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March 25, 2015

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

2014AP2551-CRNM State of Wisconsin v. Edwood Dean Hastings (L.C. #2013CF3754)

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

Edwood Dean Hastings pled no contest to the charge of failing to give information or render aid following a motor vehicle accident resulting in death. The trial court imposed a twenty-two-year term of imprisonment, bifurcated as twelve years of initial confinement and ten years of extended supervision. The trial court also ordered Hastings to pay $6176.11 in restitution.

The state public defender appointed Attorney Colleen Marion to represent Hastings in postconviction and appellate proceedings. Attorney Marion filed a motion for postconviction relief, asking the trial court to correct the judgment of conviction by vacating a DNA surcharge and to modify the sentence by declaring Hastings eligible for participation in the Wisconsin substance abuse program. The trial court granted the motion in part, vacating the DNA surcharge but denying the motion to modify the sentence. Attorney Marion then filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Hastings did not file a response. We have considered the no-merit report, and we have independently reviewed the record. 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, a sport utility vehicle struck and killed a pedestrian who was crossing Farwell Avenue in Milwaukee, Wisconsin, on August 11, 2013, at approximately 8:40 p.m. The operator of the SUV drove away from the scene without rendering any assistance or providing identification. The next morning, Hastings walked into the Milwaukee Municipal Court building and told the security officer that he wanted to turn himself in because he was the driver of the SUV that struck a pedestrian on Farwell Avenue the previous night.

The State charged Hastings with one count of failing to give information or render aid following a motor vehicle accident resulting in death. *See* WIS. STAT. §§ 346.67(1),

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

346.74(5)(d). Hastings waived a preliminary examination and quickly resolved the case with a no-contest plea to the charge on September 18, 2013.

We first consider whether Hastings could pursue a meritorious challenge to his no-contest plea. At the outset of the plea proceeding, the State confirmed that it had filed an offer letter reflecting the terms of the parties' plea bargain. The letter is in the record and reflects that, upon Hastings's plea of no contest to the charge: (1) "the State would recommend state imprisonment, leaving the initial confinement and extended supervision to the wisdom and discretion of the court"; (2) the State would be free at sentencing to discuss the mitigating or aggravating facts of the case; (3) the victim's family members and Hastings would all be free to make any recommendations they wished; and (4) Hastings would agree to pay reasonable restitution. The State reviewed the contents of the offer letter on the record, and Hastings and his trial counsel confirmed that the State's summary correctly described the plea bargain.[2]

The record includes a signed plea questionnaire and waiver of rights form with attachments. The form reflects that Hastings understood the charge he faced, the constitutional rights he waived by pleading no contest, and the penalties that the trial court could impose. The form further reflects Hastings's understanding that, in exchange for his no-contest plea, the State would recommend "prison" without specifying a sentence of any particular length. A signed

[2] The transcript of the State's description of the plea bargain includes the following: "the [S]tate would recommend stayed imprisonment within the wisdom and discretion of the court. That is, both the initial confinement and the extended supervision would be obviously left within the wisdom and discretion of the Court but the [S]tate would recommend stayed imprisonment." Because the State's remarks were presented as a summary of the State's written offer letter, which included a recommendation for "state imprisonment," the context makes clear that "stayed imprisonment" reflects court reporter error. Further, appellate counsel advises that her investigation reveals nothing to suggest that the plea bargain included a probation recommendation.

addendum attached to the form reflects Hastings's acknowledgment that by pleading no contest he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of evidence against him. The jury instruction describing the elements of the offense is also attached to the form. Hastings confirmed that he reviewed the form and the attachments with his trial counsel and that he understood them.

The trial court established that Hastings was forty-eight years old, had a high-school education, and had taken some college courses. The trial court inquired about the medication he was taking, and he responded that the medication helped to control his anxiety and did not interfere with his ability to think clearly or to understand the court proceedings.

The trial court explained to Hastings that he faced a twenty-five-year term of imprisonment and a $100,000 fine upon conviction. *See* WIS. STAT. §§ 346.67(1), 346.74(5)(d), 939.50(3)(d). Hastings said that he understood. The trial court told Hastings that it was not bound by the terms of the plea bargain or by the parties' recommendations and that the trial court was free to impose the maximum sentence. Hastings said that he understood. He assured the trial court that, outside of the terms of the plea bargain, he had not been promised anything to induce his no-contest plea and that he had not been threatened.

The trial court explained to Hastings that by pleading no contest he would give up the constitutional rights listed on the plea questionnaire, and the trial court reviewed those rights on the record. Hastings said that he understood. The trial court further explained to Hastings that his no-contest plea exposed him to the risk of deportation or exclusion from admission to this country if he was not a citizen of the United States of America. *See* WIS. STAT. § 971.08(1)(c). Hastings said that he understood. Although the trial court did not caution Hastings about the

risks described in § 971.08(1)(c), using the precise words required by the statute, minor deviations from the statutory language do not undermine the validity of the plea.[3] ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

"[The trial] 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. The trial court may determine the defendant's understanding in a variety of ways, including by summarizing the elements or by "refer[ring] to a document signed by the defendant that includes the elements." ***Id.***, ¶56. Hastings filed documents with his plea questionnaire that describe the elements of the offense and reflect that he understood them. Additionally, the trial court reviewed each element on the record, and Hastings said that he understood.

Before accepting a guilty plea, the trial court must "'make such inquiry as satisfies it that the defendant in fact committed the crime charged.'" *See* ***State v. Black***, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (citation and one set of brackets omitted). Here, the State summarized on the record the allegations in the criminal complaint, and Hastings's trial counsel stipulated that no dispute existed about the facts underlying the charge. The trial court properly found a factual basis for Hastings's no-contest plea.

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

The record reflects that Hastings entered his no-contest 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 Hastings could pursue an arguably meritorious challenge to his sentence. 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 indicated that punishment and deterrence were the primary sentencing goals and discussed the factors that the trial court deemed relevant to those goals. The trial court considered the need to protect the public, pointing out throughout the sentencing remarks that Hastings had a prior conviction, arising in 2007, for failing to stop and render aid. The trial court treated Hastings's character as largely a mitigating factor, taking into account that he had been a victim of physical abuse as a child and had a documented history of difficulty coping with adversity and stress. Further, the trial court recognized that Hastings had expressed remorse and had spared the family and the community the pain of prolonged litigation by accepting responsibility early in the criminal process and by quickly resolving the charge against him. The trial court placed greatest emphasis, however, on the gravity of the offense, explaining that the victim's extensive and fatal injuries particularly required the aid that Hastings did not provide. The trial court viewed the offense as aggravated because Hastings neither called the police after he reached his home nor returned to the scene of the accident to try and help the victim. The trial court considered appropriate factors in selecting a twenty-two-year term of imprisonment. An appellate challenge to that decision would lack arguable merit.

Further, we agree with appellate counsel's conclusion that the sentence was not unduly harsh or excessive. 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 sentence imposed here was within the statutory maximum

allowed by law. Such a sentence is presumptively not unduly harsh. *See **id.***, ¶32. We cannot say that the sentence imposed in this case is disproportionate or shocking.

The trial court declared Hastings ineligible to participate in the challenge incarceration program and the Wisconsin substance abuse program. Both 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* WIS. STAT. §§ 302.045(3m)(b) & 302.05(3)(c)2. Inmates who have committed offenses specified in WIS. STAT. ch. 940 or certain offenses against children specified in WIS. STAT. ch. 948 are statutorily excluded from participation in these programs. *See* §§ 302.045(2)(c), 302.05(3)(a)1. Additionally, inmates who have reached the age of forty are ineligible to begin participating in the challenge incarceration program. *See* § 302.045(2)(b). As to other offenders, the sentencing court must decide, as part of its exercise of sentencing discretion, whether they are eligible to participate in the program. *See* WIS. STAT. § 973.01(3m), 973.01(3g).[4] Here, the trial court declared Hastings ineligible for both programs and added that he was ineligible "by virtue of [his] age."

Hastings moved to reconsider on the ground that his age is not a statutory impediment to his participation in the Wisconsin substance abuse program. He urged the trial court to find him

[4] The Wisconsin substance abuse program was formerly called the Wisconsin earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. Both names are used to refer to the program in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

eligible for that program, pointing out that a Department of Corrections clinician has diagnosed him with both an alcohol use disorder and a cannabis use disorder.

The trial court has an opportunity to explain its sentence further when resolving a postconviction motion for sentence modification. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Here, the trial court again found that Hastings was ineligible to participate in the Wisconsin substance abuse program, concluding that the gravity of the offense and the aggravating factors surrounding it required that he serve the full period of initial confinement imposed. A trial court exercises its discretion when deciding an offender's eligibility for prison treatment programs and is not obliged to find an offender eligible merely because the offender satisfies statutory criteria. *See* ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. The gravity of the offense is an appropriate reason for denying eligibility. *See* ***id.***, ¶11. The trial court properly exercised its discretion in resolving the motion to modify the sentence. An appellate challenge to that decision would lack arguable merit.

We last consider whether Hastings could pursue an arguably meritorious argument that the trial court erred by ordering that he pay restitution of $6176.11. Hastings stipulated to the amount of restitution ordered. *See* WIS. STAT. § 973.20(13)(c). Therefore, he could not mount an arguably meritorious challenge to the order. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Based on an independent review of the record, we conclude that there are no additional potential issues warranting discussion. Any further proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Colleen Marion is relieved of any further representation of Edwood Dean Hastings on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals