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February 4, 2015

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

2014AP1969-CRNM State of Wisconsin v. Salina Lenore Williams
(L.C. #2012CF4701)

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

Salina Lenore Williams appeals from a judgment of conviction, entered upon her guilty plea, on one count of conspiracy to commit possession with intent to deliver between ten and thirty grams of heroin. She also appeals from an order denying her postconviction motion for sentence modification. Appellate counsel, Michael J. Backes, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1]

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

Williams was advised of her right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

According to the criminal complaint, Milwaukee police had received reports of a woman on a bicycle selling heroin in a particular neighborhood. On September 10, 2012, two officers watched from their squad car as Williams rode up on a bicycle to two seated men. As Williams left, she turned her bike into the path of the now-moving squad car, which had to stop to avoid hitting her. One of the officers told her to stop, and they watched Williams discard a napkin on the ground. As she tried to ride past the officers, one grabbed her arm to stop her. The napkin contained two small bags and one large bag of a substance that field-tested positive for heroin. The amount was just over ten grams, and Williams was charged with possession with intent to deliver between ten and fifty grams of heroin, a Class D felony. Williams posted bond after her arrest and retained counsel.

Williams originally attempted to enter a plea to possession with intent to deliver between three and ten grams of heroin, a Class E felony. The circuit court rejected the plea, however, because even though Williams indicated she wanted to enter a plea because she did not think she would get a fair trial, Williams was adamant that she did not possess the heroin, claiming one of the two seated men had thrown the napkin. As a result, there was no factual basis for the plea.

Ultimately, the State and Williams' successor attorney negotiated a new plea agreement. As noted, Williams denied she had possessed the heroin, but she did admit that she had a role in facilitating a heroin transaction. Specifically, she admitted conspiring with others to get heroin

for her Percocet dealer so that he would continue to provide her with Percocet. Williams called a person, who called the heroin dealer, and Williams knew that the dealer was going to bring at least three grams of heroin. She then intended to put the heroin dealer in contact with the Percocet dealer. The parties agreed to a revised statement reflecting those facts for purposes of the plea, and the State amended the charge to conspiracy to commit possession with intent to deliver between three and ten grams of heroin. This time, the circuit court accepted the plea. It sentenced Williams to three years' initial confinement and three years' extended supervision, with eligibility for the substance abuse and challenge incarceration programs after serving eighteen months' confinement.

Postconviction counsel was appointed and he filed a motion for sentence modification, claiming that the circuit court "was not fully informed as to who Ms. Williams was" because trial counsel did not call any character witnesses on her behalf at the sentencing hearing. Attached to the motion, which couched its argument in terms of a new factor, were several reference letters regarding Williams' "moral character." The circuit court denied the motion, explaining that the content of the letters would not have changed the sentence.

The first potential issue counsel identifies is whether there is any arguable merit to a challenge to the validity of Williams' second guilty plea. Our review of the record—including the plea questionnaire and waiver of rights form, attached documents, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In addition, we have reviewed the record to ensure there is a factual basis for Williams' second plea. Her admissions, as reflected in the parties' agreed-upon statement of

facts described above, satisfy us that there is a sufficient factual basis. Thus, there is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Williams' plea was anything other than knowing, intelligent, and voluntary.

The second issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. 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, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court rejected probation, explaining it would unduly depreciate the seriousness of the offense and that confinement was necessary to protect the public until Williams addressed her addiction issue. The circuit court considered several mitigating factors, like Williams' positive education and employment history, her minimal criminal record, and the fact that she had been very respectful during court proceedings. However, the circuit court also noted that, based on Williams' age—she was forty at the time of sentencing—and education, she should have known better than to become part of a drug supply chain. Moreover, the amount of heroin she was found with was enough for more than 100 doses. Thus, the circuit court determined that a medium-range sentence was appropriate.

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

The final issue counsel raises is whether the circuit court erred when it denied Williams' sentence modification motion without a hearing.[3] The circuit court's ability to modify a sentence is one of its inherent powers. *See* ***State v. Crochiere***, 2004 WI 78, ¶11, 273 Wis. 2d 57, 681 N.W.2d 524, *overruled in part as stated in* ***State v. Harbor***, 2011 WI 28, ¶¶47 n.11, 48, 333 Wis. 2d 53, 797 N.W.2d 828. Whether to modify a sentence is committed to the circuit court's discretion, and is limited to certain parameters. *See* ***Crochiere***, 273 Wis. 2d 57, ¶12. One condition that allows the circuit court to modify a sentence is the existence of a new factor. *See* ***id.***

[2] The circuit court also imposed the $250 DNA surcharge, explaining that it was "appropriate as punishment and quite frankly because of the likelihood that this individual will reoffend … and to protect the community, I think the DNA sample and surcharge are important." It is clear, based on the entirety of the circuit court's sentencing comments, that it was ultimately concerned about emphasizing the seriousness of Williams' crime, not only for the community's sake but for her own rehabilitation and punishment. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (protecting community and rehabilitation of defendant are appropriate sentencing objectives). As such, imposition of the surcharge was, based on the record as a whole, an appropriate exercise of the circuit court's discretion. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241.

[3] This refers to the motion filed by counsel. Williams had filed a *pro se* motion, attempting to change her program eligibility so she could begin a shorter treatment program earlier. The circuit court denied the *pro se* motion, explaining that Williams needed the longer program for addressing her substance abuse issues. There is no arguable merit to a challenge to that decision.

A new factor is a fact, or a set of facts, "'highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (citing ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Contrary to the sentence modification motion, "frustration of the purpose of the original sentence" is not an independent consideration; the ***Rosado*** definition of "new factor" controls. *See* ***Harbor***, 333 Wis. 2d 53, ¶¶47-48. Whether a fact or set of facts is a new factor is a question of law. ***Id.***, ¶36.

The postconviction motion asserted a new factor because trial counsel had not called any character witnesses for Williams' sentencing hearing and, thus, the circuit court "was not fully informed as to who Ms. Williams was as a person and was truly not likely one who would be active in the distribution of heroin into the community." Attached to the motion were character reference letters, from people who ostensibly would have testified at any resentencing hearing.

We question whether these witnesses or their letters actually are a new factor, as many of these people had known Williams for years. Nevertheless, the circuit court, without expressly determining whether a new factor existed, still denied the motion. It explained that trial counsel had shared many relevant facets of Williams' character. Further, despite the laudatory contents of the letters supporting Williams, the circuit court concluded that her character "does not make it less likely that she would have been active in the distribution of heroin in this community *because she admitted that she was when she entered a guilty plea*[.]" (Emphasis in original.) As such, the additional character references "would not have altered the court's perception of the defendant's risk … [and the] sentencing decision would have been no different." We discern no

erroneous exercise of discretion in this conclusion. *See* ***Harbor***, ¶33. Thus, there is no arguable merit to a challenge of the circuit court's denial of the motion for sentence modification.[4]

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved of further representation of Williams in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] To the extent that the sentence modification motion would have been more appropriately presented as an ineffective-assistance claim for trial counsel's failure to call the witnesses at the sentencing hearing, we note that the circuit court's ruling that the sentence would have been the same means there was no prejudice from trial counsel's failure. As such, there would be no arguable merit to a claim of ineffective assistance of trial counsel. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (ineffective assistance claims require showing of both deficient performance and prejudice; prejudice requires a showing of a reasonable probability of a different result).