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March 27, 2015

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

2013AP2270-CRNM State of Wisconsin v. Christian A. Perry (L.C. #2012CF4804)

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

Christian A. Perry pled guilty to one count of second-degree sexual assault. The circuit court imposed a twelve-year term of imprisonment, bifurcated as seven years of initial confinement and five years of extended supervision. The circuit court also ordered Perry to pay a $250 deoxyribonucleic acid surcharge pursuant to WIS. STAT. § 973.046(1r) (2011-12).[1]

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

The state public defender appointed Attorney Russell D. Bohach to represent Perry in postconviction and appellate proceedings. Attorney Bohach filed a no-merit report, concluding that Perry could not pursue an arguably meritorious postconviction or appellate challenge to the plea or the sentence. *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Perry did not file a response. We asked Attorney Bohach to file a supplemental no-merit report to discuss the nonconforming presentence investigation report (PSI) that included a sentencing recommendation when the circuit court ordered a PSI without such a recommendation. After counsel filed the supplemental no-merit report, we remanded for a hearing to develop the facts surrounding the nonconforming PSI. The hearing we contemplated did not go forward, however, because Perry invoked his attorney-client privilege and, consequently, the circuit court did not hear any testimony or receive any evidence. The record then returned to us. Upon our independent review of that record, including the record made following remand, and upon consideration of the no-merit reports, we conclude that no arguably meritorious issues exist for appeal. Accordingly, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged in the criminal complaint that, on September 22, 2012, in Milwaukee, Wisconsin, Perry choked and strangled L.T., the mother of his child. The State further alleged that Perry next sexually assaulted L.T. by forcing her to have mouth-to-penis and penis-to vagina sexual intercourse with him. The State charged Perry with one count of strangulation and suffocation and one count of second-degree sexual assault.

Perry waived a preliminary examination. Within five weeks of the incident, he resolved the charges with a plea bargain and entered a guilty plea.

We first consider whether Perry could pursue an arguably meritorious challenge to his guilty plea. At the outset of the plea proceeding, the State described the terms of the parties' plea bargain, explaining that Perry would plead guilty to second-degree sexual assault, the State would move to dismiss and read in the other charge, and, at sentencing, the State would recommend "substantial prison in an amount up to the court." Trial counsel said that the State correctly described the terms of the plea bargain. Perry, however, told the circuit court that he wanted new counsel because his current counsel had "made [Perry] accept" an offer from the State to recommend "seven to ten years" that Perry in fact wanted to reject. Perry's trial counsel and the circuit court both told Perry on the record that the State's offer was a recommendation of "substantial prison." After some further discussion, Perry said he wanted to accept that offer and keep his lawyer. The State subsequently confirmed again that "the State will not be making a number recommendation to the court," and Perry said he understood.

The record includes a signed plea questionnaire and waiver of rights form with attachments. The form reflects that Perry was twenty-one years old at the time of the guilty plea, that he had completed the tenth grade, and that he understood the charge of second-degree sexual assault, the constitutional rights he waived by pleading guilty to that charge, and the penalties that the circuit court could impose. A signed addendum attached to the form reflects Perry's acknowledgment that by pleading guilty 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, and Perry's initials appear next to each element. Perry confirmed that he reviewed the form and the attachments with his trial counsel and that he understood them.

The circuit court explained to Perry that he faced a forty-year term of imprisonment and a $100,000 fine upon conviction of second-degree sexual assault. *See* WIS. STAT. §§ 940.225(2)(a), 939.50(3)(c). Perry said that he understood. The circuit court told Perry that it was not bound by any plea negotiations and that it was free to impose the maximum sentence. Perry said that he understood. He told the circuit court that he had not been promised anything outside of the plea bargain to induce his guilty plea and that he had not been threatened.

The circuit court explained to Perry that by pleading guilty he would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed each of those rights on the record. Perry said that he understood. The circuit court further explained to Perry that his guilty plea exposed him to various risks if he was not a citizen of the United States. *See* WIS. STAT. § 971.08(1)(c). Perry said that he understood. Although the circuit court did not caution Perry 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.[2] ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

"[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. The circuit 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. Perry filed a document with his plea questionnaire that

[2] 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 Perry could make such a showing.

describes the elements of the offense and reflects that he understood them. Additionally, the circuit court reviewed each element on the record, and Perry said that he understood.

Before accepting a guilty plea, the circuit 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, Perry's trial counsel and the State stipulated to the facts in the criminal complaint. "'[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint.'" ***Id.***, ¶13 (citation omitted). The circuit court properly found a factual basis for Perry's guilty plea.

The record reflects that Perry 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 Perry could pursue an arguably meritorious claim based on the PSI filed in this matter. At the close of the plea colloquy, the circuit court ordered preparation of a PSI but granted trial counsel's request that the PSI omit a sentencing recommendation. Nonetheless, the PSI ultimately filed in this matter included a recommendation for seven-to-ten years of initial confinement and five-to-six years of extended supervision.

