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

2013AP1580-CRNM State of Wisconsin v. Darnell Echols (L.C. #2012CF3690)

Before Fine, Kessler and Brennan, JJ.

Darnell Echols pled guilty to possessing a firearm as a felon. The circuit court imposed a six-year term of imprisonment, bifurcated as two years of initial confinement and four years of extended supervision. He appeals.

Appellate counsel, Attorney Beth A. Eisendrath, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Echols did

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

not respond. At our request, Attorney Eisendrath filed supplemental materials to address whether Echols's illiteracy gives rise to an arguably meritorious basis for challenging his guilty plea. We have considered the no-merit report and the supplements, and we have independently reviewed the record. We conclude that no arguably meritorious appellate issues exist, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Echols was a passenger in a van that police stopped on a city street in Milwaukee, Wisconsin on July 21, 2012. Echols fled on foot, and police saw him discard a firearm while he ran. When the officers subsequently arrested Echols, they determined that he previously had been convicted of armed robbery in Illinois. The State charged Echols with possessing a firearm as a felon.

We first consider whether Echols could mount an arguably meritorious challenge to his guilty plea. When a defendant enters a guilty plea, the circuit court must fulfill certain duties during a colloquy on the record. *See* WIS. STAT. § 971.08; *see also* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794 (listing the duties that the circuit court must fulfill). To assist in fulfilling the duties required, the circuit court may use a guilty plea questionnaire and waiver of rights form, and the circuit court may, "within its discretion ... incorporate into the plea colloquy the information contained in the plea questionnaire, relying substantially on that questionnaire to establish the defendant's understanding." ***Id.***, ¶30 (two sets of brackets omitted; ellipses in ***Hoppe***). If the circuit court does not fulfill its obligations, and if the defendant alleges that he or she did not know or understand the information that should have been provided at the hearing, the defendant is entitled to plea withdrawal unless the State can show by clear and convincing evidence at a postconviction hearing that the plea was entered knowingly,

intelligently, and voluntarily. *See* ***State v. Brown***, 2006 WI 100, ¶¶36, 40, 293 Wis. 2d 594, 716 N.W.2d 906.

Here, the record contains a guilty plea questionnaire and waiver of rights form along with an addendum. Echols and his trial counsel signed both documents. The questionnaire reflects that Echols understood the charge he faced, the constitutional rights he waived by pleading guilty, and the penalties that the circuit court could impose. The addendum reflects Echols's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of evidence against him.

Echols told the circuit court that he had completed twelve years of school and that he had no difficulty reading and understanding the forms he signed. The record reflects, however, that Echols took a reading test soon after pleading guilty in this matter, and the test "revealed he has a reading grade equivalency below first grade (.6)."

The steps a circuit court takes to ascertain a defendant's understanding of the plea proceeding depends upon the circumstances of the case and the characteristics of the defendant. *See* ***id.***, ¶52. The less a defendant's education, the more a court must do to ensure the defendant's understanding. *See* ***id.*** We reviewed the guilty plea colloquy with these principles in mind.

Our review raised a concern as to whether the circuit court sufficiently ensured that Echols understood the constitutional rights given up by pleading guilty because the circuit court did not discuss with Echols his understanding of each right. The circuit court told Echols that by entering a plea he would give up the constitutional rights listed on the guilty plea questionnaire, and the circuit court explained to Echols that these included the rights to have a trial and to cross-

examine the witnesses against him. The circuit court also mentioned several other constitutional rights that Echols would surrender by pleading guilty, but the circuit court did not conduct a probing inquiry about his understanding of those additional rights. Although Echols told the circuit court that he understood the rights listed on the form and had discussed all of them with his lawyer, ***Brown*** suggests that more may be required when, as here, the defendant is illiterate. *See* ***id.***, ¶¶73-76. We therefore directed appellate counsel to supplement the no-merit report with a discussion of this issue.

In the supplemental materials, Attorney Eisendrath advises us that she held a series of meetings with Echols, both face-to-face and on the telephone. She further advises that during the meetings, Echols acknowledged that "he does not read well but he understands spoken words adequately," and further he "declared ... he understood the constitutional rights that he waived at the plea hearing." Counsel states that Echols "responded thoughtfully to questions asked of him [about] the meaning of items on the plea questionnaire and waiver [of rights form]." Counsel goes on to state that during her conversations with Echols, he confirmed his understanding of each of the constitutional rights he waived by pleading guilty and that he "is unable to allege that he lacked knowledge or understanding of the information he should have received at the plea hearing." In light of the supplemental materials submitted, we accept counsel's assurances that Echols cannot pursue an arguably meritorious postconviction motion for plea withdrawal based on any alleged defect in the plea colloquy regarding his understanding of his constitutional rights. *See* ***id.***, ¶63 (postconviction challenge to plea based on defects in colloquy is unwarranted if defendant cannot assert lack of understanding about some aspect of plea process).

Further, our independent review of the balance of the plea hearing reflects no other basis for challenging the guilty plea in this case. At the outset of the hearing, the State described the

terms of the plea bargain: Echols would plead guilty as charged, and the State would recommend a prison sentence without making any specific recommendation as to the length of the sentence. Echols confirmed that the State correctly described the terms of the plea bargain.

The circuit court explained to Echols that he faced ten years of imprisonment and a $25,000 fine upon conviction of possessing a firearm as a felon. *See* WIS. STAT. §§ 941.29(2), 939.50(3)(g). The circuit court told Echols 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. Echols said that he understood. The circuit court explained the elements of the crime, and Echols said that he understood the elements.

The circuit court told Echols that, by pleading guilty, he would give up the right to file motions, including motions challenging the constitutionality of the actions taken by the police when they arrested him. Echols said that he understood. Echols's trial counsel explained on the record that she discussed with Echols the possible motions that he could file in this matter and the reasons for not filing any of those motions. Echols confirmed that his trial counsel's disclosure was accurate.

The circuit court next told Echols that, by pleading guilty, he would give up his defenses to the charge. Echols said that he understood. In response to questioning by the circuit court, his trial counsel explained that she reviewed the available defenses with Echols and discussed with him why those defenses were not viable. Echols again confirmed the accuracy of his trial counsel's disclosures.

Echols told the circuit court that he had not been promised anything outside of the plea bargain to induce his guilty plea and that he had not been threatened. He said he understood that

if he is not a citizen, his plea could lead to his deportation, exclusion from admission to the United States of America, or the denial of naturalization. *See* WIS. STAT. § 971.08 (1)(c).

Echols agreed on the record that, as alleged in the criminal complaint, he possessed a firearm on July 21, 2012, in Milwaukee, Wisconsin and that he was previously convicted of an armed robbery in Illinois in 1997. Echols also admitted that he knew armed robbery is a felony in both Wisconsin and Illinois. Trial counsel stipulated to the facts in the criminal complaint. The circuit court properly found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

In sum, the guilty plea colloquy here was, for the most part, commendably careful and detailed. Although the circuit court did not fully discuss with Echols his understanding of each of his constitutional rights, and although Echols's profound illiteracy raised concerns about the extent of the discussion, we are satisfied, in light of the record and appellate counsel's supplemental submissions, that further appellate proceedings seeking plea withdrawal would lack arguable merit. *See* WIS. STAT. § 971.08; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W. 2d 12 (1986).

We next consider whether Echols 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. 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. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Further, in exercising sentencing discretion, the circuit 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 35, ¶40. "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." ***Stenzel***, 276 Wis. 2d 224, ¶7.

Attorney Eisendrath advises us in the no-merit report that Echols views his sentence as excessive. Upon review, however, we conclude that the record reflects an appropriate exercise of sentencing discretion.

The circuit court discussed the gravity of the offense, finding that the offense was aggravated because Echols fled while carrying a firearm and then dropped it on a city street. The circuit court explained that Echols's actions "created danger for [Echols], for the police and [for] any property owners whose yards and all[ey]s and property ... [he] crossed." The circuit court considered both positive and negative aspects of Echols's character. The circuit court recognized that Echols had provided significant assistance and comfort to his disabled sister. The circuit court observed, however, that the presentence investigation report disclosed a history of committing serious, violent offenses, including prior offenses involving a firearm, and that Echols had spent a substantial portion of his adult life in prison. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (extensive criminal record is evidence of character). In considering the need to protect the public, the circuit court recognized that Echols

was forty-nine years old and, because he is "getting along" in years, the circuit court concluded that "the odds of [Echols] committing violent and hurtful crimes ... [are] diminished." Nonetheless, the circuit court found that, in light of Echols's criminal history, his risk to reoffend remained significant and that he therefore posed a continuing danger to the community.

The circuit court appropriately considered probation as the first alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The circuit court concluded, however, that placing Echols on probation would not adequately protect the public and would unduly depreciate the seriousness of his offense. *See* ***id.***

The circuit court indicated that punishment was the primary sentencing goal. Additionally, the circuit court noted that Echols had significant rehabilitative needs, and the circuit court therefore required that he participate in an educational program, emphasizing that he should "advance [his] reading level" during his term of imprisonment.

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, we cannot agree with Echols that the sentence imposed was 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 sentence imposed here was well within the statutory maximum allowed by law. *See* WIS. STAT. §§ 941.29(2), 939.50(3)(g). Such a sentence 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. We conclude that a challenge

to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We have also considered whether Echols could pursue an arguably meritorious claim that the circuit court erroneously declared him ineligible for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program. *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. With exceptions not implicated here, a circuit court must decide as part of its exercise of sentencing discretion whether a defendant is eligible to participate in these programs. *See* WIS. STAT. §§ 973.01(3m), 973.01(3g).[2]

In this case, the circuit court correctly determined that Echols's age statutorily precluded him from participating in the Challenge Incarceration Program. *See* WIS. STAT. § 302.045(2)(b) (requiring an inmate to be under the age of forty upon entering the program). As to the Wisconsin Substance Abuse Program, the circuit court concluded that Echols's participation would undermine the primary sentencing goal by allowing Echols to serve less time in confinement than the circuit court deemed necessary for punishment. This is a proper exercise of sentencing discretion. *See* ***State v. Owens***, 2006 WI App 75, ¶11, 291 Wis. 2d 229, 713 N.W.2d 187. A postconviction challenge to the circuit court's determinations regarding Echols's

[2] 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).

eligibility for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program would lack arguable merit.

Last, we note appellate counsel's conclusion that Echols cannot raise a challenge to the effectiveness of his trial counsel. We agree that the record does not reveal an arguably meritorious basis for such a challenge.

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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Beth A. Eisendrath is relieved of any further representation of Darnell Echols on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals