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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

May 5, 2014

To:

Hon. Dennis P. Moroney
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

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

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

Donna Odrzywolski
6650 W. State St., Unit D, #234
Wauwatosa, WI 53213

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

Anthony D. Ward 592753
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2013AP2562-CRNM State of Wisconsin v. Anthony D. Ward (L.C. #2012CF1100)

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

Anthony D. Ward appeals from a judgment of conviction, entered upon his guilty plea, on one count of robbery with the threat of force. Appellate counsel, Donna Odrzywolski, 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] Ward was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and

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

counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On November 30, 2011, a man entered a gas station in West Allis and handed the cashier a note that said, "I have explosives and a gun in my pocket. Give me the money in the drawer." The man placed his left hand in his coat pocket and pointed the pocket at the clerk, simulating a gun. The clerk put the cash on the counter. The man used his right hand to put the money in his right pocket, then fled. In total, the robber took $383.

The robbery had been caught on surveillance video. The video was released to the media. When the video was replayed on that evening's newscasts, a citizen recognized the man as Ward, his employee since 2007. The citizen later told police that Ward last reported to work on November 29, 2011, and had missed subsequent shifts.

The complaint was filed on March 10, 2012, charging Ward with robbery with the threat of force. Bond was set at $7500 and was posted by Ward's girlfriend on March 16, 2012. After the preliminary hearing at which the gas station cashier testified, the State filed an information elevating Ward's charge to armed robbery, a Class C felony. While Ward was released on bond in this matter, he was arrested and charged in Milwaukee County Circuit Court case No. 2012CF2612 with misdemeanor battery, disorderly conduct with a domestic violence allegation, felony bail jumping, and obstructing or resisting an officer.

Ward ultimately agreed to resolve the two cases with a plea agreement. In exchange for a guilty plea, the State would reduce the robbery charge back to robbery with the threat of force, a Class E felony. Additionally, the State agreed to dismiss and read in the four charges in case No. 2012CF2612. After a plea colloquy, the circuit court accepted Ward's guilty plea. Later,

the circuit court sentenced Ward to seven years of initial confinement and four years of extended supervision. Ward filed a *pro se* motion, asking the circuit court to allow his participation in the Wisconsin Substance Abuse Program, but the circuit court denied the request.

The first potential issue counsel identifies is whether the circuit court followed the appropriate procedures in accepting Ward's plea. Our review of the record—including the plea questionnaire, waiver of rights form, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Ward's plea was anything other than knowing, intelligent, and voluntary.[2]

The second issue counsel addresses is whether the circuit court properly 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 primary 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 circuit court should consider a

[2] There are occasional references to Ward's diagnosis of depression and the efficacy of his medication regime. However, there is no arguable merit to any claim relating to incompetency because our review of the record satisfies us that Ward was fully able to understand the proceedings and assist counsel. *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 ("[A] medical condition does not necessarily render the defendant incompetent to stand trial. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings." (Internal citation omitted.)).

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* ***id.***

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The eleven-year sentence imposed is well within the fifteen-year 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 court's sentencing discretion in setting the length of imprisonment.

Independently, we have also considered whether the circuit court erroneously exercised its sentencing discretion when it imposed a $250 DNA surcharge. *See* WIS. STAT. § 973.046(1g); ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. While we expect the circuit court to appropriately consider relevant factors in deciding whether to impose the surcharge, *see* ***Cherry***, 312 Wis. 2d 203, ¶¶9-10, we do not require the circuit court to explicitly describe its reasons for imposing the surcharge, *see* ***State v. Ziller***, 2011 WI App 164, ¶12, 338 Wis. 2d 151, 807 N.W.2d 241. Additionally, we may search a record for reasons to support a circuit court's discretionary decision. *See* ***State v. Lock***, 2012 WI App 99, ¶43, 344 Wis. 2d 166, 823 N.W.2d 378.

Here, the circuit court simply stated, "If one has not been taken, the court will order a DNA sample be taken of your body, and you pay the surcharges connected with that." This case represents Ward's first felony conviction in Wisconsin, so it can be reasonably inferred that no

DNA sample is currently on file. Thus, collection and processing of the sample will generate a cost, and it is not unreasonable to make Ward pay that cost instead of the public. *See* ***Ziller***, 338 Wis. 2d 151, ¶¶11-12. That reasoning is implicit in the circuit court's pronouncement. Additionally, the circuit court had noted that, in light of the $7500 bond from which surcharges and other costs can be deducted, Ward should have no difficulty paying any of the imposed costs in this case. That reasoning includes the DNA surcharge. *See* ***id.***, ¶11. Accordingly, we conclude there is also no arguable merit to a claim that the circuit court erroneously exercised its discretion in imposing the DNA surcharge.

Finally, although counsel did not discuss it, we consider whether there is any arguable merit to a claim that Ward should have been granted sentence modification based on a new factor. Ward had filed a *pro se* motion—and later a reconsideration motion—asking the circuit court to find him eligible for participation in the Wisconsin Substance Abuse Program. *See* WIS. STAT. § 302.05. At sentencing, no particular alcohol or other drug (AODA) issues were noted, though the circuit court did order that an AODA assessment be administered. According to Ward's motion, the assessment indicated that he had AODA issues and treatment needs, and prison personnel recommended that he write to the court to ask about participation in the program.

A new factor is a fact, or a 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, even though it was then in existence, 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). Whether a fact or set of facts is a "new factor" is a question of law. ***Id.***, ¶36. Whether

a new factor justifies sentence modification is committed to the discretion of the circuit court. ***Id.***, ¶33.

We will assume, for argument's sake, that Ward's AODA assessment results constitute a new factor.[3] However, the circuit court, in rejecting Ward's motions, explained that it was not inclined to grant Ward eligibility for the substance abuse program because it had expressly found that drugs and alcohol were not the "catalyst" for Ward's behavior. Indeed, Ward had attempted to explain his motivation for the robbery by claiming he had a gambling addiction. We discern no erroneous exercise of discretion by the circuit court, so there is no arguable merit to a claim that Ward should have been granted sentence modification based on a new factor.

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

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 Donna Odrzywolski is relieved of further representation of Ward in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] The presentence investigation report indicated that the UNCOPE screening tool revealed no AODA issues.