At the outset of the sentencing proceedings, trial counsel advised the circuit court that counsel had read the PSI to Perry and that Perry had also reviewed it himself. Trial counsel said

that the defense had no additions or corrections to the PSI. Neither trial counsel nor Perry suggested that the PSI was objectionable or that it failed to conform to the circuit court's order.

Because Perry did not object to the nonconforming PSI during the circuit court proceedings, he did not preserve a challenge for appellate review. *See* ***State v. Jones***, 2010 WI App 133, ¶25, 329 Wis. 2d 498, 791 N.W.2d 390. Accordingly, any challenge would be considered, if at all, within the rubric of ineffective assistance of counsel. *See* ***id.*** Reasonable strategic decisions based on the facts and the law, however, will not support a claim of ineffective assistance of counsel. *See* ***State v. Arredondo***, 2004 WI App 7, ¶27, 269 Wis. 2d 369, 674 N.W.2d 647. Moreover, "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

In response to this court's inquiry, Attorney Bohach filed a supplemental no-merit report addressing the nonconforming PSI. The supplemental submission included an affidavit from Perry permitting Attorney Bohach to disclose confidential information that he received from trial counsel about the PSI. Additionally, Attorney Bohach filed his own affidavit. The affidavit described Attorney Bohach's conversation with trial counsel and revealed trial counsel's conclusion that the nonconforming PSI benefitted Perry. According to the supplemental submissions, trial counsel discussed the PSI with Perry before sentencing began and then made a strategic decision not to object to the nonconformity.

We remanded for a hearing to permit further development of the facts in regard to the nonconforming PSI.[3] *See* WIS. STAT. § 808.075(6); *see also* WIS. STAT. RULE 809.32(1)(g). The hearing convened with trial counsel in the courtroom, but Attorney Bohach advised that Perry declined to waive the attorney-client privilege. The circuit court conducted a colloquy with Perry and established that Perry had discussed the attorney-client privilege with Attorney Bohach, that Perry had adequate time to consider his decision, and that he had not been threatened or promised anything to induce him to assert the privilege. The circuit court then ended the hearing without taking any testimony. Under these circumstances, we conclude that, when the matter returned to circuit court, Perry elected to waive the opportunity to develop the record regarding the PSI. *See* ***State v. Divanovic***, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996) (explaining that waiver is the "'intentional relinquishment or abandonment of a known right or privilege'") (citation omitted).

The materials available to this court thus show that trial counsel made a strategic decision not to object to the nonconforming PSI after discussing the matter with Perry. A defendant is bound by strategic decisions that he or she explicitly or tacitly approved. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971). Perry has elected to waive the opportunity to present any grounds that may exist to overcome application of that rule here. Accordingly, further pursuit of the issue on appeal would lack arguable merit. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996) (no merit to pursuit of a waived issue).

[3] Due to clerical error, we remanded this matter for a hearing before the affidavits of Perry and Attorney Bohach reached this court.

We next consider whether Perry could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit 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 [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit 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 circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit 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 circuit 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 circuit court determined that rehabilitation was the primary sentencing goal, finding that Perry needed to "fix ... what is going on within [him]." The circuit court then discussed a variety of factors that it deemed relevant to the sentencing goal. The circuit explained that the matter was "very serious," not only for L.T., but also for the child she and Perry shared, because that child was exposed to the violence Perry exhibited. The circuit court considered Perry's character, noting that his

criminal history was limited but that it included prior acts of domestic violence against L.T. The circuit court explained that Perry's displays of inappropriate rage towards L.T. raised concerns about how he would behave in the community. The circuit court properly considered the information in the PSI, noting the disclosure that Perry reads at a fourth grade level. The circuit court observed that he must overcome this disadvantage and develop skills that would permit him to find satisfying employment that could support a family. The circuit court discussed the need to protect the public, finding that Perry was dangerous and posed a particularly grave risk to the victim.

The circuit court appropriately considered probation as the first sentencing alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. In the circuit court's view, however, Perry needed treatment in a confined setting before he returned to the community to continue his rehabilitation there.

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, 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 well 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. We conclude that a challenge to the trial court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

Next, we conclude that a challenge to the DNA surcharge would lack arguable merit. Under WIS. STAT. § 973.046(1r) (2011-12), the surcharge was mandatory for the offense in this case.[4] *See* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. We also conclude that Perry could not present an arguably meritorious challenge to the circuit court's orders denying him eligibility for the Wisconsin substance abuse program and the challenge incarceration program, because he is statutorily ineligible to participate in those programs. *See* WIS. STAT. §§ 302.05(3)(a)1., 302.045(2)(c).

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 judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of any further representation of Christian A. Perry on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] Effective January 1, 2014, the legislature amended WIS. STAT. § 973.046(1r) (2011-12). *See* 2013 Wis. Act 20, §§ 2354-55, 9426. The amendment first applies to sentences imposed on the effective date. *See* ***id.***, § 9326(1)(g). The circuit court sentenced Perry in February 2013. The amendment is not relevant to Perry.