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

2014AP297-CRNM State of Wisconsin v. Jante Toba Bork (L.C. #2012CM2748)
2014AP298-CRNM State of Wisconsin v. Jante Toba Bork (L.C. #2012CF5015)

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

Jante Toba Bork pled guilty in case No. 2012CM2748 to three misdemeanor offenses, namely, two counts of theft and one count of fraudulent use of a credit card. *See* WIS. STAT. §§ 943.20(1)(a), 943.20(3)(a), 943.41(5)(a)1.a., 943.41(8)(c) (2011-12).[1] During the same hearing, she pled guilty in case No. 2012CF5015 to one felony count of possessing narcotic drugs. *See* WIS. STAT. § 961.41(3g)(am). At sentencing, the trial court imposed three concurrent

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

ninety-day jail sentences for the misdemeanor convictions. As to the felony conviction, the trial court imposed a forty-two-month term of imprisonment, bifurcated as eighteen months of initial confinement and twenty-four months of extended supervision. The trial court stayed that sentence and placed Bork on probation for thirty months. The trial court ordered Bork to serve twelve months in jail as a condition of her probation but stayed that condition and ordered her to serve the twelve months only if she violates other terms of her probation. Bork appeals.

Appellate counsel, Timothy L. Baldwin, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. He also filed a supplemental no-merit report and affidavit discussing the order that imposed and stayed jail time as a condition of Bork's probation. Bork did not file a response. We have considered the no-merit reports and independently reviewed the consolidated records. We conclude that no arguably meritorious appellate issues exist, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The criminal complaint in case No. 2012CM2748 alleges that, on May 2, 2012, Bork entered a restaurant and took a purse belonging to Kelly C. The complaint next alleges that on May 10, 2012, Bork entered a delicatessen and took a purse belonging to Jessica C., then used Jessica C.'s credit card at a gas station. Based on the foregoing, the State charged Bork with two counts of theft and one count of fraudulent use of a credit card. In addition, under the heading "read in," the complaint includes a description of a fourth offense. In this portion of the complaint, the State alleged that on May 12, 2012, Bork stole jewelry from her friend's mother, Sally S., while visiting in her home.

The criminal complaint in case No. 2012CF5015 alleged that, on October 2, 2012, a police officer saw a car that was weaving and drifting between lanes. The officer approached the

driver, subsequently identified as Bork, after she stopped the car in front of a garage. The officer observed that Bork's speech was slurred, she did not know where she was, her pupils were constricted, and she had fresh needle marks on her arms. After Bork failed field sobriety tests, the officer arrested her and then inventoried the contents of her car before having it towed. In the car, the officer found forty-eight used syringes and fourteen packages containing a white powdery substance that later tested positive for the presence of heroin. The State subsequently filed an information charging Bork with one count of possessing heroin, a narcotic drug. *See* WIS. STAT. §§ 961.14(3)(k), 961.41(3g)(am).

Bork disputed the charges for some time. In June 2013, however, she told the trial court that she wanted to resolve the matters with a plea bargain.

We first conclude that Bork could not mount an arguably meritorious challenge to her guilty pleas. At the outset of the plea hearing, the parties described the terms of the plea bargain on the record: Bork would plead guilty to the two counts of misdemeanor theft and one count of fraudulent use of a credit card charged in case No. 2012CM2748, and she would also plead guilty to the felony offense of possessing narcotics charged in case No. 2012CF5015. The State would recommend a global disposition of eighteen-to-twenty-four months of probation and an imposed and stayed sentence of twelve months in jail. Bork said that she understood these terms. Later in the proceedings, the parties said they had also agreed that the State would move to read in an uncharged offense. The trial court questioned the parties about the disparities between the read-in described at the hearing and the read-in described in the complaint. Trial counsel and

Bork assured the trial court that the parties had accurately described the read-in offense, namely, a theft of a ring from Bork's stepmother.[2]

The trial court explained to Bork 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 conviction of each charge, and the trial court told Bork that it was free to impose the penalties that it deemed appropriate. Bork said she understood.

The record includes two signed guilty plea questionnaire and waiver of rights forms, each with a signed addendum. Bork confirmed on the record that she had reviewed the questionnaires and addenda with her trial counsel and that she understood them.

The trial court explained to Bork that by pleading guilty she would give up the constitutional rights listed on the guilty plea questionnaires, and the trial court reviewed those rights. Bork said that she understood. The trial court also explained that by pleading guilty, Bork would give up the defenses and claims listed on the signed addenda to the guilty plea questionnaires, and the trial court reviewed those defenses and claims with Bork. She said that she understood. The trial court reviewed the elements of each offense on the record. Bork confirmed that she understood the elements. Bork further confirmed that she was entering her guilty pleas freely and that she did so because she was guilty of the offenses.

The trial court explained to Bork the effect of reading in allegations for sentencing purposes. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835.

[2] Later proceedings identified Bork's stepmother as Debra B.

Specifically, the trial court told Bork that the State could not prosecute her for a read-in offense, that the trial court could consider a read-in charge when selecting her sentences, and that the trial court could order her to pay restitution for a read-in charge. *See* ***id.*** Bork said that she understood.

The trial court told Bork that if she was not a citizen of the United States, her guilty pleas "may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." *See* WIS. STAT. § 971.08(1)(c). Bork said that she understood. Although the trial court's warning about the risk of deportation deviated in some minor ways from the statutory language in § 971.08(1)(c), such deviations do not undermine the validity of the plea.[3] *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

A guilty plea colloquy must include an inquiry sufficient to satisfy the trial court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, Bork told the trial court that the facts in the criminal complaints were true. Additionally, Bork's trial counsel agreed that the trial court could use the facts alleged in the criminal complaints as factual bases for the guilty pleas. "'[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint.'" ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted). The trial court properly found factual bases for the guilty pleas.

[3] 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 "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Bork could make such a showing.

The record reflects that Bork entered her guilty pleas 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 pleas.

We next consider whether Bork could make an arguably meritorious claim that the State breached the plea bargain at sentencing. During the plea hearing, the parties described an agreement to read in one offense, but during the State's sentencing remarks, the State asked the trial court to consider two read-in offenses: (1) the theft from Bork's stepmother, Debra B., described during the plea colloquy; and (2) the theft from Sally S., described in the criminal complaint underlying case No. 2012CM2748. Notwithstanding this discrepancy, we conclude that the record does not support an arguably meritorious claim that the State breached the plea bargain.

An actionable breach of a plea bargain cannot be merely technical, but must be material and substantial. *See* ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.*** Whether a breach is material and substantial is a question of law. ***Id.***, ¶2.

Here, treating the theft from Sally S. as a read-in offense did not undermine the terms of Bork's plea bargain. Although the trial court may consider read-in offenses at sentencing, in this case the read-in procedure did not alert the trial court to the theft from Sally S., because that theft

was in the complaint and thus squarely before the trial court for its consideration at sentencing. Further, the plea bargain described during the plea colloquy did not purport to—and indeed, could not as a matter of public policy—prevent the sentencing court from considering relevant information about Bork's criminal conduct. *See* ***State v. Frey***, 2012 WI 99, ¶78, 343 Wis. 2d 358, 817 N.W.2d 436. Finally, the trial court held a restitution hearing at which the State asked the trial court to set restitution for Sally S. at zero because she recovered all of her property and had no losses. Bork did not object to that entirely favorable proposal, and the trial court granted the State's request. Under these circumstances, Bork cannot make an arguably meritorious claim that reading in the offense involving Sally S. defeated the benefit Bork received from the plea bargain. Rather, reading in the second offense benefitted her by allowing her to resolve a criminal allegation without increasing either the trial court's familiarity with her criminal behavior or her burden to pay restitution.[4] *See* ***State v. Lichty***, 2012 WI App 126, ¶¶22, 24-25, 344 Wis. 2d 733, 823 N.W.2d 830 (technical nonconformity with plea bargain provides no grounds for postconviction relief absent prejudice).

We next consider whether Bork could raise an arguably meritorious challenge to her sentences. Sentencing lies within the trial court's discretion, and our review is limited to

[4] Although we have discussed whether the State materially and substantially breached the plea bargain by deviating from its terms, we observe that, on the record before us, the parties appear to have agreed before sentencing to modify the plea bargain. *See* ***State v. Paske***, 121 Wis. 2d 471, 475, 360 N.W.2d 695 (Ct. App. 1984) (plea bargain is a contract that may be modified by the parties without additional consideration). The supreme court has explained that parties "may negotiate [the read-in] procedure either as a part of a plea bargain or as part of sentencing." *See* ***State v. Frey***, 2012 WI 99, ¶74, 343 Wis. 2d 358, 817 N.W.2d 436. Here, Bork did not object when the State indicated at sentencing that the thefts from both Sally S. and Debra B. should be read in for sentencing purposes, nor did Bork complain that the State improperly sought restitution on behalf of Sally S. *Cf.* ***id.***, ¶43 (explaining that read-in charges, but not dismissed charges, are "subject to restitution"). Rather, Bork agreed to a restitution hearing to address Sally S.'s restitution request. Under these circumstances, Bork appears to have agreed to use the read-in procedure for resolution of the allegations that she stole from Sally S.

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 court may also 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 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 considered the gravity of the thefts, noting that Kelly C. and Jessica C. were waitresses who needed the money Bork took. The trial court also considered information from Kelly C. and Jessica C. suggesting that they felt vulnerable because they feared Bork might use the keys she stole to break into their homes. As to the offense of possessing heroin, the trial court observed that Bork's heroin use endangered her own life and also led her to drive while impaired, and the trial court analogized her actions to pointing a weapon at other drivers on the road.

The trial court considered Bork's character. The trial court observed that Bork was only twenty-three years old, which it viewed as a mitigating factor. Further, the trial court took into account that Bork had graduated from high school, that she was intelligent, and that she had a supportive family. Also before the trial court, however, was a report from pretrial services reflecting that Bork had missed appointments and refused a drug test. The trial court expressed concern that, while Bork plainly needed to maintain compliance with drug and alcohol treatment, she had "demonstrated to this point that [she was] not going to do it."

The trial court discussed the need to protect the public, stating that "every year there are people who are seriously injured or killed by people driving under the influence." The trial court also observed that heroin addiction undermines family relationships and leads users to commit additional crimes.

The trial court identified deterrence, rehabilitation, and punishment as the goals of sentencing. The trial court explained that it intended the dispositions in these matters to help Bork "turn [her] life around and not commit any other violations," and to "convince [her] and then others throughout the community not to commit" similar violations. The trial court also explained that it intended to punish Bork for the fear she had caused her victims and the risk that she posed to motorists when she drove her car under the influence of heroin.

The trial court identified the factors that it considered in fashioning appropriate sentences in these matters. The factors are proper and relevant. Moreover, the sentences are not 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). Bork faced nine months in jail and a $10,000 fine upon conviction of each misdemeanor. *See* WIS. STAT. § 939.51(3)(a). She faced an additional three years and six months in prison and a $10,000 fine upon conviction for possessing narcotics. *See* WIS. STAT. § 939.50(3)(i). The penalties imposed are far less than the law allowed. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted). Accordingly, the sentences are not unduly harsh or excessive. We conclude that a challenge to the trial court's exercise of sentencing discretion would lack arguable merit.

We have also considered whether the trial court erred as a matter of law when it imposed and stayed twelve months in jail as a condition of probation and ordered:

> for a first violation you'll do the ten days straight time at the House of Corrections. Second violation, twenty-five days straight time. Third violation 60 days. For a fourth violation, at that point I think you should be revoked. If you're not revoked, then you'll do the balance of it all as straight time.

