OFFICE OF THE CLERK
**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**

July 17, 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

Michael J. Backes
Law Offices of Michael J. Backes
P.O. Box 11048
Shorewood, WI 53211

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

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

Dierre D. Cotton 601412
Prairie Du Chien Corr. Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

---

2013AP2456-CRNM State of Wisconsin v. Dierre D. Cotton (L.C. #2012CF700)

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

Dierre D. Cotton appeals from a judgment of conviction, entered upon his guilty pleas, on three counts of armed robbery, two of which were as party to a crime. Appellate counsel, Michael J. Backes, Esq., has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Cotton was advised of his right to file a response, but he has not responded. Upon this court's independent review of the Record, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On January 4, 2012, a black male wearing a hooded jacket entered a CVS Pharmacy, displayed a sawed-off shotgun, and informed the sales clerk, "I don't got no time to play." The clerk surrendered $153 in a shopping bag.

On January 19, 2012, a black male wearing a hooded jacket and mask entered a Radio Shack. To one employee, he said, "You know what this is? Come on, come on." The employee walked to the cash register where another employee was. The second employee told police that the man had a gun up his coat sleeve, which he pointed at her as he demanded she "[g]ive me all the money and hurry up." The employee surrendered approximately $700.

On January 30, 2012, a black male in a black coat and black scarf entered an Aldi grocery store, waving a gun and pointing it at customers while demanding money from the cashier. The cashier put money in a plastic bag but, as the robber was fleeing, an armed customer took out his gun and shot at the robber, striking him. The wounded robber dropped the money and fled.

Also on January 30, 2012, police were dispatched to St. Joseph's Hospital to investigate a shooting. They encountered Cotton, who had a gunshot wound to his left thigh and a grazing gunshot wound to his head. Police linked Cotton to the Aldi robbery by his injuries. They ascertained that he had been transported to the hospital in a Jeep driven by Edyon Hibbler but owned by Herbert Haywood. Police obtained Haywood's permission to search the vehicle, and recovered a black scarf and tennis shoes with possible blood stains.

After he was advised of his rights, Cotton admitted his involvement in the Aldi robbery and, later, in the CVS and Radio Shack robberies. Hibbler also admitted his role in the Radio Shack and Aldi robberies, having driven Cotton to both locations.

Cotton was charged with three counts of armed robbery, contrary to WIS. STAT. § 943.32(2), the latter two charges as party to a crime. Cotton filed a motion to suppress his incriminating statements, claiming he had invoked his right to an attorney and claiming that his statements were involuntary because of medications. After a two-day hearing, the motion was denied. Cotton then agreed to a plea bargain. In exchange for his guilty pleas, the State would recommend a sentence of six to eight years' initial confinement with the length of extended supervision up to the court. Further, the State would not prosecute a potential felony theft charge, provided that Cotton would stipulate to pay $3992.84 in restitution as part of a read-in arrangement at sentencing. The circuit court accepted Cotton's guilty pleas and sentenced him to eight years' initial confinement and seven years' extended supervision on each count, to be served concurrently. Additional facts will be described herein as necessary.

Counsel raises four potential issues, each of which he concludes lacks arguable merit. We first consider whether there is any arguable merit to a claim that the circuit court erred when it denied Cotton's motion to suppress his statements to police.

Police conducted three interviews with Cotton. Detectives Brian Hardrath and Douglas Williams interviewed him on January 31, 2012, around 2:15 p.m., after he had been released by the hospital and taken to jail. They also interviewed Cotton on February 2, 2012, after receiving more information from Hibbler. Detective Marlon Davis also interviewed Cotton on January 31, but around 10 p.m.

The circuit court conducted a ***Miranda/Goodchild*** hearing.[1] The burden at such a hearing is on the State. *See* ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 475, 663 N.W.2d 798, 807. The State must show, by a preponderance of the evidence, that the defendant received and understood his ***Miranda*** warnings before knowingly and intelligently waiving his protected rights, and that the defendant's statements were given voluntarily. ***Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d at 474–475, 663 N.W.2d at 807. A circuit court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388. We do not reverse the circuit court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***, 2008 WI App 166, ¶9, 314 Wis. 2d at 668, 762 N.W.2d at 388–389.

Having reviewed the Record, we are confident that the circuit court properly concluded that there were no "***Miranda*** problems." Detectives properly advised Cotton of his rights each time they started questioning him, and Cotton waived those rights each time. We also agree with the circuit court's determination that those statements were voluntary—that is, that there was also no ***Goodchild*** violation. Cotton had attempted to show that his statements were not voluntary due to the physical pain of his injuries and his medicated status. Indeed, at the outset of his first interview, Cotton vomited into a wastebasket. However, the detectives testified that Cotton seemed alert and not confused, and that once he vomited, Cotton told them that he felt

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 133 N.W.2d 753, 762 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714–715, 345 N.W.2d 457, 464–465 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***Goodchild***, 27 Wis. 2d at 264–265, 133 N.W.2d at 763–764.

better and could continue with the interview. Based on the testimony, it was not improper for the circuit court to conclude that Cotton's statements were voluntary.

There was, however, a concern that detectives might have disregarded Cotton's request for counsel, resulting in a violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981), which requires police to immediately stop questioning a suspect who clearly invokes the ***Miranda*** right to counsel during a custodial interrogation. *See* ***State v. Jennings***, 2002 WI 44, ¶26, 252 Wis. 2d 228, 242, 647 N.W.2d 142, 148–149. Cotton had made statements during the 10 p.m. interview with Davis that Cotton claimed were a request for counsel. He then made an inquiry during the second interview with Hardrath and Williams, which Cotton claimed should have been recognized as a request for counsel.

Subsequent to ***Edwards***, the Supreme Court clarified that a suspect must clearly and unambiguously invoke the right to counsel for ***Edwards*** to apply: "a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel" does not require interrogation to cease. *See* ***Davis v. United States***, 512 U.S. 452, 459 (1994); *see also* ***Jennings***, 2002 WI 44, ¶29, 252 Wis. 2d at 243, 647 N.W.2d at 149. Police are not required to clarify ambiguities. ***Davis***, 512 U.S. at 461; ***Jennings***, 2002 WI 44, ¶42, 252 Wis. 2d at 249, 647 N.W.2d at 152.

Here, the parties questioned Davis about his interview with Cotton, but also played the recording of the interview. Davis testified that after he read Cotton his ***Miranda*** rights and asked if he was willing to make a statement, Cotton said something to the effect of, "Do I have to make another statement or can I get a lawyer or I don't know." Davis answered that he just wanted to

clear some things up and asked whether Cotton wanted to continue. Cotton indicated he would answer questions.

About twenty minutes into the interview, Cotton complained that he had not eaten in hours. Davis asked, "Are you hungry, what do you need?" Cotton replied, "I'll just have a lawyer, man, because it's not—I'm trying to tell you the truth." Though not required to do so, Davis attempted to clarify Cotton's statement, telling Cotton that if he wanted a lawyer, then "that's what I got to get for you." Cotton, however, responded that he would keep talking. At one point in the interview, Cotton also said, "I don't know, should I have a lawyer? I'm not sure."

During the second interview with Hardrath and Williams, Cotton inquired when his first court date would be. Williams answered. Cotton then asked when he would be able to speak to a lawyer, and Williams answered that one would be assigned. Williams testified that Cotton never expressly stated that he wanted a lawyer during the interview.

Whether a defendant properly invoked the right to counsel is a question of constitutional fact subject to a two-part review. *See* ***Jennings***, 2002 WI 44, ¶20, 252 Wis. 2d at 239, 647 N.W.2d at 147. A suspect "'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" ***Id.***, 2002 WI 44, ¶30, 252 Wis. 2d at 243, 647 N.W.2d at 149 (citation omitted). The circuit court noted that Cotton kept asking questions related to an attorney, but the police are not required to guess at what a defendant wants, and it found that at no point did Cotton clearly and unambiguously indicate that he wanted an attorney. Therefore, the court concluded, "there's no way I can say the bright-line rule was violated here[.]" Upon our

independent review of the Record, we agree. Thus, there is no arguable merit to a claim the circuit court erred in refusing to suppress Cotton's statements to police.

We next consider whether there is any basis for a challenge to the validity of Cotton's guilty pleas. To be constitutionally valid, Cotton's pleas must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12, 20 (1986). Cotton completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827–828, 416 N.W.2d 627, 629–630 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly acknowledged the maximum penalties Cotton faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, and the colloquy complied with the requirements of ***Bangert*** and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24. The circuit court did not explicitly review the nature of read-in offenses to explain that those charges can be considered at sentencing or form the basis for a restitution order. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 306, 750 N.W.2d 835, 858. However, this does not render the plea infirm because it was clear from the outset of the plea hearing, and noted on the plea questionnaire, that Cotton would be stipulating to nearly $4000 in restitution for a read-in offense. Ultimately, the plea questionnaire and waiver of rights form and addendum, along with the court's colloquy, appropriately advised Cotton of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

We next consider whether there is any arguable merit to a claim the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. At sentencing, a court must consider the principal 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, 606, 712 N.W.2d 76, 82, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557, 678 N.W.2d at 207. 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 may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606, 712 N.W.2d at 82.

The circuit court rejected probation as an option based on the egregiousness of this case. It characterized Cotton's actions as foolish, and rejected Cotton's explanation of his motivation—that he needed cash for college and living expenses—as any sort of mitigating factor, explaining that plenty of people attend school part time, work multiple jobs, or start at a technical school as a way to afford higher education. It noted the dangerousness of Cotton's behavior, because it causes people "to invoke this whole concept now we have of this concealed carry and almost a vigilantism …. [N]ow you are going to have this other focus of guys around you with guns that can shoot you and maybe even shoot another innocent person who might be happening to get in the way[.]"

The maximum possible sentence Cotton could have received was 120 years' imprisonment. The concurrent sentences totaling fifteen years' imprisonment are well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456, and are 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, 461 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[2]

We have considered whether there is any arguable merit to a challenge to the circuit court's imposition of a DNA surcharge, because the circuit court merely said, "A D.N.A. sample of your body is going to be taken and a surcharge paid by you." This does not appear to reflect an exercise of discretion as contemplated by ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. We note, however, that the Record nevertheless provides support for imposition of the surcharge. *See* ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 97, 750 N.W.2d 780, 786 (reviewing court may search record for reasons to sustain discretionary decision). These are Cotton's first felony convictions, so there should be no sample previously on file. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 654, 807 N.W.2d 12, 15. Additionally, Davis testified that some items in this case were processed for DNA evidence, thereby generating an actual DNA-related cost. *See* ***Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 395. There would no arguable merit to a claim the circuit court erroneously imposed a DNA surcharge.

[2] All restitution amounts were set by stipulation.

Finally, we address whether there is any arguable merit to a claim for sentencing modification based on a new factor in order to seek eligibility for the challenge incarceration or substance abuse programs. Counsel explains that Cotton "decided to misinform the PSI writer and the Court" by denying having any drug or alcohol problems. Cotton believed that, if he had admitted such problems, the circuit court would view him as a greater threat and impose a greater sentence.

There is no basis for seeking resentencing. Assuming Cotton does have a drug or alcohol problem, it would not constitute a "new factor" warranting modification: a new factor must be knowingly overlooked, not intentionally withheld. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 74, 797 N.W.2d 828, 838. Counsel also represents that, despite his request for additional information from Cotton that might demonstrate drug or alcohol dependency, Cotton has not provided anything. We also observe that a screening tool administered to Cotton indicated no drug or alcohol issues. Accordingly, there is no arguable merit to a claim for resentencing 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 Michael J. Backes, Esq., is relieved of further representation of Cotton in this matter. *See* WIS. STAT. RULE 809.32(3).

---

*Diane M. Fremgen*
*Clerk of Court of Appeals*