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July 16, 2014

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

2014AP803-CRNM State of Wisconsin v. Jotaviaous J. Cheese (L.C. #2011CF5685)

Before Fine, Kessler and Brennan, JJ.

Jotaviaous J. Cheese pled guilty to one count of first-degree reckless homicide as a party to a crime. The circuit court imposed a thirty-year term of imprisonment, bifurcated as twenty years of initial confinement and ten years of extended supervision. The circuit court also ordered Cheese to pay \$10,796 as restitution and to pay a \$250 deoxyribonucleic acid surcharge.

The state public defender appointed Attorney Matthew J. Pinix to represent Cheese in postconviction and appellate proceedings. Attorney Pinix filed a notice of appeal and a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32

(2011-12).¹ We dismissed the appeal at appellate counsel’s request and extended the deadline for Cheese to pursue postconviction relief. *See State v. Cheese*, No. 2013AP2076-CRNM, unpublished op. and order (WI App Feb. 11, 2014). Following remand, Cheese successfully moved to vacate the \$250 deoxyribonucleic acid surcharge. Attorney Pinix next filed a second notice of appeal and submitted the no-merit report now before this court. *See* RULE 809.32 and *Anders*. Cheese 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 issues exist for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Cheese and DeAngelo Webster were visiting their friend Dominique Thomas on November 14, 2011. While the three men were in Thomas’s backyard, Neil Tellis walked through the alley behind Thomas’s home. Thomas accused Tellis of wearing Thomas’s jacket, and Thomas then announced, “this is my alley.” After Tellis responded that the alley was his, Thomas commanded, “pop that motherfucker,” and both Cheese and Webster fired shots. Bullets struck Tellis in the ankle, arm, and torso. When police arrived at the scene, Tellis lay dead in the alley. An autopsy revealed that he died of a gunshot wound to the chest.

The State charged Cheese with first-degree intentional homicide by use of a dangerous weapon and as a party to a crime. He disputed the allegations for some time, but eventually he decided to resolve the case with a plea bargain.

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

We first consider whether Cheese could pursue a meritorious challenge to his guilty plea. At the outset of the plea proceeding, the State filed an amended information charging Cheese with first-degree reckless homicide as a party to a crime. The State then described the terms of the parties' plea bargain, explaining that Cheese would plead guilty to the amended charge, and the State would recommend twenty-five years of initial confinement as a penalty without making any recommendation as to the length of extended supervision. Trial counsel confirmed that the State correctly described the plea bargain, and Cheese said that he understood its terms.

The record includes a signed guilty plea questionnaire and waiver of rights form with attachments. The questionnaire reflects that Cheese understood the charge he faced, the constitutional rights he waived by pleading guilty, and the penalties that the circuit court could impose. A signed addendum attached to the questionnaire reflects Cheese'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. Also attached to the guilty plea questionnaire are documents initialed by Cheese that describe the elements of the offense and that explain liability as a party to a crime. Cheese confirmed that he signed the form after fully reviewing the materials with his trial counsel.

The circuit court explained to Cheese that he faced a sixty-year term of imprisonment upon conviction. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b). Cheese said that he understood. The circuit court told Cheese that it was not bound by the terms of the plea bargain and that he therefore might receive the maximum sentence. Cheese said that he understood. Cheese assured the circuit court that, outside of the terms of the plea bargain, he had not been promised anything to induce his guilty plea and that he had not been threatened.

The circuit court explained to Cheese that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire, and the circuit court reviewed each right listed on the form. Cheese said that he understood. The circuit court further explained to Cheese that if he was not a citizen of the United States of America, his guilty plea could result in his deportation or exclusion from admission to this country. *See* WIS. STAT. § 971.08(1)(c). Cheese said that he understood. Although the circuit court did not caution Cheese about the risks described in § 971.08(1)(c) using the precise words of the statute, minor deviations from the statutory language do not undermine the validity of the plea.² *See State v. Mursal*, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

“[A] circuit court must establish that a defendant understands every element of the charges to which he pleads.” *State v. Brown*, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may determine the defendant’s understanding in a variety of ways, including by summarizing the elements or by “refer[ring] to a document signed by the defendant that includes the elements.” *Id.*, ¶56. Here, Cheese signed and filed documents describing the elements and reflecting his understanding of those elements, the circuit court reviewed the elements on the record, and the circuit court further confirmed on the record that Cheese had reviewed the elements with his trial counsel and that he understood them. The circuit court established Cheese’s understanding of the elements.

² We observe that, before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that “the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization.” *See* § 971.08(2). Nothing in the record suggests that Cheese could make such a showing.

Before accepting a guilty plea, the circuit court must “make such inquiry as satisfies it that the defendant in fact committed the crime charged.” See *State v. Black*, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (citation and one set of brackets omitted). Here, Cheese’s trial counsel and the State stipulated to the facts in the criminal complaint. “[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint.” *Id.*, ¶13 (citation omitted). The circuit court properly found a factual basis for Cheese’s guilty plea.

The record reflects that Cheese entered his guilty plea knowingly, intelligently, and voluntarily. See WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); 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 Cheese 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 court may additionally consider a wide range of other factors concerning the defendant, the offense, and the community. See *id.* The 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 considered the gravity of the offense. The circuit court concluded that the crime was “as serious as offenses get,” and the circuit court lamented that the loss of life in this case was a “true tragedy.”

The circuit court discussed various aspects of Cheese’s character at length. The circuit court gave Cheese credit for accepting responsibility and pleading guilty, and the circuit court commended him for writing a letter of apology. At the same time, the circuit court was deeply concerned that Cheese acknowledged never considering any alternative to firing shots when his friend directed him to shoot somebody.

The circuit court recognized that Cheese was seventeen years old at the time of the crime, and the circuit court determined that his age was a mitigating factor. The circuit court also took into account that Cheese had only a limited juvenile record, but the circuit court noted that the record consisted of a weapons offense and that Cheese did not succeed on supervision as a juvenile: “he went A.W.O.L. multiple times. He was apprehended periodically.” The circuit court further observed that Cheese was “academically behind,” and that his work history consisted of nothing more than “community service type projects” that he performed while he was in a residential placement as a juvenile.

The circuit court considered the need to protect the public, determining that Cheese presented a “very high risk to the community” because he was “willing to fire shots at another person because someone yelled ‘shoot.’” In the circuit court’s view, Cheese’s behavior demonstrated that he was “a serious danger.”

The circuit court identified punishment, deterrence, and protection of the community as the sentencing goals in this case. The circuit court explained that Cheese must receive “a lengthy sentence to punish him [and] to deter him specifically from this behavior in the future.” The circuit court acknowledged that he had a “litany of needs” for treatment and education, but the circuit court determined that the risk he posed to the community required that he address those needs initially in a correctional facility.

The circuit court considered but rejected the recommendation in the presentence investigation report that Cheese serve ten years of initial confinement and three years of extended supervision. *See State v. Hall*, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41 (court should consider recommendations in presentence investigation report but is not bound by them). The circuit court explained that it had reviewed the assessment of Cheese’s future risk that was conducted in conjunction with the presentence investigation, and the circuit court concluded that Cheese presents “a very high risk to reoffend. He’s a high risk to involve himself with weapons. He’s a high risk to involve himself with a ... criminal peer group.” The circuit court therefore concluded that the presentence author’s recommendation was inadequate to meet the sentencing goals of punishment, deterrence, and community protection. For similar reasons, the circuit court rejected Cheese’s proposal that he serve four years of initial confinement and ten years of extended supervision.

The circuit court, however, also rejected the State's recommendation of twenty-five years of initial confinement. The circuit court explained that Cheese was not, in its view, "beyond redemption," and the circuit court concluded that the totality of the factors required that Cheese serve twenty years of initial confinement and ten years of extended supervision. The circuit court determined that such a sentence would permit Cheese to address his treatment and educational needs in a secure environment and would ensure a "lengthy period of extended supervision to transition Mr. Cheese back into the community."

The circuit court explained the factors that it considered when imposing sentence. The factors were 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 statutory maximum allowed by law. Such a sentence is presumptively not unduly harsh. See *id.*, ¶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 next consider whether Cheese could pursue an arguably meritorious claim that the circuit court erred by ordering that he pay restitution of \$10,796 jointly and severally with Webster and Thomas. Cheese stipulated to the restitution ordered. See WIS. STAT. § 973.20(13)(c). Therefore, he could not mount an arguably meritorious challenge to the order. See *State v. Leighton*, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Finally, we note appellate counsel's contention that Cheese could not pursue a claim that his trial counsel was ineffective. We agree that the record reveals no arguably meritorious basis for such a claim.

Based on our independent review of the record, no other issues warrant discussion. 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 amended judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Matthew S. Pinix is relieved of any further representation of Jotaviaous J. Cheese on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals