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April 30, 2015

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

2014AP2783-CRNM State of Wisconsin v. Homer D. Washington (L.C. #2013CF3307)

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

Homer D. Washington appeals from a judgment of conviction, entered upon his guilty plea, on one count of first-degree reckless homicide with a dangerous weapon. Appellate counsel, Angela C. Kachelski, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Washington was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as

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

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.

Around 6 p.m. on July 16, 2013, the Shorewood Police Department was contacted by relatives of Clarence Charles, who had reason to be concerned about Charles's well-being. Around 8 p.m., police went to Charles's apartment to conduct a welfare check. Officers found Charles on the bedroom floor, with blood all over his chest and neck. He was pronounced dead at the scene.

The medical examiner determined the cause of death was exsanguination: Charles had suffered five stab wounds to the right abdomen, one stab wound to the left abdomen, one stab wound to the right neck, and six stab wounds to the throat. The right carotid artery had been cut, the neck injury had gone to the spine, and Charles's bowel, liver, and kidney had been punctured.

On July 24, 2013, a Shorewood detective spoke to a man named Derric Hudson. He stated he had been at Charles's apartment briefly on July 16, dropping off some popcorn to thank Charles for giving him a ride a few days prior. Hudson reported that Washington was at the apartment when he stopped by, that Charles was making a pizza for Washington, and that Charles and Washington appeared to be having a spat.

Police interviewed Washington after informing him of his ***Miranda***[2] rights. He acknowledged that Hudson had been to the apartment.[3] Washington said that after Hudson left,

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] While Hudson told police he had been at the apartment on July 16, Washington stated that the date was July 15. The criminal complaint also indicates an offense date of July 15. The minor discrepancy in the date, however, is irrelevant.

Charles accused Washington of "fooling around" with Hudson, and they argued for several minutes. Charles then wanted to have sex with Washington, so they went to the bedroom, but Washington had difficulty getting an erection. This caused Charles to become "'pissed off.'"

Charles went to the kitchen to get the pizza from the oven. When he came back to the bedroom, he had a knife in his hand. As Washington stood up to get dressed, Charles punched him in the back of the head, and the men began struggling for the knife. During the struggle, Charles stabbed himself in the neck, and told Washington, "Your life is over." To stop Charles from screaming, Washington began choking and stabbing Charles.

Washington panicked when he heard a neighbor outside. He did not get help for Charles because he was scared. Charles appeared to gasp for air, and when Washington went over to him, Charles did not appear to be breathing. Washington left the apartment through a window and drove away in Charles's Chevrolet Blazer, which Washington later sold for $250.

Washington was charged with one count of first-degree intentional homicide with a dangerous weapon and one count of operating a motor vehicle without the owner's consent. The State offered a plea agreement. In exchange for Washington's guilty plea to an amended count of first-degree reckless homicide with a dangerous weapon, the State would recommend substantial confinement and restitution. It would dismiss and read in the second count, which would be available for restitution purposes. In addition, Charles's family would be free to make any sentencing recommendation it wanted to the circuit court.

The circuit court accepted the plea and ordered a presentence investigation report. Washington also submitted an alternate report. At sentencing, Washington argued for a sentence not to exceed twenty years' initial confinement and ten years' extended supervision. The circuit

court imposed a sentence of thirty-six years' initial confinement and fourteen years' extended supervision. It also ordered that Washington pay $12,330.50 in restitution for Charles's funeral expenses.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Washington's guilty plea and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Washington's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Washington 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), in which he acknowledged that his attorney had explained the elements of the offense. Attached to the questionnaire were the jury instructions for first-degree reckless homicide. The form correctly acknowledged the maximum penalties Washington faced, including the additional five years of confinement attributable to the dangerous-weapon enhancer. The plea questionnaire, along with an addendum, also specified the constitutional rights Washington was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also 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 the court told Washington that the maximum penalty was sixty years' imprisonment, which omitted the penalty for the dangerous-weapon enhancer, the State pointed out the error and corrected the maximum sentence to sixty-five years. The circuit court acknowledged the correction and then confirmed Washington's understanding of the higher maximum.

The plea questionnaire and waiver of rights form and addendum, along with the circuit court's colloquy, appropriately advised Washington of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other 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 noted that Washington had been through a "significantly bad and deprived environment" growing up. It also took into consideration Washington's mental health issues; as described in the alternate presentence investigation report, these included posttraumatic stress disorder, persistent depressive disorder, and generalized anxiety. However, the circuit court noted that the offense revealed a "significant amount of anger" and that self-defense was not a plausible explanation. Aggravating the situation was that Washington drove away in, then sold, Charles's car. The circuit court determined a prison sentence was necessary to protect the

community from future criminal behavior by Washington, to punish Washington, and to give Washington an opportunity for significant rehabilitation.

The maximum possible sentence Washington could have received was sixty-five years' imprisonment. The sentence totaling fifty 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 in setting the sentence length.[4]

We also consider an issue that counsel did not raise: imposition of the DNA surcharge. The circuit court ordered simply, "Now, you're to provide[] for the DNA and its surcharges." Directing a defendant to submit a sample of his DNA is, as it has been, mandatory for a felony conviction. *See* WIS. STAT. § 973.047(1f). Under WIS. STAT. § 973.046(1g) (2011-12), imposition of the attendant $250 surcharge was a discretionary decision for the circuit court in most felony convictions, and mandatory only for a select few, *see* WIS. STAT. § 973.046(1r) (2011-12). This case would have involved the discretionary surcharge.

On June 30, 2013, the legislature enacted 2013 Wis. Act 20. That act repealed WIS. STAT. § 973.046(1g) and amended § 973.046(1r), which now states that "[i]f a court imposes a sentence or places a person on probation, the court shall impose a deoxyribonucleic acid analysis surcharge," thereby making the surcharge mandatory in every case every time. *See* 2013 Wis. Act 20, §§ 2353-54. The amendment was made first effective for sentences imposed on or after

[4] Washington stipulated to the restitution amount.

January 1, 2014. *See* ***id.***, § 9426(1)(am). Washington was sentenced on February 25, 2014. This amendment has since given rise to an issue of whether the change, because it is effective based on a sentencing date rather than an offense date, constitutes an *ex post facto* violation.

But even if the prospective amendment making the DNA surcharge mandatory were to be held unconstitutional, imposition of the surcharge would revert to being a discretionary decision. Although the circuit court did not articulate any specific reasons for imposing the surcharge, possibly because it thought the surcharge was mandatory but also possibly because it simply neglected to state its reasoning, "'we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" *See* ***State v. Hall***, 2002 WI App 108, ¶6, 255 Wis. 2d 662, 648 N.W.2d 41 (citation omitted); *see also* ***State v. Hunt***, 2003 WI 81, ¶45, 263 Wis. 2d 1, 666 N.W.2d 771; ***Odom***, 294 Wis. 2d 844, ¶8.

Here, a discretionary imposition of the DNA surcharge is supported by facts of record. First, Washington has no prior convictions in Wisconsin. This means the sample he is required to provide is the first sample being sent to the databank and, as such, it would be appropriate to shift the cost of collecting, analyzing, and maintaining that sample on to Washington. *See, e.g.*, ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. Further, Washington stipulated to more than $12,000 in restitution. The addition of a $250 surcharge on top of that obligation is not unreasonable in light of the stipulation. *See* ***id.***; *see also* ***State v. Ziller***, 2011 WI App 164, ¶¶10-12, 338 Wis. 2d 151, 807 N.W.2d 241. Accordingly, there is no arguable merit to a challenge to the imposition of the $250 DNA surcharge in this case.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Angela C. Kachelski is relieved of further representation of Washington in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals