶4, 25, 253 Wis. 2d 173, 646 N.W.2d 1. As counsel points out, there is nothing in the record to suggest Hart is anything other than a United States citizen.

Finally, any error in failing to discuss the nature of read-ins was harmless. The State is barred from prosecuting the dismissed charges, and no restitution was ordered for the read-in offenses. Accordingly, despite the rather lacking colloquy, we agree with counsel that there is no arguable merit to a claim that the pleas were not knowing, intelligent, and voluntary.

Hart complains in his response that the circuit court would not accept his no-contest pleas, forcing him to enter guilty pleas. The circuit court explained this was because no-contest pleas "have resulted in people on their way out of the courtroom saying see, I told you I was not guilty." Hart contends that "after researching in the law library in prison," he is convinced there is a difference between no-contest and guilty pleas.

Whether to accept or reject a plea is a matter for the circuit court's discretion. *See* ***State v. Waldman***, 57 Wis. 2d 234, 237, 203 N.W.2d 691 (1973); *see also* WIS. STAT. § 971.06(1)(c) (no-contest plea subject to court approval). A defendant does not have a constitutional right to have his plea accepted by the court. *See* ***North Carolina v. Alford***, 400 U.S. 25, 38 n.11 (1970). When accepted by the circuit court, a no-contest plea "constitutes an implied confession of guilt for the purposes of the case to support a judgment of conviction and in that respect *is equivalent*

to a plea of guilty." ***Lee v. State Bd. of Dental Examiners***, 29 Wis. 2d 330, 334, 139 N.W.2d 61 (1966) (emphasis added). The primary difference between a guilty and a no-contest plea is simply that a guilty plea may be used against a defendant in a subsequent or collateral civil action. *See* ***id.*** As best we can tell from the record, there would be no basis for a civil action on these convictions. Accordingly, because a no-contest plea and a guilty plea are effectively identical here, because the circuit court explained why it would not accept a no-contest plea, and because Hart affirmatively indicated that he wanted to proceed despite this condition, there are no arguably meritorious issues stemming from the circuit court's refusal to accept Hart's no-contest pleas and insist on guilty pleas.

The other issue counsel raises is whether 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. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. "An erroneous exercise of discretion exists 'if the [circuit] court failed to exercise its discretion or if there was no reasonable basis for its decision.'" ***Marquez v. Mercedes-Benz USA, LLC***, 2012 WI 57, ¶105, 341 Wis. 2d 119, 815 N.W.2d 314 (one set of quotation marks omitted).

The circuit court here did not exercise its discretion in any meaningful way. Instead, it simply ratified the parties' recommended sentence. Indeed, the *entire* sentencing decision is as follows:

> I will order that he serve two and a half years of initial incarceration followed by two years of extended supervision [for the delivery charge in case 297]; as a result it will be consecutive to the felony file contained in [case] 296, [Racine] felony file 1065. Conditions of extended supervision of course would be no alcohol, no drugs, no drug paraphernalia, $50 of buy money, restitution, AODA assessment and followthrough, DNA sample plus costs which will be taxed along with other costs. The defendant is going to be -- will be eligible for ERP[4] and the challenge program. No weapons and counseling. With respect to the possession charge [in case 296], I would order the defendant serve a year and a half that will be consecutive to any other prison sentence he is now serving or just ordered. Two years of extended supervision. The defendant's conditions will be the same; costs, DNA sample and AODA assessment and followthrough. He will be eligible for the earned release program and the challenge program.

Under any other circumstances, we would reject this sentence as an erroneous exercise of discretion: circuit courts "are not rubber stamps. They do not blindly accept or adopt sentencing recommendation from any particular source." ***State v. Allen Briggs Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. Rather, "[t]hey accept recommendations only if they can independently conclude that the recommended sentence is appropriate in light of the acknowledged goals of sentencing as applied to the facts of the case." ***Johnson***, 158 Wis. 2d at 465.

[4] The Earned Release Program is now the Wisconsin Substance Abuse Program. *See* 2011 Wis. Act 38, § 19 (eff. Aug. 3. 2011).

Despite the circuit court's error, Hart cannot challenge the sentences on appeal because he affirmatively approved them through the joint recommendation. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). In addition, we note that the maximum possible sentence Hart could have received was more than seventeen years' imprisonment, so the sentence totaling eight years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). For these reasons, there would be no arguable merit to an appellate challenge to the sentencing court's discretion.

There is, however, a scrivener's error in the judgment of correction for case No. 2011CF297. The judgment reflects that Hart is to repay "buy money" in the amount of $100. As can be seen above, however, the circuit court in that case only ordered repayment of $50. The judgment of conviction shall be corrected upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Finally, we note that Hart's response also includes what we will categorize as a claim of ineffective assistance of trial counsel for counsel's failure to: (1) challenge the Walworth County Sheriff's drug unit's use of "only the word of the Confidential Informant" to bring charges against Hart; (2) investigate, as a means of challenging her credibility, an incident in which the informant allegedly gave three different stories to Burlington police; (3) show Hart "all the evidence that was against" him; and (4) tell Hart about newly discovered evidence in November 2011.

The "newly discovered evidence" was described by trial counsel as four DVDs disclosed late in the proceedings. Trial counsel told the circuit court that the State had not seen them, either, so it stands to reason that these are discs from the sheriff. Regardless, appellate counsel reports that when she met with Hart, he told her that trial counsel had allowed him to see all of the discovery material, but he had not been able to review the discovery discs.[5] Appellate counsel avers that she reviewed a total of seven discs before discussing their contents with Hart via two letters and a phone call.

Further, when Hart says the sheriff only had the informant's word to go on and complains about her credibility, he may be attempting to highlight the fact that a detective testified at the preliminary hearing that she had not observed the hand-to-hand exchange of the informant's cash for Hart's cocaine. However, the record indicates that both prerecorded cash and audio recordings were available from the controlled buy. Further, by entering the guilty pleas Hart waived the right to challenge the sufficiency of the State's evidence. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). There is no arguable merit to a claim that trial counsel provided ineffective assistance.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment of conviction in Walworth County Circuit Court case No. 2011CF296 is summarily affirmed.

[5] This is likely because of equipment limitations at Hart's institution.

IT IS FURTHER ORDERED that upon remittitur, the judgment of conviction in Walworth County Circuit Court case No. 2011CF297 shall be modified as described herein.

IT IS FURTHER ORDERED that the judgment of conviction in Walworth County Circuit Court case No. 2011CF297, as modified, is summarily affirmed.

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved of further representation of Hart in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals