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**DISTRICT I**

April 16, 2015

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

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2014AP2936-CRNM      State of Wisconsin v. Zephaniah A. Holmes (L.C. #2013CM3556)

Before Curley, P.J.<sup>1</sup>

Zephaniah A. Holmes pled guilty to the charge of carrying a concealed weapon. The trial court imposed a thirty-day jail sentence with work release privileges and a \$200 DNA surcharge. The trial court denied Holmes's request for expungement of his record upon completion of the sentence.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The state public defender appointed Attorney John R. Breffeilh to represent Holmes in postconviction and appellate proceedings. With Attorney Breffeilh's assistance, Holmes filed a postconviction motion to vacate the DNA surcharge. The trial court granted the relief requested. Holmes then appealed the judgment of conviction, and Attorney Breffeilh filed and served a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Holmes 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.

On August 5, 2013, police found a loaded handgun on the floor of a car in which Holmes was a passenger. Holmes admitted that he owned the gun. The State charged Holmes with the misdemeanor offense of carrying a concealed weapon. Holmes pled guilty as charged, and the matter proceeded immediately to sentencing.

We first consider whether Holmes could pursue an arguably meritorious claim for plea withdrawal. At the outset of the plea hearing, the State described the terms of the plea bargain: Holmes would plead guilty to the charge of carrying a concealed weapon, and the State would recommend four-to-six months in the House of Corrections without objecting to work release privileges. Holmes initially expressed some confusion about the State's recommendation, and the trial court permitted him to confer with his attorney off the record. When proceedings resumed, Holmes confirmed that he understood the recommendation and that the State correctly described it.

The trial court explained to Holmes that he faced nine months in jail and a \$10,000 fine upon conviction of carrying a concealed weapon. See WIS. STAT. §§ 941.23(2), 939.51(3)(a). Holmes said he understood. The trial court explained it was not bound by the parties' sentencing recommendations and that it could impose a maximum sentence if it chose to do so. Holmes said he

understood. He told the trial court he had not been promised anything outside of the terms of the plea bargain in order to induce his guilty plea and that he had not been threatened.

A signed plea questionnaire and waiver of rights form with an attached addendum is in the record. Holmes told the trial court that he reviewed the form with his attorney and understood its contents. The trial court explained to Holmes that by pleading guilty he would give up the constitutional rights listed on the form, and the trial court reviewed those rights on the record. Holmes said he understood. The trial court discussed the addendum submitted with the plea questionnaire and waiver of rights form. The addendum is signed by Holmes and his trial counsel and reflects Holmes'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 his statements and other evidence. Holmes told the trial court he had reviewed the addendum and understood it.

The trial court described to Holmes the elements of the offense. Holmes said he understood the elements. The trial court cautioned Holmes that if he was not a citizen of the United States, his guilty plea to the offense could result in his deportation, exclusion from admission to this country, or denial of naturalization, under federal law. *See* WIS. STAT. § 971.08(1)(c). Holmes said he understood.

A guilty plea colloquy must include an inquiry sufficient to satisfy the trial court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Holmes admitted on the record that he went armed with a concealed handgun at a time when he did not have a permit to carry a concealed handgun. The trial court found a factual basis for Holmes's guilty plea.

The record reflects that Holmes 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 Holmes 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 identified punishment, deterrence, and community protection as the sentencing goals, and the trial court discussed the factors that it deemed relevant to those goals. The trial court explained that the offense was serious, finding that the presence of guns can lead to dangerous escalation of conflicts and that the Milwaukee community experiences problems with gun violence arising from such conflicts. The trial court indicated, however, that it viewed Holmes's character as a mitigating factor.

The trial court recognized that Holmes did not have a prior record, that he had a high school education and that he was married, employed, and supporting his family. The trial court concluded that Holmes did not have any probationary needs and that a thirty-day jail sentence with work release privileges would meet the sentencing goals.

The trial court considered appropriate factors in selecting a sentence. An appellate challenge to the sentencing 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 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 last consider whether Holmes could pursue an arguably meritorious challenge to the trial court's order denying his request for expungement of his conviction upon completion of the sentence. When the trial court sentences a person who was younger than twenty-five years old when he or she committed a crime such as the one at issue here, the trial court may also order expungement of the conviction 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 recognized that Holmes was twenty-four years old when he committed his crime, and the trial court agreed that he would benefit from expungement. The trial court

explained, however, that Holmes had failed to follow the rules governing gun possession, and the trial court reiterated its concerns about the dangers that arise when armed individuals in the community do not obey the law. Therefore, the trial court concluded it could not find that society would be unharmed by expungement. “This court will sustain a trial court’s exercise of discretion if the conclusion reached by the trial court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion.” *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. In light of our standard of review, a challenge to the trial court’s exercise of discretion would lack arguable merit.

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 John R. Breffeilh is relieved of any further representation of Zephaniah A. Holmes on appeal. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*