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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

September 15, 2014

To:

Hon. Mary E. Triggiano
Circuit Court Judge
Children's Court Center
10201 Watertown Plank Road
Wauwatosa, WI 53226-1425

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

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

Hannah Blair Schieber
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

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

Damon Johnson 405698
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2014AP868-CRNM State of Wisconsin v. Damon Johnson (L.C. #2011CM4619)
2014AP869-CRNM State of Wisconsin v. Damon Johnson (L.C. #2012CF2611)

Before Brennan, J.[1]

Damon Johnson appeals two amended judgments of conviction entered after he pled guilty to seven crimes. He also appeals two orders resolving his claims for postconviction relief. Johnson's appointed counsel, Attorney Hannah B. Schieber, filed a no-merit report, concluding

[1] Although the criminal convictions in these consolidated matters at one time included a felony, the circuit court changed the status of the felony to a misdemeanor during postconviction proceedings. Accordingly, these appeals are 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.

that further postconviction and appellate proceedings would lack arguable merit. *See* ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Johnson did not file a response. We have considered the no-merit report, and we have independently reviewed the records. 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 in case No. 2011CM4619, which underlies appeal No. 2014AP868-CRNM, Johnson entered Summer R.'s home by climbing through the bedroom window on August 10, 2011. At that time, Johnson was subject to a domestic abuse injunction preventing him from having contact with Summer R., and, additionally, he was out of custody awaiting trial in two pending cases where conditions of his bond required that he commit no crimes and have no contact with Summer R. The complaint further alleged that Johnson had been convicted of at least three misdemeanors during the five-year period preceding August 10, 2011, and certified documents attached to the complaint reflected that his prior crimes included bail jumping and incidents in which he defecated on Summer R.'s front porch and punched a hole in the wall of her home after she had obtained a restraining order against him.

As a result of Johnson's acts on August 10, 2011, the State charged Johnson with four misdemeanor offenses. These included two counts of bail jumping and one count of criminal trespass to dwelling, each as an act of domestic abuse and as a habitual offender. *See* WIS. STAT. § 946.49(1)(a), 943.14, 968.075(1)(a) & 939.62(2). Each of those three offenses carries statutory maximum penalties of a $10,000 fine, a nine-month jail sentence, or both, but, because the State charged Johnson as a habitual offender, he faced an enhanced penalty of two years in prison for each offense. *See* WIS. STAT. §§ 939.51(3)(a), 939.62(1)(a). The State also charged Johnson with one misdemeanor count of violating a domestic abuse injunction as an act of domestic

abuse and as a habitual offender. *See* WIS. STAT. §§ 813.12(4), 968.075(1)(a), 939.62(2). Pursuant to WIS. STAT. § 813.12(8), this offense carries a maximum fine of $1,000, a maximum sentence of nine months in jail, or both, but, because the State charged Johnson as a habitual offender pursuant to § 939.62, he faced a two-year term of imprisonment for this offense as well. *See* § 939.62(1)(a).

According to the criminal complaint in case No. 2012CF2611, which underlies appeal No. 2014AP869-CRNM, Johnson went to the home of Summer R. on May 23, 2012, rang the doorbell, kicked the door, and shouted obscenities. Police stopped him as he fled the scene, and Johnson identified himself using the name and birthdate of his deceased brother. The complaint further alleged that, as of May 23, 2012, Johnson was subject to a domestic abuse injunction preventing him from having contact with Summer R. and, additionally, that he was out of custody awaiting trial in case No. 2011CM4619, where conditions of his bond included that he have no contact with Summer R. and that he commit no crimes.

As a result of Johnson's acts on May 23, 2012, the State charged Johnson with the misdemeanor offenses of bail jumping and obstructing an officer, for which the penalties are nine months in jail, a $10,000 fine, or both. *See* WIS. STAT. §§ 946.41(1), 946.49(1)(a), 939.51(3)(a). The State also charged him with violating a domestic abuse injunction in violation of WIS. STAT. § 813.12(4). The State alleged that he committed this crime as a domestic abuse repeater within the meaning of WIS. STAT. § 939.621(1)(b), and therefore the nine-month maximum term of imprisonment for the offense "may be increased by not more than two (2) years and the penalty increase changes the status of a misdemeanor to a felony." *See* §§ 813.12(8), 939.621(2).

Johnson resolved the charges against him with a plea bargain in which he pled guilty to the six misdemeanors and one felony as charged. In case No. 2011CM4619, the circuit court imposed four consecutive two-year terms of imprisonment, each evenly bifurcated between initial confinement and extended supervision. The circuit court further ordered that Johnson serve his sentences concurrently with a jail sentence that he was already serving in another matter, case No. 2012CM208, and awarded Johnson 141 days of presentence incarceration credit.

In case No. 2012CF2611, the circuit court imposed a two-year, evenly bifurcated term of imprisonment for the felony offense of violating a domestic abuse injunction as a domestic abuse repeater, and the circuit court also required Johnson to pay a $250 deoxyribonucleic acid surcharge. The circuit court further imposed two nine-month jail sentences for the misdemeanor offenses of bail jumping and obstructing an officer. The circuit court ordered that Johnson serve the three sentences concurrently with each other but consecutively to the sentences imposed in case No. 2011CM4619.

With the assistance of Attorney Schieber, Johnson filed a consolidated postconviction motion raising various claims in both cases. The circuit court granted Johnson's motion in part. In case No. 2012CF2611, the circuit court agreed with Johnson that the State had failed to prove that he was a domestic abuse repeater. The circuit court commuted his two-year sentence for violating a domestic abuse injunction to nine months and the circuit court ordered the offense designated a misdemeanor. The circuit court also granted his motion to vacate the DNA surcharge. In case No. 2011CM4619, however, where Johnson argued that the circuit court had illegally bifurcated his enhanced misdemeanor sentences, the circuit court rejected his claim and denied sentence modification. The circuit court also rejected Johnson's request for an additional

seven days of jail credit. Further, the circuit court determined that he had received too much presentence incarceration credit and modified the award *sua sponte* to a total of seventy-one days.

Johnson now appeals. For the reasons that follow, we agree with appellate counsel's conclusions that further proceedings would lack arguable merit.

We first conclude that Johnson could not pursue a meritorious challenge to the orders resolving his postconviction motion. The order commuting his two-year term of imprisonment for violating a domestic abuse injunction and instead imposing a nine-month jail sentence grants Johnson the relief he requested, and he cannot challenge that order on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (defendant may not challenge on appeal a sentence that he or she affirmatively approved). For the same reason, Johnson cannot challenge the order vacating the DNA surcharge. Moreover, although Johnson did not specifically ask the circuit court to classify his crime of violating a domestic abuse injunction as a misdemeanor instead of a felony, the order is not adverse to Johnson. Therefore, he cannot appeal it. *See* WIS. STAT. RULE 809.10(4) (appeal from final order or judgment brings before this court only those orders and rulings that are adverse to the appellant).

The circuit court correctly rejected Johnson's postconviction claim for resentencing in case No. 2011CM4619. Johnson argued that a defendant convicted of a misdemeanor as a habitual offender cannot receive an evenly bifurcated two-year term of imprisonment. The law in fact permits such a sentence. *See* ***State v. Lasanske***, 2014 WI App 26, ¶¶3, 12, 353 Wis. 2d 280, 844 N.W.2d 417. Further pursuit of this issue would lack arguable merit.

Similarly, Johnson cannot pursue an arguably meritorious challenge to the postconviction order rejecting his claim for an additional seven days of presentence incarceration credit and reducing his award of credit to a total of seventy-one days. In his postconviction motion, Johnson argued that his award of 141 days of presentence incarceration credit was inadequate and that he was entitled to 148 days of presentence credit representing time in custody during three periods: August 10-23, 2011, January 12-21, 2012, and May 23, 2012 until September 24, 2012, the date of sentencing. In the postconviction order, the circuit court agreed that Johnson was in custody during those periods but found that, as of July 9, 2012, Johnson was serving a seven-month jail sentence in another case, No. 2012CM208. Indeed, at Johnson's plea hearing on August 27, 2012, and again at his sentencing hearing on September 24, 2012, the parties advised the court that he was presently in jail serving a seven-month sentence in case No. 2012CM208, and electronic docket entries confirm that, on July 9, 2012, the circuit court imposed a total of seven months in jail for his convictions in that case.[2] A convicted person is not entitled to presentence incarceration credit against one sentence for time spent in custody serving an earlier-imposed sentence for an unrelated crime. *See* ***State v. Gavigan***, 122 Wis. 2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984). Accordingly, the circuit court correctly disallowed Johnson any credit against his sentences in the instant matters for time he spent in custody

[2] This court may take judicial notice of CCAP entries. ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

serving a sentence on an unrelated matter from July 9, 2012 until September 24, 2012.[3] Further pursuit of this issue would lack arguable merit.

We next consider the merits of other issues that Johnson might have raised but did not pursue in the postconviction motion. We conclude that any such issues lack arguable merit.

We first consider whether Johnson could pursue an arguably meritorious claim for plea withdrawal. "[A] plea will not be disturbed unless the defendant establishes by clear and convincing evidence that failure to withdraw the guilty ... plea will result in a manifest injustice." ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. A plea that is not knowing, intelligent, and voluntary constitutes a manifest injustice. ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). When a defendant pleads guilty, the circuit court must conduct a colloquy that satisfies a set of statutory and court-mandated duties to ensure the knowing, intelligent, and voluntary nature of the plea. *See* ***State v. Brown***, 2006 WI 100, ¶¶25, 35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may use a guilty plea questionnaire and waiver of rights form to aid in ensuring the validity of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794.

[3] A defendant is entitled to sentence credit for time in custody "in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1)(a). The connection, however, must be factual and not merely procedural. ***State v. Johnson***, 2009 WI 57, ¶33, 318 Wis. 2d 21, 767 N.W.2d 207. Although limited information is available to us about case No. 2012CM208, the record is sufficient to show that the time that Johnson spent in custody following sentencing in that case was not factually "in connection with" his crimes in the instant cases. Johnson made an initial appearance in case No. 2012CM208 in January 2012 in conjunction with a return on a bench warrant in, *inter alia*, case No. 2011CM4619. The transcript of that hearing is therefore in the record. The transcript reflects that case No. 2012CM208 arose following a traffic stop while Johnson was out of custody on bond in case No. 2011CM4619. The record is thus clear that case No. 2012CM208 did not arise out of the same course of conduct as that giving rise to the charges in either the earlier-arising case, No. 2011CM4619, or the later-arising case, No. 2012CF2611.

At the outset of the plea hearing in these proceedings, the State described the plea bargain. Johnson would plead guilty as charged in case Nos. 2011CM4619 and 2012CF2611. In exchange, the State would move to dismiss and read in the charges in case Nos. 2011CM1296, 2011CM4241, and 2012CM1486, comprising a total of five counts of violating a domestic abuse injunction, five counts of bail jumping, and one count of criminal trespass to dwelling, all as a repeat offender. The parties were free to recommend the sentences deemed appropriate, but the State would recommend that Johnson serve any sentence imposed in case No. 2011CM4619 concurrently with the seven-month jail sentence that he was serving in case No. 2012CM208. Johnson confirmed that the State accurately recited the plea bargain and that he understood it.

Among the circuit court's duties at a plea hearing is to establish that the defendant understands the range of punishments he or she faces upon entering a plea. *See* ***Brown***, 293 Wis. 2d 594, ¶35. Here, the circuit court reviewed the maximum penalties that Johnson faced for each offense but, as Attorney Schieber explains, the circuit court misspoke when describing the penalties that Johnson faced upon conviction of violating a domestic abuse injunction as a domestic abuse repeater. Although the circuit court correctly advised Johnson that upon conviction of the offense, he faced a fine of not more than $1000 or imprisonment for nine months, or both, the circuit court then stated that, because he was "a domestic abuse repeater ... the maximum term of imprisonment for this offense may be increased *to* not more than two years and the penalty increase changes the status of a misdemeanor to a felony." (Emphasis added.) In fact, upon conviction of a crime as a domestic abuse repeater, the maximum term of imprisonment "may be increased *by* not more than two years." *See* WIS. STAT. § 939.621(2) (emphasis added). Under the facts of this case, however, the error does not provide an arguably meritorious claim for relief.

A defect in explaining the penalty increase accompanying a repeater allegation does not affect the validity of the plea to the underlying substantive charge if the circuit court has properly explained the statutory penalty for that substantive charge. *See* ***Taylor***, 347 Wis. 2d 30, ¶45. Therefore, Johnson cannot seek withdrawal of his plea to the substantive offense of violating a domestic abuse injunction based on the misinformation he received about the effect of the domestic abuse repeater allegation. During postconviction proceedings, the circuit court vacated the domestic abuse repeater allegation and voided all of its consequences. Therefore, a challenge to his plea "as a domestic abuse repeater" is moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy.").

We further conclude that no other component of the guilty plea colloquy presents a basis for plea withdrawal. The circuit court fully and accurately described the maximum penalties applicable to the misdemeanor charges that Johnson faced, and Johnson said that he understood the penalties. The circuit court explained that it was not bound by the parties' sentencing recommendations and that it could impose maximum sentences if it chose to do so. Johnson said that he understood. The circuit court further explained the effect of reading in dismissed charges for sentencing purposes. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. Johnson said he understood.

A signed guilty plea questionnaire and waiver of rights form with a signed addendum is in each record. Johnson confirmed that he had reviewed the forms with his trial counsel and that he understood them. The circuit court explained to Johnson that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaires, and the circuit court reviewed each right listed on the forms. Johnson said that he understood. Additionally, the

signed addenda reflect Johnson'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.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***Brown***, 293 Wis. 2d 594, ¶58. The circuit court may establish the defendant's requisite understanding in a variety of ways, including by "refer[ence] to a document signed by the defendant that includes the elements." ***Id.***, ¶56. Here, Johnson submitted initialed copies of the jury instructions applicable to each offense. Johnson told the circuit court that he had reviewed each element of the offenses with his trial counsel and that he understood the elements.

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Johnson admitted that the allegations in the criminal complaints are true. The circuit court found factual bases for Johnson's guilty pleas.

The record discloses no ground for an arguably meritorious challenge to the validity of Johnson's guilty pleas. *See* WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***Taylor***, 347 Wis. 2d 30, ¶45. The record reflects that Johnson knowingly, intelligently, and voluntarily entered his guilty pleas to the seven charges of which he stands convicted. We conclude that further proceedings to challenge the pleas would be frivolous within the meaning of ***Anders***.

We turn to Johnson's sentences. As already discussed, the circuit court correctly rejected Johnson's claim that the circuit court improperly bifurcated his enhanced misdemeanor

sentences, and Johnson prevailed in his claim that the circuit court imposed an excessive sentence based upon an enhancement that the State failed to prove. We conclude that a further challenge to Johnson's sentences would lack arguable merit.

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 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 circuit court appropriately exercised its sentencing discretion here. The circuit court identified deterrence and rehabilitation as primary sentencing goals, emphasizing the persistence of the criminal behavior and suggesting that it reflects Johnson "is someone that just can't stop [such behavior] without some services." The circuit court also determined that Johnson must be punished for his crimes. In selecting a disposition to meet the objectives, the circuit court discussed appropriate factors. The circuit court considered the gravity of the offenses, explaining that the incessant quality of Johnson's actions aggravated their severity. The circuit court discussed Johnson's character, commending him for participating in anger management classes and Bible study while incarcerated. The circuit court also noted that he held jobs for

periods of time when he was not incarcerated and that he had a supportive family. The circuit court took into account, however, that he displayed consistently poor judgment over many years and that he had eight prior convictions dating back to 1994. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record spanning decades is evidence of character). The circuit court considered the need to protect the public, observing that his conduct affected not only the victim but also the children in her home, and the circuit court pointed out that "the impact of domestic violence on children can be extremely damaging."

The circuit court appropriately considered probation as the first alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The circuit court rejected that option, however, finding that probation would unduly depreciate the seriousness of the offenses and concluding that Johnson required treatment in a confined setting.

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. We cannot say that the circuit court erroneously exercised its discretion in imposing sentence here.

We have considered whether Johnson could pursue an arguably meritorious challenge to the circuit court's decisions declaring him ineligible for participation in the Wisconsin substance abuse program and delaying his eligibility for participation in the challenge incarceration program. *See* WIS. STAT. §§ 302.05, 302.045. Both programs are prison treatment programs that, upon successful completion, permit an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* §§ 302.045(3m)(b)1., 302.05(3)(c)2.a. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if

they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187, and WIS. STAT. §§ 973.01(3g)-(3m).[4]

Here, the State pointed out that Johnson evidently was not intoxicated during the incidents underlying his current convictions, and Johnson's own sentencing recommendations did not include a request for substance abuse treatment. The record supports the circuit court's discretionary decision not to declare Johnson eligible for the Wisconsin substance abuse program. Johnson did, however, request eligibility for the challenge incarceration program, a multi-faceted and rigorous program of exercise, labor, treatment, and counselling. *See* WIS. STAT. § 302.045(1). The circuit court granted the request but concluded that he must first serve two years and eight months of initial confinement before he became eligible for participation in a program that might permit him early release from incarceration. In light of the circuit court's assessment of Johnson's rehabilitative needs, the delay represents a reasonable exercise of sentencing discretion. *See* ***State v. Lehman***, 2004 WI App 59, ¶17, 270 Wis. 2d 695, 677 N.W.2d 644 (circuit court has discretion to delay eligibility for challenge incarceration program).

Finally, we cannot conclude that the sentences imposed are 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

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[4] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

circuit court considered a total of seven crimes that Johnson admitted by pleading guilty, and the circuit court further considered an additional eleven crimes that were dismissed and read in for sentencing purposes. The sentences chosen reflect the circuit court's conclusion that Johnson must receive treatment in a confined setting to assist him in avoiding future criminal behavior, and at the same time permit Johnson to participate in a program that might both hasten his rehabilitation and permit him to earn a reduction in his confinement time. Under the circumstances here, we cannot say that the sentences are unduly harsh or unconscionable.

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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved of any further representation of Damon Johnson on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals