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June 10, 2014

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

2014AP211-CRNM State of Wisconsin v. Java I. Orr (L.C. #2012CM1952)

Before Kessler, J.[1]

Java I. Orr appeals a judgment of conviction entered upon his guilty plea to one count of disorderly conduct as a repeat offender and as an act of domestic abuse. He also appeals

[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.

postconviction orders denying his motions for plea withdrawal and for reconsideration.[2] Appellate counsel, Attorney Benjamin J. Peirce, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. In the no-merit report, appellate counsel examines the validity of Orr's plea, the circuit court's exercise of sentencing discretion, and whether Orr received a sufficient award of credit for his time in custody before sentencing. Orr did not file a response. We have considered the no-merit report, 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.

The State filed a criminal complaint alleging that, on April 14, 2012, Orr arrived at the home of Marlene Murphy, his ex-wife, to return their son after a visit. According to the complaint, Orr began to shout and swear at Murphy and then pushed her into a wall. The complaint goes on to name two people who allegedly witnessed the incident. The State charged Orr with two misdemeanor offenses, battery and disorderly conduct, both as acts of domestic abuse. *See* WIS. STAT. §§ 940.19(1), 947.01(1), 968.075(1)(a). The State further charged Orr as a repeat offender pursuant to WIS. STAT. § 939.62(1)(a), alleging that he had been convicted of felony offenses on September 15, 2009, a date within the five-year period immediately preceding the incident alleged here.

Orr disputed the charges in this case for some time, and the circuit court scheduled the matter for trial on multiple occasions. Eventually, however, Orr decided to plead guilty to

[2] The Honorable Mary E. Triggiano presided over the plea and sentencing proceedings and entered the judgment of conviction in this matter. The Honorable Lindsay Canonie Grady presided over the postconviction proceedings and entered the orders denying postconviction relief and reconsideration.

disorderly conduct as a repeat offender and as an act of domestic abuse. On May 9, 2013, the circuit court imposed nine months in jail, consecutive to the reconfinement term that Orr was serving following revocation of his extended supervision for a prior felony conviction.

Orr moved for postconviction relief, seeking plea withdrawal on the ground that his trial counsel was ineffective. The circuit court denied the motion and denied Orr's motion to reconsider. He appeals.

We begin by examining whether Orr could pursue an arguably meritorious challenge to the denial of his claim for plea withdrawal based on the alleged ineffectiveness of his trial counsel. A defendant who alleges ineffective assistance of counsel must make a two-prong showing that counsel performed deficiently and that the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to make an adequate showing as to one prong of the ***Strickland*** analysis, the court need not address the other. ***Id.*** at 697.

Orr claimed in his postconviction motion that his trial counsel gave him a false promise that he would serve his sentence for disorderly conduct in prison, but, as Orr conceded in his motion to reconsider, the Department of Corrections in fact did permit him to serve his sentence for disorderly conduct in prison. Thus, Orr shows no deficiency in his trial counsel's explanation of where he would serve his sentence.

Orr next complained in his postconviction motion that his trial counsel failed to give him an accurate explanation of the elements of disorderly conduct, but the record reveals that during Orr's guilty plea, the circuit court correctly explained the elements to Orr on the record, and Orr said that he understood them. The circuit court's accurate explanation of the elements at the time

of the guilty plea overrides any defects in the information that Orr may have received from his trial counsel before the plea. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996). Accordingly, trial counsel's alleged error in explaining the elements did not prejudice Orr.

Orr also complained in his postconviction motion that his trial counsel did not tell him that he had the right to waive a jury trial in favor of a bench trial, but, in fact, a defendant does not have such a right. *See* ***State v. Burks***, 2004 WI App 14, ¶9, 268 Wis. 2d 747, 674 N.W.2d 640. To the contrary, the State and the circuit court may each withhold consent to a jury waiver in a criminal case and require that any trial be to a jury. *See* ***id.***, ¶¶11-12. Thus, Orr identified no deficiency in regard to trial counsel's explanation of his right to a trial.

Finally, Orr complained in his postconviction motion that his trial counsel urged him to accept a plea bargain because counsel predicted that Orr would otherwise receive four years in prison, that is, maximum consecutive sentences for the two charges that he faced. He identifies no deficiency in his trial counsel's performance. "[A] coercion allegation based on 'defense counsel's enthusiasm for the negotiated plea bargain' is insufficient." ***State v. Goyette***, 2006 WI App 178, ¶26, 296 Wis. 2d 359, 722 N.W.2d 731 (citation omitted). Rather, "'[o]nce the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, he should use reasonable persuasion to guide the client to a sound decision.'" ***State v. Rock***, 92 Wis. 2d 554, 564, 285 N.W.2d 739 (1979) (citation omitted).

In sum, the claim that trial counsel was ineffective in assisting Orr with his guilty plea lacks arguable merit. Further pursuit of plea withdrawal on this basis would be frivolous within the meaning of ***Anders***.

A defendant may also pursue a claim for plea withdrawal if the defendant can both show that the circuit court failed to perform the duties required of it during a guilty plea colloquy and allege that he or she did not understand the information that should have been provided during the colloquy. *See* ***State v. Brown***, 2006 WI 100, ¶¶36, 40, 293 Wis. 2d 594, 716 N.W.2d 906. We have therefore considered whether the record shows that the circuit court fulfilled its duties during the plea colloquy. *See* WIS. STAT. § 971.08; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Our review of the record reveals no arguably meritorious basis for a challenge to the sufficiency of the guilty plea proceedings.

At the outset of the plea hearing, the State explained that, pursuant to the parties' plea bargain, Orr would plead guilty to disorderly conduct as a habitual offender and as an act of domestic abuse, and the State would not make a specific sentencing recommendation. The State stressed that, although it would also move to dismiss the battery charge, the motion to dismiss was not part of the plea bargain, and the State "reserved the right to reissue the battery component of th[e] case." Orr said that he understood. Orr told the circuit court that he had not been promised anything outside of the terms of the plea bargain in order to induce his guilty plea and that he had not been threatened.

The circuit court explained to Orr that the maximum penalties for disorderly conduct are normally ninety days in jail and a $1,000 fine but that, because Orr was "a repeater having been convicted of at least one felony during a five year period immediately pr[e]ceding the commission of this offense, the maximum term of imprisonment may be increased to not more than two years." *See* WIS. STAT. §§ 947.01(1), 939.62(1)-(2). The circuit court also told Orr that he would be "responsible for the domestic abuse assessment." *See* WIS. STAT. §§ 968.075(1)(a), 973.055(1)(a)1. Orr said that he understood. The circuit court told Orr that it was not bound by

the plea bargain or any sentencing recommendations and that the circuit court could impose the maximum penalties allowed by law if the circuit court deemed such penalties appropriate. Orr said that he understood.

A signed guilty plea questionnaire and waiver of rights form and a signed addendum to the form are in the record. The elements of the offense of disorderly conduct are included on a third form, and Orr's handwritten initials appear next to those elements. Orr told the circuit court that he had reviewed the forms with his attorney and that he understood them.

The circuit court explained to Orr that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire. Orr assured the circuit court that he understood the rights described on the questionnaire, that he wanted to give them up, and that he had no questions about them. The circuit court reviewed the elements of the offense on the record and explained that the State would be required to prove those elements if the case went to trial. Orr told the circuit court that he understood.

The circuit court cautioned Orr that if he was not a citizen of the United States of America, his guilty plea could result in his deportation, exclusion from admission to the country, or denial of naturalization, under federal law. *See* WIS. STAT. § 971.08(1)(c). Orr said that he understood.

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). Orr and his trial counsel explained to the circuit court that, although Orr disputed the accuracy of the criminal complaint, Orr expressly agreed that he became "extremely loud and boisterous" in an interaction with Murphy at her home late in the evening of April 14, 2012. Orr also expressly

agreed that his conduct tended to cause a disturbance because Murphy lived in an apartment complex and the incident occurred late in the evening when neighbors were present. The circuit court found a factual basis for Orr's guilty plea.

The record reflects that Orr entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***Bangert***, 131 Wis. 2d at 266-72; *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.

We next consider whether Orr could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***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 also "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 acknowledged that the offense was not the worst of crimes, but the circuit court concluded that the incident was aggravated because two small children were forced to witness a dispute between Orr and his ex-wife. The circuit court considered Orr's character at length, noting that he had completed many self-improvement programs and earned many certificates while incarcerated, and the circuit court further recognized that he had participated in counseling. The circuit court, however, also took into account Orr's eight prior criminal convictions, including one for an incident of domestic violence that he committed only a few years before the current charge arose. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court considered the need to protect the public, noting in particular that Orr was serving a term of extended supervision at the time of the crime in this case and that his criminal record included incidents of domestic abuse that involved three different women.

The circuit court appropriately considered probation as the first alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The circuit court determined, however, that probation would unduly undermine the primary sentencing goal, which the circuit court identified as punishment. Accordingly, the circuit court imposed a sentence of nine months in jail, and required Orr to serve the time consecutively to any other sentence.

The circuit court identified the factors that it considered in fashioning the sentence. The factors are proper and relevant. Moreover, we agree with appellate counsel's conclusion that the

sentence was not unduly harsh or excessive. 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 maximum allowed by law, and therefore is presumptively not unduly harsh. *See* ***id.***, ¶32. We cannot say that the sentence imposed in this case is shocking. A challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

Last, we conclude that the record reveals no arguably meritorious basis for Orr to seek presentence credit in addition to the one day awarded to him. During the sentencing proceeding, the parties discussed Orr's request for credit against his sentence for each day that he spent in custody after his arrest in this matter on April 15, 2012. Trial counsel explained on the record that, following Orr's arrest, he was in custody for only one day before the Department of Corrections placed a hold on him based on suspicion that he had violated the terms of his extended supervision imposed for an earlier conviction. Trial counsel further explained that the Department of Corrections subsequently revoked Orr's extended supervision, that Orr was serving an eighteen-month term of reconfinement as a consequence, and that Orr would receive credit against the reconfinement term for the time he spent in custody after the Department of Corrections placed a hold on him and before his sentencing in the instant matter. Appellate counsel confirms in the no-merit report that Orr in fact received appropriate credit against his reconfinement term for his time in custody following his arrest in this matter. "'The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.'" ***State v. Boettcher***, 144 Wis. 2d 86, 101, 423 N.W.2d 533 (1988)

(citation omitted). Because the circuit court imposed a consecutive sentence in this case, Orr cannot receive credit here for time awarded against another sentence.

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 Benjamin J. Peirce is relieved of any further representation of Java I. Orr on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals