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February 12, 2014

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

2013AP1812-CRNM State of Wisconsin v. Derek Dawin McCastle
(L.C. #2012CM1096)

Before Curley, P.J.[1]

Derek Dawin McCastle appeals from a judgment of conviction, entered upon his guilty plea, of one count of misdemeanor child neglect as a repeater. Appellate counsel, Benjamin J. Peirce, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. McCastle was advised of his right to file a response, and he has

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

responded. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's report, and McCastle's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

McCastle was on his way to the home of Carla Jones, with then-five-year-old T.C. as a passenger. Jones was going to babysit T.C. so that McCastle and T.C.'s mother could go out. McCastle hit a parked car and he and T.C. got out of their vehicle. The apparent owner of the parked car came out of a nearby house after she heard a bang. Her boyfriend came out, too. McCastle offered $500 for repairs to the car, but the boyfriend refused, believing repairs would cost much more. According to the owner, McCastle—whose probation agent had evidently put out a warrant for him—begged her not to call police and got back into the car, driving off without T.C.

T.C. told police that "D-Rock" hit a parked car. When they got out of the car, D-Rock talked to some people and then got in the car and drove away. T.C. said the strangers with whom he was left were nice to him and walked him to a fire station. Jones told police that McCastle called her, said there had been an accident and he left T.C. alone, and asked her to go get T.C., because he (McCastle) would not be returning to the scene.

McCastle was charged with one count of misdemeanor child neglect as a repeater. Later, he was also charged in Milwaukee County Circuit Court case No. 2012CM5460 with two counts of intimidating a witness for his attempts to dissuade the car owner and her boyfriend from appearing to testify against him.

In exchange for McCastle's guilty plea to the enhanced child neglect charge, the State agreed to dismiss and read in the intimidation charges. The State would recommend

incarceration, with the length of the sentence left to the circuit court, and would remain silent with regard to whether the sentence should be concurrent or consecutive to a revocation or any other sentence. McCastle would be free to argue the sentence length.

The circuit court accepted the guilty plea and imposed one year of initial confinement and nine months of extended supervision, to be served consecutively. At the sentencing hearing, the circuit court explained that the sentence was consecutive so there would be no sentence credit, yet somehow, the judgment of conviction reflected 280 days' credit. The Department of Corrections wrote for clarification, and the circuit court vacated the credit.

Counsel identified three potential issues: whether there is any basis for a challenge to the validity of McCastle's guilty plea, whether the circuit court appropriately exercised its sentencing discretion, and whether the circuit court erred in vacating the sentence credit. We agree with counsel's conclusions that these issues lack arguable merit. McCastle raises multiple issues, which we distill to four main points: two challenges related to his plea and two related to his sentence. For the reasons herein, we conclude there is no arguable merit to any of McCastle's issues, either.

There is no arguable basis for challenging whether McCastle's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). McCastle 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), in which he acknowledged that his attorney had explained the elements of the offenses. Attached to the plea questionnaire were the jury instructions for child neglect, which listed the elements of the offense and which were initialed by McCastle. The questionnaire correctly acknowledged the maximum penalties

McCastle faced—two years' imprisonment or a $10,000 fine or both—and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court reviewed McCastle's education and mental health history. It ascertained that no threats or promises had been made to secure the plea. It noted that the jury instructions for the charge were attached, and inquired whether McCastle had, in fact, reviewed them with counsel and understood them. *See* ***Bangert***, 131 Wis. 2d at 267-68. It reviewed the constitutional rights that McCastle would be surrendering, advised him that the court was not bound by any plea agreement at sentencing, and provided the required deportation warning. The circuit court also appropriately explained the nature and implications of read-in offenses.

When the circuit court inquired whether the facts in the complaint were "basically true and correct," as a predicate for establishing a factual basis for the guilty plea, *see* WIS. STAT. § 971.08(1)(b), McCastle answered, "Yes, but not really. But yeah, I'm guilty." The circuit court responded, "But I still want to know what you are guilty of. Is there something that's in there that you think is wrong?" McCastle then explained that he had asked "the young lady"—presumably, the vehicle owner—if he could leave T.C. with her while he went to go get T.C.'s mother, who lived nearby, but the lady "changed her story." The circuit court asked trial counsel whether he had discussed with McCastle whether there were any defenses worth pursuing. Counsel explained that he had reviewed the option of going to trial and, given the facts and witness cooperation with law enforcement, he thought that a plea was in McCastle's best interest, but he was not forcing a plea. The circuit court then noted that, even if what McCastle was

saying was true, "[t]here is certainly an argument to be made that leaving a five year-old child in the control … of any adult that you don't know from beans immediately after an accident is still neglect." Accordingly, it determined there was an adequate factual basis for the plea.

The plea questionnaire and waiver of rights form and addendum, the jury instructions, and the court's colloquy all appropriately advised McCastle of the elements of his offense and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. In his reply, McCastle asserts that he made the plea under duress because he had not taken his medication for bipolar disorder that morning. However, the record reveals that it was disclosed to the circuit court that he had not taken his medication. Further, shortly after the circuit court inquired about McCastle's medication, it asked him whether he had "[a]ny questions so far" and whether there was "anyone pushing you or making you do this." He answered in the negative both times. Further, when the circuit court additionally inquired whether McCastle was "entering your plea today of your own free will[,]" McCastle answered affirmatively. He did not complain that he was entering the plea under duress. Accordingly, the record does not bear out such a claim, and there is no arguable merit to a challenge to the plea's validity.

