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DISTRICT I

October 6, 2015

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

2015AP755-CRNM State of Wisconsin v. Deshawn L. Peterson (L.C. #2014CF375)

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

Deshawn L. Peterson pled guilty to one count of armed robbery as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.05(1) (2013-14).[1] The circuit court imposed an evenly bifurcated five-year term of imprisonment and declared Peterson eligible for the challenge incarceration program but ineligible for the Wisconsin substance abuse program. He appeals.

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

Appellate counsel, Attorney John R. Breffeilh, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Peterson did not file a response. Upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Peterson and a co-actor approached D.M. on February 2, 2014, in the parking lot of a K-Mart store in Milwaukee County, Wisconsin. Peterson pointed a handgun at D.M., took her money, including a $100 bill, and fled with his co-actor in a blue Buick LeSabre. A Milwaukee police officer followed the Buick after observing it leave the K-Mart parking lot at a high rate of speed. While following the car, the officer heard a report on his police radio that an armed robbery had just occurred at K-Mart. The officer determined that the car was travelling at approximately twenty-five miles over the speed limit and conducted a traffic stop. The officer found a loaded .380 caliber handgun in the Buick and its driver, subsequently identified as Peterson, had a $100 bill in his pocket. Police gave Peterson the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[2] Peterson then admitted that he robbed a woman in the K-Mart parking lot using the handgun found in the Buick.

The State charged Peterson with one count of armed robbery as a party to a crime. Peterson decided to resolve the charge against him with a plea bargain.

[2] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

We first consider whether Peterson could pursue an arguably meritorious challenge to his guilty plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain. The State explained that Peterson would plead guilty as charged, and the State would recommend a five-year term of imprisonment, evenly divided between initial confinement and extended supervision. Peterson confirmed that the State correctly described the plea bargain and that he understood its terms.

The circuit court explained to Peterson that he faced a forty-year term of imprisonment and a $100,000 fine upon conviction of the charge against him. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c). The circuit court told Peterson that it could impose the maximum statutory penalties if it chose to do so and that it was not bound by the terms of the plea bargain or by any sentencing recommendations. Peterson said he understood.

The circuit court warned Peterson that, if he was not a citizen of the United States, his guilty plea exposed him to the risk of deportation or exclusion from admission to this country. *See* WIS. STAT. § 971.08(1)(c). Peterson said he understood. Although the circuit court did not caution Peterson 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 a plea.[3] *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

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[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 Peterson could make such a showing.

The record contains a signed guilty plea questionnaire and waiver of rights form with attachments. Peterson confirmed that he reviewed the documents with his trial counsel and that he understood them. The guilty plea questionnaire reflects that Peterson was twenty-one years old and had completed high school. The questionnaire further reflects that Peterson understood the charge he faced, the rights he waived by pleading guilty, the penalties the circuit court could impose, and that he had not been threatened or promised anything outside of the terms of the plea bargain to induce his guilty plea. A signed addendum reflects Peterson'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.

The circuit court told Peterson that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire, and the circuit court reviewed those rights on the record. Peterson said he understood. The circuit court explained that by pleading guilty, Peterson would give up his available defenses to the charge and his potential challenges to the actions of the police in stopping, searching, and questioning him. Peterson said he understood.

A written summary of the elements of armed robbery is attached to the guilty plea questionnaire, and Peterson's initials appear next to the summary. Peterson told the circuit court that he had discussed the elements of the offense with his trial counsel and that he understood them. The circuit court then reviewed the elements on the record, and the circuit court explained the concept of party-to-a-crime liability. Peterson said he understood.

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Peterson and his trial counsel both told the circuit court that it could rely on the facts alleged in the criminal

complaint. The circuit court properly found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Peterson 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 Peterson 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 "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. In seeking to fulfill the sentencing objectives, 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.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court identified punishment and deterrence as the primary sentencing goals, and the circuit court discussed the factors that it deemed relevant to those goals. The circuit court considered the gravity of the offense, reminding Peterson that the incident would always be part of D.M.'s life experience and that she would feel "vulnerable because of what happened to her." The circuit court viewed Peterson's character as largely mitigating, recognizing that he had a "basic education," a history of employment, and no prior criminal record, and the circuit court credited the information that he was a loving father to two children. On the other hand, the circuit court observed that his character led him to a "thought process of going out and doing this [armed robbery] with a very dangerous weapon under [his] control." The circuit court addressed the need to protect the community, stating: "this type of behavior that's unfortunately running somewhat rampant in our area ... it just has to stop. People can't treat other people this way."

The circuit court did not adopt Peterson's recommendation for a probationary disposition. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). The circuit court explained that Peterson would "have a chance of doing the right thing" in the future, but he must first be punished and would not be allowed to "get away with what [he] did."

The circuit court identified the factors that it considered in choosing an appropriate sentence in this matter. 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 circuit court's exercise of sentencing discretion would lack arguable merit.

We last consider a question that appellate counsel did not discuss, namely, whether the circuit court's decisions about Peterson's eligibility for the challenge incarceration program and the substance abuse program give rise to an arguably meritorious appellate issue. Both the challenge incarceration program and the substance abuse program 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. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187, and WIS. STAT. §§ 973.01(3g)-(3m).[4] Here, the circuit court declared Peterson eligible to participate in only the challenge incarceration program. We are satisfied that Peterson could not mount an arguably meritorious challenge to the decision denying him eligibility for the substance abuse program.

[4] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

Peterson told the circuit court in his sentencing presentation that he committed the armed robbery in this case because he was struggling financially after losing a job and because his grandfather, who had previously served as his counselor and advisor, had recently passed away. The circuit court concluded that Peterson's criminal conduct did not stem from substance abuse, and therefore Peterson was not eligible for the substance abuse program. The challenge incarceration program, however, is a multi-faceted program that includes labor, treatment, exercise, and personal development counselling. *See* WIS. STAT. § 302.045(1). In light of Peterson's need for guidance and in light of the factors triggering his criminal behavior, the circuit court properly exercised its discretion by finding him eligible for the challenge incarceration program but ineligible for the substance abuse program. Further pursuit of this issue 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 Deshawn L. Peterson on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals