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November 12, 2014

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

2014AP1026-CRNM State of Wisconsin v. Boisy N. Walker, III (L.C. #2012CF5691)

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

Boisy N. Walker, III, pled guilty to one felony count of criminal damage to property as an act of domestic abuse. *See* WIS. STAT. §§ 943.01(2)(d) (2011-12),¹ 968.075(1)(a). The trial

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

court imposed three years and six months of imprisonment, bifurcated as eighteen months of initial confinement and two years of extended supervision. The trial court stayed that sentence and placed Walker on probation for three years. The trial court imposed nine months in jail as a condition of probation and ordered Walker to serve that term without the opportunity to reduce the time in custody by earning credit for good behavior (good time credit). The trial court ordered Walker to pay the domestic abuse surcharge required by WIS. STAT. § 973.055(1), and the trial court also ordered Walker to pay a DNA surcharge pursuant to WIS. STAT. § 973.046(1g) if he had not previously paid a DNA surcharge. At a subsequent restitution hearing, Walker stipulated to a total of \$11,623.89 in restitution.

The Office of the State Public Defender appointed Attorney Randall E. Paulson as postconviction and appellate counsel for Walker. With the assistance of appointed counsel, Walker moved for postconviction relief and the trial court granted his motion, vacating the DNA surcharge and correcting the judgment of conviction to reflect that Walker was eligible to participate in both the Wisconsin substance abuse program and the challenge incarceration program. The trial court also entertained but denied Walker's *pro se* motion for eligibility to earn good time credit against the nine months he must spend in jail as a condition of probation. Walker appeals.

Appellate counsel filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Walker did not file a response. This court has considered the no-merit report and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Jennifer H., the mother of Walker's child, received a text message from Walker on November 4, 2012, stating that he had "just left from fuckin up" her apartment. Jennifer H. was not in the home at the time because she feared for her safety and was staying elsewhere to avoid Walker. On November 7, 2012, a maintenance worker employed by the owner of the apartment complex where Jennifer H. lived entered her apartment and discovered that the water was running in the sinks and bathtub, which had been clogged with drywall. Jennifer H.'s apartment had sustained substantial water damage, and the apartment below hers had also sustained damage from water pouring through a light fixture. The State charged Walker with one count of criminal damage to property in violation of WIS. STAT. § 943.01(2)(d), and the State alleged that Walker committed the crime as an act of domestic abuse within the meaning of WIS. STAT. § 968.075(1)(a).

Walker offered to plead guilty at his arraignment in December 2012. He entered a guilty plea to the charge on January 3, 2013, and the matter proceeded immediately to sentencing.

We first consider whether Walker could bring a meritorious challenge to the validity of his guilty plea. We conclude that he could not do so.

At the outset of the plea hearing, the State described the terms of the plea bargain. Walker would plead guilty as charged, and the State would recommend a sentence imposed and stayed in favor of probation. The State would take no position as to the length of either the sentence or the probationary term but would recommend eleven months in the House of Correction as a condition of probation. The State would also seek restitution. Walker confirmed that he understood the terms of the plea bargain.

The trial court explained to Walker that it was not bound by the terms of the plea bargain or the recommendations of the parties. The trial court described the maximum penalties that it could impose upon Walker's conviction of the charge, and the trial court told Walker that it was free to impose the penalties, up to the statutory maximums, that it deemed appropriate. Walker said he understood.

A signed guilty plea questionnaire and waiver of rights form and an addendum to the form are in the record. Walker said that he had reviewed the form and addendum with his attorney and that he understood them. The form reflects that Walker had not been promised anything outside of the terms of the plea bargain to induce his guilty plea and that he had not been threatened. Walker confirmed that he was freely entering his guilty plea after discussing the decision with his trial counsel.

The trial court told Walker that, by pleading guilty, he would waive the constitutional rights listed on the guilty plea questionnaire and waiver of rights form, and the trial court reviewed those rights on the record. Walker said he understood. He also confirmed his understanding that, by pleading guilty, he would give up the opportunity to raise defenses and to seek suppression of his statements and other evidence.

“[A] circuit court must establish that a defendant understands every element of the charge[] to which he pleads.” *State v. Brown*, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, Walker filed a copy of WIS JI—CRIMINAL 1400, the jury instruction for criminal damage to property, along with the guilty plea questionnaire and waiver of rights form. Walker said that he had reviewed the jury instruction with his trial counsel and that he understood it. Further, the trial court discussed with Walker how the elements of the offense applied to the

allegations against him, and the trial court explained that the State also alleged that the offense involved an act of domestic abuse. Walker told the trial court that he understood the elements of the offense.

A guilty plea colloquy must include an inquiry sufficient to satisfy the trial court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). In this case, Walker assured the trial court that the facts alleged in the complaint were substantially true and correct, and his trial counsel also stipulated to the accuracy of the alleged facts. The trial court properly found a factual basis for Walker’s guilty plea. *See State v. Black*, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Walker 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 a challenge to the sentence would have arguable merit. Sentencing lies within the trial court’s discretion, and our review is limited to determining if the trial court erroneously exercised its discretion. *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 trial court in passing sentence.” *State v. Stenzel*, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The trial 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 trial court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See id.* The trial 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. Additionally, the trial court must “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 trial court put greatest emphasis on Walker’s character, praising him for completing high school and maintaining employment as an auto mechanic. The trial court noted with concern, however, that Walker had fourteen prior criminal convictions. *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 trial court lamented that Walker’s actions were “just not right” and pointed out to Walker that his conduct affects not only his life but the lives of those around him. The trial court indicated that protection of the public was the primary sentencing goal, but the trial court also explained that it “didn’t want to lose [Walker]” because it believed he could contribute to society.

Walker faced three years and six months of imprisonment and a \$10,000 fine upon his conviction for criminal damage to property. *See WIS. STAT. §§ 943.01(2)(d), 939.50(3)(i)*. As required, however, the trial court considered probation as the first sentencing alternative. *See Gallion*, 270 Wis. 2d 535, ¶25. The trial court determined that Walker should be afforded the

opportunity to “start turning it around” and that probation was therefore the appropriate disposition. The trial court concluded, however, that Walker should have known better than to commit the destructive acts underlying the charge in this case. The trial court therefore determined that Walker should serve some time in jail to punish him and to assist him in “figuring out how to behave” in the future.

The trial court ultimately imposed but stayed the maximum term of imprisonment and required Walker to serve nine months in jail as a condition of probation. The disposition does not exceed the penalties authorized by law, and thus is neither shocking nor disproportionate to the offense. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Further, the trial court considered proper and relevant factors in fashioning the disposition imposed. We agree with appellate counsel that further proceedings on this issue would lack arguable merit.

We next consider whether Walker could pursue an arguably meritorious challenge to the postconviction order denying his *pro se* request to earn good time credit against the time he must serve in the House of Correction as a condition of probation. With an exception not relevant here, a trial court has discretion to determine whether a probationer may earn good time credit while serving a jail term as a condition of probation.² *See Prue v. State*, 63 Wis. 2d 109, 114,

² Pursuant to WIS. STAT. § 973.09(1)(d), a person is entitled to earn good time credit while serving a jail term imposed as a condition of probation for an offense that carries either a presumptive or a mandatory minimum period of one year or less of imprisonment. The crime that Walker committed does not carry a presumptive or mandatory minimum period of imprisonment upon conviction. *See* WIS. STAT. §§ 943.01(2)(d), 968.075.

216 N.W.2d 43 (1974). Here, the trial court explained that Walker could not earn good time credit while incarcerated as a condition of probation because the time imposed is a necessary part of the punishment for the offense. The trial court's decision reflects a proper exercise of discretion. See *Gallion*, 270 Wis. 2d 535, ¶19. Further pursuit of this issue would lack arguable merit.

We also conclude that a challenge to the restitution order would lack arguable merit. At the restitution hearing, the trial court ordered a total of \$11,623.89 as restitution after considering the amounts requested for the losses that Walker caused. The parties stipulated to most of the amounts. The parties disputed only the amount necessary to repair Jennifer H.'s apartment. The State requested \$7650, but Walker contended that the requested amount inappropriately included the cost of replacing missing appliances. The trial court agreed with Walker and imposed \$5795 for repairs. Accordingly, Walker cannot challenge the restitution order. See *State v. Michels*, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987) (defendant judicially estopped from arguing a position contrary to that asserted before the trial court). An appellate challenge to the restitution order would lack arguable merit.³

³ The amended judgment of conviction in this case includes a scrivener's error. Although the "comments" section of the judgment correctly reflects that the trial court ordered restitution in the total amount of \$11,623.89, the judgment also reflects, under the word "restitution," an amount of \$14,541.65. As appellate counsel correctly explains, the trial court ordered \$2,917.76 as partial restitution at sentencing. The trial court expressly vacated that order at the restitution hearing and imposed a total restitution amount of \$11,623.89, which included \$2,917.76 for certain itemized losses. Because \$14,541.65 is the sum of \$11,632.89 and \$2,917.76, it appears that the entry of \$14,541.65 under the word "restitution" flows from a failure to implement fully the order vacating the partial restitution. Upon remittitur, the trial court shall oversee entry of a corrected judgment of conviction replacing the number "\$14,541.65" with the number "\$11,623.89." See *State v. Prihoda*, 2000 WI 123, ¶¶5, 17, 239 Wis. 2d 244, 618 N.W.2d 857 (trial court may correct clerical errors in written judgment of conviction at any time).

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, corrected as required by footnote three, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Randall E. Paulson is relieved of any further representation of Boisy N. Walker, III, on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals