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

2014AP805-CRNM State of Wisconsin v. Dana E. McCalla
(L.C. #2012CF5909)

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

Dana E. McCalla appeals from an amended judgment entered after he pled guilty to first-degree sexual assault—sexual contact with a child under thirteen, contrary to WIS. STAT. § 948.02(1)(e) (2009-10), and from an order denying his postconviction motion for sentence modification.[1] McCalla's postconviction and appellate lawyer, George M. Tauscheck, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

809.32. McCalla did not respond. After independently reviewing the record and the no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The criminal complaint charged McCalla with three crimes: repeated sexual assault of a child (three or more violations), contrary to WIS. STAT. § 948.025(1)(b), and two counts of repeated sexual assault of a child, contrary to § 948.025(1)(e). The maximum sentence for the first count was sixty years, with at least twenty-five years of confinement. McCalla faced potential sentences of up to forty years on each of the other two counts.

According to the complaint, the victim reported that McCalla had sexual intercourse with her beginning when she was eleven years old and continuing until she was fourteen. The victim told police that the first time she had intercourse with McCalla, he raped her. Afterward, however, the victim said that McCalla convinced her it was "'okay'" for them to continue to have sex on a regular basis. The victim told police that McCalla would frequently take her out of school and they would sometimes go shopping; at other times, he would take her to his residence to have sex.

The complaint alleged that McCalla told police whatever the victim stated was true, although he disputed the number of times the victim said they had sex and commented that the victim is "'bad with numbers.'" The complaint further relayed McCalla's statement that he would only admit to having intercourse with the victim one time.

The parties ultimately reached a plea agreement. McCalla pled guilty to an amended charge of first-degree sexual assault—sexual contact with a child under thirteen. The other

charges were to be dismissed and read in at sentencing. The circuit court accepted McCalla's plea and sentenced him to seventeen years in prison.

In his no-merit report, counsel addresses whether there would be arguable merit to an appeal on three issues: (1) the validity of McCalla's plea; (2) the circuit court's exercise of sentencing discretion; and (3) the denial of McCalla's postconviction motion for sentence modification. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursing these issues on appeal.

Plea

Counsel first addresses whether McCalla has an arguably meritorious basis for challenging his plea on appeal. To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). McCalla completed a plea questionnaire and waiver of rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The form listed the maximum sentence McCalla faced, and the circuit court confirmed that McCalla understood. The form, along with an addendum, further specified the constitutional rights that McCalla was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Although counsel does not mention it, we note that the form properly described the charge against McCalla as first-degree sexual assault, sexual contact, but referenced the wrong statute. Instead of WIS. STAT. § 948.02(1)(e), the form referenced WIS. STAT. § 948.025(1)(e), the statute relating to engaging in repeated acts of sexual assault of the same child. Despite the

erroneous statutory references, the maximum sentence was properly stated on the form. Moreover, following a request for clarification by the prosecutor, the circuit court, during its plea colloquy, went over the definition of sexual contact. McCalla confirmed he understood what sexual contact meant. There would be no arguable merit to challenging McCalla's plea on the basis of the erroneous references to § 948.025(1)(e) on the form.

We also note that the circuit court did not recite the text of WIS. STAT. § 971.08(1)(c) verbatim. We have held that, although the statutory language is "strongly preferred," a court's failure to use the exact language set forth in § 971.08(1)(c) does not entitle a defendant to plea withdrawal, as long as the court "substantially complied" with the statutory mandate. *See* ***State v. Mursal***, 2013 WI App 125, ¶¶15-17, 20, 351 Wis. 2d 180, 839 N.W.2d 173. Like in ***Mursal***, here, the circuit court substantially complied with the statute.[2] *See* ***id.***, ¶16 ("Substantively, the [circuit] court's warning complied perfectly with the statute, and linguistically, the differences were so slight that they did not alter the meaning of the warning in any way."). There would be no arguable merit to challenging the validity of McCalla's guilty plea.

[2] WISCONSIN STAT. § 971.08(1)(c) directs courts to do the following, before accepting a plea of guilty or no-contest:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Here, the circuit court stated: "And you also understand if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization?"

Sentencing

The next issue the no-merit report discusses is the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that 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, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit 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 it may consider several subfactors. ***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. ***Gallion***, 270 Wis. 2d 535, ¶41.

McCalla's sentencing took place the same day as the plea proceedings. McCalla's trial counsel began by clarifying for the court that she had misspoke when she had stated during the plea proceedings that she and McCalla had reviewed the jury instructions. She explained that she had, however, gone over the instructions during the interim period prior to the sentencing and confirmed that McCalla was comfortable with proceeding. McCalla confirmed for the court that he wanted to move forward.

As the State was making its sentencing remarks, McCalla's trial counsel interjected, explaining that McCalla disagreed with statements that were being taken from the complaint. Trial counsel acknowledged that she had previously agreed that the complaint would serve as a basis for McCalla's plea. After conferring with McCalla, McCalla's trial counsel explained to the court:

> [McCalla] is not denying that he had sexual contact with this girl. And it's more talking about the details of when and where and how. So he is … satisfied with my description. That I would be able to discuss or qualify or argue with some of the statements of the victim. However the fact that the sexual contact did occur is not being questioned or denied.

McCalla then confirmed for the court that he wished to proceed.

In sentencing McCalla, the circuit court explained that this was not a case for probation given the "horrific acts that occurred." The court took into consideration that McCalla did not have a criminal record, had led "a good productive life," and took responsibility for his actions early on. Notwithstanding these mitigating considerations, the court concluded that confinement was necessary to protect the public and to punish McCalla for the wrongfulness of his conduct. The court sentenced McCalla to nine years of initial confinement and eight years of extended supervision.

The maximum sentence McCalla could have received was sixty years. *See* WIS. STAT. §§ 948.02(1)(e), 939.50(3)(b). McCalla's sentence is 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 as to shock the public's sentiment, *see* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Sentence Modification

Next, we consider whether there would be merit to arguing that the circuit court should have granted McCalla's postconviction motion to modify his sentence based upon the worsening of his chronic obstructive pulmonary disease (COPD) after his sentencing. McCalla asserted that his condition left him permanently confined to a wheelchair, a factor that was unknown at the time of his sentencing. McCalla argued that part of the circuit court's sentencing rationale was the need for confinement to protect the public from further criminal activity and that the danger he posed was substantially lessened by his being bound to a wheelchair.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. ***Id.***, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.*** Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶37.

A new factor is "'a fact or 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 ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If "the facts do not constitute a new factor as a matter of law," a court "'need go no further in its analysis.'" ***Id.***, ¶38 (citation omitted).

Here, the circuit court explained in its order denying the motion for sentence modification:

> The court clearly understood the defendant's health problem to be serious given that he had to utilize an oxygen tank since 2007. The court was also informed at sentencing that he was unemployable as of 2008 and had obtained SSI disability benefits [in] short order. That his health would get progressively worse was not "unknowingly overlooked" by the court.
>
> ….
>
> The defendant's current health situation does not constitute a new factor warranting modification of the sentence. The court and the parties could clearly and reasonably deduce that the defendant's condition would worsen. Moreover, the defendant's health condition and expected deterioration was not highly relevant to the sentence. The main purpose of the sentence was punishment and the need for community protection given the egregiousness of the offense.

(Record citation omitted.)

We further note that a convicted person's diminished health is normally not a new factor. *See* ***State v. Iglesias***, 185 Wis. 2d 117, 128, 517 N.W.2d 175 (1994) (change in health not a new factor); *see also* ***State v. Ramuta***, 2003 WI App 80, ¶21, 261 Wis. 2d 784, 661 N.W.2d 483 (obesity-related health problems and shorter-than-normal life expectancy not new factors). There would be no arguable merit to challenging the circuit court's legal conclusion. The sentencing transcript demonstrates that the circuit court was aware of McCalla's health problems.[3] The worsening of those health problems is not a new factor that justifies sentence modification.

[3] During her sentencing remarks, McCalla's trial counsel detailed McCalla's health problems for the court:

(continued)

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 George M. Tauscheck is relieved of further representation of McCalla in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

> In '97, he had his first bou[t] of pneumonia. And he started getting pneumonia a couple of times a year. And in 2007 he had a biopsy. And was—the biopsy diagnosed him with COPD fibrosis and required from at that point on, from 2007 until now, to use an oxygen tank. And the COPD fibrosis, the source of that was asbestos fiberglass insulation from the different jobs he had done over the years.
>
> He immediately went on to—he got onto—in 2008 his boss said he was unemployable because of his health condition, and he applied for SSI.
>
> He has a pulmonologist who he still sees regularly and received SSI disability within 70 days. That's how clear[-]cut his case was.