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July 28, 2015

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

2015AP264-CRNM State of Wisconsin v. Marchello A. Thomas (L.C. #2014CF706)

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

Marchello A. Thomas pled guilty, as a repeat offender, to violating a no-contact order imposed by a sentencing court. He received a forty-two-month term of imprisonment, bifurcated as eighteen months of initial confinement and twenty-four months of extended supervision.

The state public defender appointed Attorney Dustin C. Haskell to represent Thomas in postconviction and appellate proceedings. Attorney Haskell 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] Thomas 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, police received a report that Thomas had physically abused his three-year-old son, M.T., and the ensuing investigation revealed that, as of January 31, 2014, Thomas was living with M.T.'s mother, A.B. The criminal complaint went on to allege that, on September 21, 2010, Thomas pled guilty to the felony offense of substantial battery and received a sentence that included the condition that he have no contact with A.B., the victim of the offense. The complaint further alleged that, on June 17, 2012, Thomas began serving a three-and-one-half year term of imprisonment for the 2010 conviction following revocation of his probation in that case. A certified copy of a judgment of conviction attached to the complaint reflects the 2010 conviction and the conditions of Thomas's sentence in that matter.

The State charged Thomas with violating, as a repeat offender, a no-contact order imposed at sentencing under WIS. STAT. § 973.049(2). *See* WIS. STAT. §§ 941.39(1), 939.62(1)(b). Thomas disputed the allegations for several months but, on the day set for trial, he decided to accept a plea bargain and plead guilty as charged.

We first consider whether Thomas could pursue a meritorious challenge to his guilty plea. At the outset of the plea proceedings, counsel for Thomas and the State described the plea

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

bargain. Thomas would plead guilty as charged, the State would recommend a term of incarceration without specifying a recommended length for the term, and Thomas was free to recommend whatever sentence he felt was appropriate. Thomas confirmed his understanding of the terms of the plea bargain.

The record includes a signed plea questionnaire and waiver of rights form with attachments. The form reflects that, at the time of the plea, Thomas was thirty-two years old and had completed eleven years of schooling. The form further reflects Thomas's understanding of the charge he faced, the constitutional rights he waived by pleading guilty, and the penalties that the trial court could impose. A signed addendum attached to the form reflects his 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 bears Thomas's handwritten initials. Thomas told the trial court that he reviewed the form and the attachments with his trial counsel and that he understood them.

The trial court explained to Thomas that he faced a ten-year term of imprisonment and a $10,000 fine upon conviction. *See* WIS. STAT. §§ 941.39(1), 939.62(1)(b), 939.50(3)(h). Thomas said he understood. The trial court told Thomas 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. Thomas said 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 guilty plea and that he had not been threatened.

The trial court explained to Thomas that by pleading guilty he would give up the constitutional rights listed on the plea questionnaire, and the trial court reviewed those rights on the record. Thomas said he understood. The trial court further explained to Thomas that by pleading guilty, he would give up the opportunity to file motions and present defenses to the charge. Thomas said he understood.

The trial court told Thomas that his guilty 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). Although the trial court did not caution Thomas 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] *See* ***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. The jury instruction attached to Thomas's plea questionnaire describes the elements of the offense. Additionally, the trial court reviewed each element on the record, and Thomas said he understood the elements.

[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 Thomas could make such a showing.

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, Thomas told the trial court that the allegations in the criminal complaint were true. In response to the trial court's specific inquiry, Thomas also explicitly admitted that he was a repeat offender, as alleged in the criminal complaint, because he previously was convicted of a felony on September 21, 2010. The trial court properly found a factual basis for Thomas's guilty plea.

The record reflects that Thomas 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 Thomas 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 explained that the offense was serious because Thomas defied a court order. Turning to Thomas's character, the trial court considered that he had five prior convictions and that several involved incidents of domestic violence. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The trial court also observed that, according to the criminal complaint, A.B. reported to police that Thomas had "started drinking again." Although Thomas advised the trial court that he had "AODA programs set up," the trial court expressed concern that Thomas "just went back to the same old kind of patterns." The trial court discussed protection of the public, pointing out that Thomas was serving a term of extended supervision at the time of the offense but, despite receiving services, he continued "not complying with the rules."

The trial court appropriately considered probation as the first sentencing alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The trial court concluded, however, that a grant of probation

would "unduly depreciate[] how serious this was. [Thomas was] on extended supervision from a revoked probation. So to put [him] on some kind of probation, it makes a mockery of" community supervision.

The trial court determined that Thomas must serve a three-and-one-half-year term of imprisonment for violating a no-contact order as a repeat offender. The trial court acknowledged, however, that A.B. had permitted Thomas to have contact with her, and the trial court also recognized that Thomas had served ninety days in jail for his conduct as an alternative to revocation of the extended supervision imposed for his 2010 battery conviction. In light of these circumstances, the trial court granted Thomas's request to serve his sentence concurrently with his previously-imposed term of imprisonment.

The trial court identified the factors that it considered in choosing an appropriate sentence. The factors are proper and relevant. Moreover, the sentence is not unduly harsh. 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). Here, the penalties imposed are far less than the law allows. A "'sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Id.*** (citation omitted). Accordingly, the sentence is not unduly harsh or excessive. We conclude that a challenge to the trial court's exercise of sentencing discretion would lack arguable merit.

Finally, we have considered whether Thomas could mount an arguably meritorious challenge to the trial court's order denying him eligibility for 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. 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 programs. *See* WIS. STAT. §§ 973.01(3m), 973.01(3g).[3]

Here, the trial court found that the gravity of the offense required that Thomas serve the full period of initial confinement imposed. The gravity of the offense is an appropriate reason for denying program eligibility. *See* ***State v. Steele***, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112. An appellate challenge to the trial court's exercise of discretion would lack arguable merit.

[3] 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).

Based on an independent review of the record, we conclude that no additional potential issues warrant discussion.[4] 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 Dustin C. Haskell is relieved of any further representation of Marchello A. Thomas on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] The trial court ordered Thomas to pay "any mandatory costs and fees and including also the domestic abuse assessment that goes along with this case." A conviction for a violation of WIS. STAT. § 941.39(1) does not entail a domestic abuse assessment. *See* WIS. STAT. § 973.055(1)(a)1. The trial court correctly ensured that the judgment of conviction entered here did not reflect a domestic abuse assessment.