Relatedly, McCastle appears to be claiming that he had defenses he could have pursued, so trial counsel should have allowed him to go to trial rather than counseling him to take a plea. We review this claim as an assertion of ineffective assistance of counsel, which requires McCastle to show both deficient performance by counsel and prejudice from that performance. *See* ***State v. Mayo***, 2007 WI 78, ¶¶60-61, 307 Wis. 2d 642, 734 N.W.2d 115. We discern no prejudice. One of McCastle's defenses was his claim, discussed above, that he asked permission to leave T.C. with the car's owner. However, other than McCastle himself, there were no

witnesses to corroborate McCastle's claim; rather, the three other witnesses were consistent with each other.

McCastle also claims there was an identification issue, as T.C. only identified the man that left him as "D-Rock," but McCastle's name is Derek. Aside from the obvious phonetic similarities between the nickname and McCastle's first name, McCastle also clearly fails to appreciate the other witnesses against him. For instance, Jones' statement, that McCastle called her and asked her to go retrieve the abandoned T.C., would be virtually unassailable as identification testimony, given that he is the father of her child. We therefore discern no prejudice from McCastle's inability to present his so-called defenses to a jury, so there is no arguable merit to a claim of ineffective assistance from trial counsel's encouragement of a plea.

The next 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 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.

It is clear from the circuit court's comments that it was primarily concerned with protection of the community and rehabilitation of McCastle. It noted that McCastle had an inability to follow the rules of supervision when in the community: he had been revoked twice while on supervision for a prior felony conviction, there was an outstanding warrant for him when he was charged in this and an obstruction case, and then after he was charged in this case he attempted to intimidate the witnesses. The circuit court noted McCastle's platitudes about wanting to finish his career training and getting a job to support his family, but observed that there is no "consistent period of time" when McCastle was being a good person and staying out of trouble and on track to those goals. Though the circuit court noted with approval that McCastle had a high school equivalency diploma, it also expressed its incredulity that he would think it was okay to encourage the witnesses against him to "do the right thing" by not showing up for court or by lying in their testimony.

The maximum possible sentence McCastle could have received was two years' imprisonment. The sentence totaling one year and nine months' 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). There would be no arguable merit to a challenge to the sentencing court's discretion.

Counsel and McCastle both raise an issue of whether McCastle should have received sentence credit. McCastle appears to believe that because he was on his supervision hold at the same time he was also incarcerated for his arrest in this case, he is entitled to credit on this sentence. *See* WIS. STAT. § 973.155(1)(b); ***State v. Hintz***, 2007 WI App 113, ¶7, 300 Wis. 2d 583, 731 N.W.2d 646. However, as the circuit court has explained multiple times, "[t]he total

time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences." *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). The sentence in this case was set consecutive to McCastle's revocation sentence, and his time in custody has been credited against the revocation sentence. There is no arguable merit to a challenge to the circuit court's denial of sentence credit.[2]

Finally, we note that McCastle claims that he was sentenced on inaccurate information. In its comments at the January 28, 2013 sentencing hearing, the circuit court made reference to Milwaukee County Circuit Court case No. 2012CM2258, in which McCastle was charged with obstruction. That case was apparently dismissed on February 28, 2013. McCastle therefore believes that the circuit court used inaccurate information and that he should be resentenced. Aside from the fact that the obstruction case was still pending when McCastle was sentenced—and, thus, it was not inaccurate for the circuit court to note the charge's existence—circuit courts are allowed to consider even dismissed charges at sentencing. *See* ***State v. Frey***, 2012 WI 99, ¶¶5, 44-55, 343 Wis. 2d 358, 817 N.W.2d 436. There is no arguable merit to a claim that McCastle was sentenced on inaccurate information.

[2] There is also no arguable merit to a challenge that the judgment of conviction originally awarded 280 days' credit that was then vacated after the Department of Corrections wrote to the circuit court for clarification. It is not clear how the 280 days ended up on the judgment of conviction, because it is evident from the sentencing transcript that the circuit court was not awarding it in the first instance. The circuit court has the inherent authority to correct errors in judgments. *See* ***State v. Stenklyft***, 2005 WI 71, ¶60, 281 Wis. 2d 484, 697 N.W.2d 769.

Our independent review of the record reveals no other potential issues of arguable merit.[3]

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Benjamin J. Peirce is relieved of further representation of McCastle in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] We have independently considered whether there is any arguable merit to a challenge to the bifurcated structure of McCastle's enhanced misdemeanor sentence. *See* WIS. STAT. §§ 939.62(1)(a) and 973.01(2)(b)-(d). However, McCastle's term of initial confinement does not exceed seventy-five percent of the length of his sentence, and his term of extended supervision is not less than twenty-five percent of the length of confinement. Accordingly, we conclude there is no arguable merit to a challenge to the structure of the enhanced misdemeanor sentence.