We asked appellate counsel to address the foregoing order in light of ***State v. Fearing***, 2000 WI App 229, 239 Wis. 2d 105, 619 N.W.2d 115. In that case, the trial court imposed and stayed three months in jail as a condition of probation and ordered that the defendant serve that time, if at all, at the discretion of the probation agent. ***Id.***, ¶1. We held in ***Fearing*** that the trial court erred because it improperly authorized the department of corrections to impose conditions of probation, and we explained that the authority to impose such conditions rests with the judiciary. ***Id.***, ¶2. In the instant case, however, we agree with appellate counsel that the trial court did not improperly delegate its authority. Rather, the trial court properly "allow[ed] the executive

branch to determine whether [Bork] ... violated the conditions of ... her probation." *See* ***State v. Horn***, 226 Wis. 2d 637, 651, 594 N.W.2d 772 (1999). At the same time, the trial court itself selected conditions of that probation, including the penalties for violations. *See* ***Fearing***, 239 Wis. 2d 105, ¶21. Further pursuit of this issue would lack arguable merit.

We next consider whether Bork could pursue an arguably meritorious challenge to the trial court's decision at sentencing not to order expungement of her convictions upon her completion of the sentences. When the trial court sentences a person who is younger than twenty-five years old for crimes such as those at issue here, the trial court may also order expungement of the convictions upon completion of the sentence if the trial court concludes both that the person will benefit and that society will not be harmed. *See* WIS. STAT. § 973.015(1)(a). Whether to order expungement under § 973.015 rests in the trial court's discretion. ***State v. Matasek***, 2014 WI 27, ¶2, 353 Wis. 2d 601, 846 N.W.2d 811. Here, the trial court explained that it lacked confidence that Bork would successfully address her treatment needs during the term of her probation and therefore the trial court was unable to conclude that expungement would not harm the public interest. The trial court's decision was reasonable in light of Bork's noncompliance with drug testing and other obligations during the course of the criminal proceedings. A challenge to the trial court's exercise of discretion would lack arguable merit.

Next, we consider whether Bork could pursue an arguably meritorious challenge to the restitution ordered during the sentencing hearing. She expressly stipulated to $692 as restitution for Kelly C. and to $250 as restitution for Jessica C., and therefore could not mount an arguably meritorious challenge to those orders. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126. Although Bork did not explicitly stipulate to the $250 ordered as restitution for her stepmother, Debra B., the record reflects that Bork did not object when the

State made the request or when the trial court imposed the order. Under these circumstances, Bork constructively stipulated to that restitution order. *See* ***id.***

We last conclude that Bork could not pursue an arguably meritorious challenge to the order requiring her to pay a DNA surcharge. A sentencing court must order a defendant convicted of a felony to provide a DNA sample pursuant to WIS. STAT. § 973.047. Pursuant to WIS. STAT. § 973.046(1g), however, the trial court has discretion to impose a DNA surcharge when sentencing a defendant for any felony that does not involve certain sex crimes.[5] *See* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. Here, the record established that Bork had not previously been convicted of a felony. The trial court determined that, because Bork was required to donate a DNA sample pursuant to her felony conviction, she should pay the DNA surcharge to shoulder "the cost of collecting [the sample] and administering the program." The cost of collecting and analyzing a DNA specimen "is a proper consideration in imposing a surcharge—if a surcharge has not previously been paid based on those same costs." *See* ***State v Simonis***, 2012 WI App 84, ¶23, 343 Wis. 2d 663, 819 N.W.2d 328. Accordingly, a challenge to the DNA surcharge would be frivolous within the meaning of ***Anders***.

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.

[5] Effective January 1, 2014, the legislature repealed WIS. STAT. § 973.046(1g). *See* 2013 Wis. Act 20, §§ 2353, 9426. The repeal first applies to sentences imposed on the effective date. *See* ***id.***, § 9326(1)(g). The trial court sentenced Bork in June 2013.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy L Baldwin is relieved of any further representation of Jante Toba Bork on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals