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July 9, 2014

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

2013AP1858-CRNM State of Wisconsin v. Christopher Randolph Gish
(L.C. #2012CF3564)

Before Fine, Kessler and Brennan, JJ.

Christopher Randolph Gish appeals from a corrected judgment of conviction, entered upon his guilty plea, for first-degree reckless homicide. *See* WIS. STAT. § 940.02(1) (2011-12).[1] Appellate counsel, Michael J. Backes, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). After receiving a number of extensions

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

to do so, Gish responded to the report. Counsel then filed a supplemental no-merit report addressing the issue raised in Gish's response. After reviewing the submissions by counsel and Gish, and after conducting an independent review of the record, we conclude that there are no arguably meritorious appellate issues. We therefore summarily affirm.

BACKGROUND

Gish was initially charged with first-degree intentional homicide, use of a dangerous weapon, relating to the death of his girlfriend. The following background is set forth in the portions of the complaint that served as a factual basis for Gish's plea.[2]

Gish was found walking near the entrance of an air refueling wing on the south side of Milwaukee in the early morning hours of July 14, 2012. Statements made by Gish led emergency personnel to conduct a welfare check on the residents at Gish's home.

Upon arriving at the residence, police found Gish's girlfriend unresponsive and not breathing. She was pronounced dead at the scene, and an autopsy revealed that she died as a result of a stab wound to the chest. The victim also suffered stab wounds to her head, neck, and extremities.

After the victim was found dead, Gish was questioned by the police. Gish told police that he was angry with the victim because she had threatened to take the couple's children and had said that Gish would never see them again. Gish further indicated that he was upset because he

[2] With the exception of the reference to his having put his knee on top of the victim before stabbing her, Gish agreed that the complaint could serve as a factual basis for his plea.

suspected that the victim was having an affair. Gish admitted to stabbing the victim multiple times and kicking her in the face as he was leaving the scene.[3]

Following plea negotiations, Gish pled guilty to the amended charge of first-degree reckless homicide. The circuit court accepted his plea and ordered that he serve the maximum sentence of forty years of initial confinement and twenty years of extended supervision.

In his no-merit report, counsel addresses whether there would be any arguable merit to an appeal on three issues: (1) the validity of Gish's plea; (2) the circuit court's exercise of sentencing discretion; and (3) sentence modification. In his response, Gish claims that he is entitled to withdraw his guilty plea based on the ineffective assistance of his trial counsel. Specifically, Gish challenges his trial counsel's performance for failing to investigate the facts and law surrounding the affirmative defense of involuntary intoxication and to advise Gish about this viable defense.

GUILTY PLEA

A. Plea Withdrawal Based on the Colloquy

We agree with counsel that there is no arguable basis for challenging Gish's guilty plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Gish completed a plea questionnaire and waiver of rights form and an addendum, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the circuit court conducted a thorough plea colloquy addressing Gish's understanding of the charges against him, the penalties

[3] The record indicates that Gish's and the victim's children were present in the home at the time of the murder.

he faced, and the constitutional rights he was waiving by entering pleas, *see* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72.

The circuit court did not, however, inform Gish that it was not bound by the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. Here, following plea negotiations, the State filed an amended information reducing the charge against Gish from first-degree intentional homicide, use of a dangerous weapon, to first-degree reckless homicide. Upon the circuit court's acceptance of the amended information, Gish agreed to plead guilty to the charge. The plea agreement left both sides free to argue as to the length of the sentence Gish would receive.

We conclude that this defect—to the extent it can be described as such—does not run afoul of ***Hampton*** because there was no agreed upon sentencing recommendation that the circuit court might have disregarded. Moreover, Gish was not affected by the defect in his plea colloquy; in fact, he received the benefit of the plea agreement—the reduced charge of first-degree reckless homicide. The plea questionnaire stated and the circuit court reiterated during the plea hearing that Gish faced a sixty-year sentence for the crime of first-degree reckless homicide. Gish confirmed for the court that he was aware of this. Given that the plea negotiations left the parties free to argue as to the length of Gish's sentence, there would be no arguable merit to an appeal on this basis. *See generally* ***State v. Johnson***, 2012 WI App 21, 339 Wis. 2d 421, 811 N.W.2d 441 (concluding that despite ***Hampton*** violation, plea withdrawal was not warranted because no manifest injustice had occurred and because the circuit court's error was harmless).

We also note that the circuit court did not recite the text of WIS. STAT. § 971.08(1)(c) verbatim. We recently held that, although the statutory language is "strongly preferred," a court's failure to use the exact language set forth in § 971.08(1)(c) does not entitle a defendant to plea withdrawal, as long as the court "substantially complied" with the statutory mandate. *See* ***State v. Mursal***, 2013 WI App 125, ¶¶15-17, 20, 351 Wis. 2d 180, 839 N.W.2d 173. Like in ***Mursal***, here, the circuit court substantially complied with the statute.[4] *See* ***id.***, ¶16 ("Substantively, the [circuit] court's warning complied perfectly with the statute, and linguistically, the differences were so slight that they did not alter the meaning of the warning in any way.").

There would be no arguable merit to a challenge to the plea's validity under the ***Bangert*** line of cases.

B. Plea Withdrawal Based on the Ineffective Assistance of Trial Counsel

In his response, Gish argues that he should be allowed to withdraw his guilty plea based on the ineffective assistance of his trial counsel. A claim that a plea is infirm for reasons extrinsic to the plea colloquy invokes the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195

[4] WISCONSIN STAT. § 971.08(1)(c) directs courts to do the following, before accepting a plea of guilty or no-contest:

> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Here, the circuit court stated: "And you understand that if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization."

N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Because Gish rests claims for plea withdrawal on allegations that he received ineffective assistance from his trial counsel, he cannot prevail on those claims unless he shows that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

According to Gish, his trial counsel failed to investigate and inform him of the affirmative defense of involuntary intoxication. He claims that a few days before the stabbing, he was prescribed Xanax and Lamictal by his son's doctor. Gish asserts that he was a first-time user of Xanax who was prescribed more than the usual starting dosage and that at the time of the murder, he was experiencing the intoxicating side effects. Gish claims that he can prove his intoxicated condition was involuntarily produced as a result of complying with a physician's advice and that his trial counsel seemingly was not aware of and never advised Gish of this defense, which amounted to deficient performance. Had he known about this viable defense, Gish submits that he would have insisted on going to trial. Additionally, Gish claims his trial counsel's unawareness of the involuntary intoxication defense prejudiced him during the plea-negotiation phase because this could have been used as a bargaining tool in getting "the best deal possible" for Gish.

The effects of prescription drugs may form the basis for an involuntary intoxication defense where they are taken according to prescription. *See* ***State v. Gardner***, 230 Wis. 2d 32, 40, 601 N.W.2d 670 (Ct. App. 1999); *see also* WIS. STAT. § 939.42(1).[5] To support his cause,

[5] Effective April 18, 2014, WIS. STAT. § 939.42 was revised to eliminate voluntary intoxication as a defense to criminal liability. *See* 2013 Wis. Act 307, §§ 2-4. The statute now reads:

(continued)

Gish has submitted documents outside the record, which are not properly before us.[6] *See generally* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) ("The rule is well established that reviewing courts are limited to the record, and are bound by the record."). In any event, we are not convinced that this issue has arguable merit.

Gish's appellate counsel emphasizes the conclusory nature of the claimed effects of Xanax on Gish:

> As Mr. Gish points out he attempted to commit suicide [by intentionally crashing the victim's vehicle, after the stabbing]. Although he didn't injure himself in any significant way and only damaged the victim's car on the passenger side, he made a knowing effort to do so. This after he fled the scene and drove some distance. Certainly the State would have had little difficulty in arguing that the effort wasn't a sincere one and was made as the realization as to what he had done sunk in along with the realization that he had no place to hide. Mr. Gish, to his credit, expressed his sorrow for what he had done when he provided his statement to the PSI writer. Mr. Gish echoed what he had told law enforcement earlier, namely that he lost his temper as a result of the victim's relationship with another man and then threatening to leave him, taking the children with her. Mr. Gish had no problem

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> **Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:
>
> **(1)** Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.
>
> **(2)** Negatives the existence of a state of mind essential to the crime.

Sec. 939.42 (eff. Apr. 18, 2014).

[6] Gish submitted copies out of a desk reference book for physicians and print-outs from the website drugs.com. He also included prescription drug purchase receipt/records from shortly before the murder and incident reports. Interestingly, we note that one of the incident reports, which recaps a police interview with Gish the day of the murder, reads: "Gish also states he takes Xanax. He stated that he last took a dosage of Xanax approximately two or three days ago." (Some uppercasing omitted.)

> recalling the series of events leading up to his ["]blind rage["] and the brutal stabbing death of the victim. *Mr. Gish never claimed to have been in a drug induced stupor at anytime, including during his meeting with current counsel. On the contrary, as noted in current counsel's no-merit report, Mr. Gish also acknowledged what occurred and apologized at length during this sentencing before [the circuit court]. Mr. Gish during his meeting with current counsel, or at any other time, has never named a witness which would support his claim as to an intoxicated state of mind. No witness as to his taking Xanax, how much or at what time. No witness to any irrational conduct related to his past consumption of any such drug.*[7]

(Record citations omitted; emphasis added.)

According to Gish's appellate counsel, a claim that Gish's trial counsel was ineffective for not investigating is without merit "in that there wasn't anything to investigate." Based on the record before us, we agree.

SENTENCING

Counsel addresses 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. The primary objectives of a sentence include protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence. ***State v. Ziegler***, 2006 WI App 49,

[7] Compare ***State v. Gardner***, 230 Wis. 2d 32, 42, 601 N.W.2d 670 (Ct. App. 1999), where we concluded that although the involuntary intoxication defense was available, the offer of proof was insufficient in a number of regards:

> No evidence was presented concerning the duration of Paxil's effects. There was no testimony as to how much Paxil had been prescribed, save defense counsel's own assertion while questioning Spiro that he thought the dose "went to 20 milligrams the day of [Gardner's] release." Neither was there any evidence as to how much Paxil Gardner was actually taking. And even if there had been, Spiro testified that it was difficult to predict what the effect of a given dosage would be.

Similar problems plague Gish's conclusory argument in this regard.

¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A sentencing court should identify the objectives of greatest importance and explain how a particular sentence advances those objectives. ***Id.*** The necessary amount of explanation "'will vary from case to case.'" ***State v. Brown***, 2006 WI 131, ¶39, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted).

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 it 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 court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In his sentencing remarks, Gish's trial counsel brought Gish's mental health issues and use of drugs, both illegal and prescription, to the circuit court's attention:

> The question that people would like answered, but we will walk out of here without answering is, why did this happen? Why was there this reaction on this day? And we don't know why.
>
> Your Honor, I put forward for the Court's consideration that it is possible that this was a combination of Mr. Gish's remission from the illegal drugs he was abusing combined with mental health issues.
>
> Mr. Gish also, interestingly, had a medication change about four days before this homicide took place. Mr. Gish went to a doctor for his son. Mr. Gish told the doctor that he was out of prescription medications for his bipolar disorder, and that doctor, on the spot, without knowing Mr. Gish any further, gave him a prescription for a new medication, the Lamictal that I had referred to before as well as Xanax.
>
> Those were the only medications—those were the only drugs—that were in Mr. Gish's system at the time of the—the homicide. Mr. Gish was showing some reaction to this new drug. He had not slept in the days before this homicide.
>
> And Your Honor, what he describes to the police and what he described to the PSI writer and to me is that he went into a blind

> rage. He called it a blind rage. He said he blacked out. He said he saw red. He recalls this homicide only in flashback form.
>
> I put this forward, not as an explanation for what it is that caused this—Mr. Gish caused this—but I put it forward as some mitigating evidence and some explanation of what's going on.

The court, in its remarks, noted its goals of deterrence and punishment. It reflected on the fact that this "is a classic domestic violence case" and that "there is a zero tolerance level for those cases here in Milwaukee County and around the State of Wisconsin." The circuit court explained:

> Whether or not … the defendant was on alcohol or drugs or had emotional issues or mental issues, they're two separate and distinct problems. The domestic violence is a pattern of controlling behavior that is learned and is not the result of alcohol or—or drug abuse, and it appears that some abusers frequently blame alcohol and drug use to free themselves from responsibility for their violence.
>
> ….
>
> Violence was [Gish's] choice. There are individuals who abuse alcohol or have other issues that don't act out in the ways that he acted out. The entire community is—is negatively impacted by both the—by domestic violence … socially and economically.

The circuit court noted the significant benefit Gish had received in entering a plea to the lesser offense of first-degree reckless homicide. Given Gish's serious treatment needs, the aggravating factors surrounding the crime, and the need for punishment, the circuit court sentenced him to the maximum amount of time available: forty years of initial confinement and twenty years of extended supervision. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), 973.01(2)(b)1. & (2)(d)1.

The record demonstrates that the circuit court followed the dictates of ***Gallion*** at the sentencing hearing. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Although counsel does not specifically address it, we note that the circuit court ordered Gish to pay the DNA surcharge without elaborating on its reasoning. *See* ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. It is unclear whether in fact Gish has paid the surcharge in connection with this case. At the time he was sentenced, under WIS. STAT. § 973.047(1f), providing the sample was required, but the surcharge was not: In ***Cherry***, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge under the statutory authority in effect at the time, WIS. STAT. § 973.046(1g).[8] ***Cherry***, 312 Wis. 2d 203, ¶¶9-10. To that end, we held that the court "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶9.

We subsequently explained that "***Cherry*** does not require a circuit court to use any 'magic words'" and specifically declined to adopt a rule requiring a circuit court to "explicitly describe its reasons for imposing a DNA surcharge." *See* ***State v. Ziller***, 2011 WI App 164, ¶¶2, 12, 338 Wis. 2d 151, 807 N.W.2d 241. The circuit court's imposition of the DNA surcharge in this case, considered in connection with the remainder of the sentencing record, reveals an appropriate exercise of sentencing discretion. *See* ***id.***, ¶13. In ***Ziller***, given that the circuit court

[8] Effective January 1, 2014, the statutory authority for the discretionary imposition of the DNA surcharge, WIS. STAT. § 973.046(1g), was repealed and § 973.046(1r) was amended to make the imposition of the DNA surcharge mandatory for felonies. *See* 2013 Wis. Act 20, §§ 2353-2355 & 9426.

found that the defendant had the ability to pay $10,000 in restitution, we held that there was no reason for the court to restate that the defendant had the ability to pay the $250 surcharge: "What is obvious need not be repeated." ***Id.*** Similar logic applies to the circumstances presented here where the circuit court ordered the stipulated amount of restitution and also ordered Gish to pay the DNA surcharge.

We agree with counsel's conclusions that the circuit court did not erroneously exercise its sentencing discretion and additionally, that there is no basis to modify Gish's sentence.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Michael J. Backes is relieved of further representation of Christopher Randolph Gish in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals