OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

October 20, 2015

To:

Hon. Lindsey Canonie Grady
Circuit Court Judge
Courthouse, Branch 23
901 N 9th St
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Hannah Schieber Jurss
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kiante V. Banks
8904 W Villard Ave #5
Milwaukee, WI 53225

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

2015AP1360-CRNM State of Wisconsin v. Kiante V. Banks (L.C. #2013CM4342)

Before Curley, P.J.[1]

Kiante V. Banks appeals from a judgment of conviction, entered upon his guilty plea, on one court of misdemeanor battery as a domestic abuse incident. Appellate counsel, Hannah Schieber Jurss, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Banks was advised of his right to file a response, but has

[1] 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.

not responded. Upon this court's independent review of the record, as 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.

During an argument, K.F., the mother of Banks's child, told Banks to stay out of her and the child's lives. According to K.F., Banks responded by punching her in the forehead, pushing her to the ground, kicking her in the chest, and pulling her hair. Banks also began throwing items onto the floor.

Banks was charged with one count of misdemeanor battery and one count of disorderly conduct, both as domestic abuse incidents. He had also been charged in Milwaukee County Circuit Court case No. 2013CM5013 with misdemeanor battery and misdemeanor bail jumping, both as domestic abuse incidents. That case was joined with this case.

Banks agreed to resolve his charges with a plea. In exchange for his guilty plea to the misdemeanor battery–domestic abuse in this case, the disorderly conduct and the two charges in the other case would be dismissed and read in. The State would recommend the maximum nine months in jail, imposed and stayed in favor of eighteen months' probation. Banks would be free to argue for an appropriate sentence.

The circuit court accepted Banks's plea. It imposed and stayed a sentence of nine months in jail, and ordered eighteen months' probation with condition time. The condition time was stayed pending review of the progress of Banks's probation.[2] The circuit court also ordered

[2] It appears that Banks successfully completed the review periods and did not have to serve the condition time.

Banks to pay a $200 DNA surcharge, the domestic abuse surcharge, and other mandatory costs and surcharges; it waived non-mandatory items. The circuit court further ordered Banks to pay $204 in restitution to K.F., representing copays for a year of counseling.

Banks filed a postconviction motion challenging the restitution as speculative; he also challenged some of the surcharges and costs that had been taxed, as well as the DNA surcharge. Ultimately, the DNA surcharge was vacated because of an *ex post facto* violation and the costs and surcharges were ordered amended to comply with the court's earlier order.[3] Banks withdrew the restitution challenge after postconviction counsel found case law she believed to be controlling.

The first potential issue counsel identifies is whether the circuit court followed the appropriate procedures in accepting Banks's plea. Our review of the record—including the plea questionnaire, waiver of rights form, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35 nn.13-22, 293 Wis. 2d 594, 716 N.W.2d 906. *See also* ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (regarding circuit court's reliance on the plea questionnaire form), and ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835 (recommended advisements when plea involves read-in offenses). There is no

[3] The record reveals that, after the postconviction ruling, the new judgment of conviction properly reflects only ordered assessments, so we do not discuss them further.

arguable merit to a claim that the circuit court failed to fulfill its obligations or that Banks's plea was anything other than knowing, intelligent, and voluntary.

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 this was a lower type of crime, based on its classification, but it was still violent. There were many mitigating factors working in Banks's favor that the circuit court considered: he had stability in the community, a good employment history, and no criminal record. However, the circuit court noted that it did not buy the "it's not me, it's her" scenario that Banks tried to convey, and it noted a higher need to protect the community when the offender does not take responsibility for his actions. The circuit court also noted that while Banks has three children, he does not support any of them and has been perpetually in arrears.

Based on these factors, the circuit court sentenced Banks to nine months in jail, imposed and stayed in favor of eighteen months' probation with sixty days in jail as condition time. The

circuit court also stayed the condition time, commenting that it was part of the sentence to see how seriously Banks was going to take it.

Banks received the maximum jail term, but the maximum possible term of probation was two years. *See* WIS. STAT. § 973.09(2)(a)1.b. The eighteen-month probationary term is 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.

The final issue counsel raises is whether the circuit court erred in ordering restitution for K.F.'s prospective counseling needs. K.F. had originally been seeking co-payments for a year and a half's worth of counseling. The circuit court denied payment for counseling that predated the underlying offense, but awarded an amount for the approximately six months between the offense and sentencing and for the following six months.

Postconviction counsel originally thought the issue was controlled by ***State v. Handley***, 173 Wis. 2d 838, 839, 496 N.W.2d 725 (Ct. App. 1993), which disallowed coverage for future counseling expenses because they were too speculative. However, counsel withdrew the challenge upon discovering ***State v. Loutsch***, 2003 WI App 16, 259 Wis. 2d 901, 656 N.W.2d 781, overruled in part on other grounds by ***State v. Fernandez***, 2009 WI 29, ¶5, 316 Wis. 2d 598, 674 N.W.2d 509. ***Loutsch*** noted that the restitution award in ***Handley*** could not be sustained because it had no support in the record. *See* ***Loutsch***, 259 Wis. 2d 901, ¶18. However, "[n]othing in our [***Handley***] decision suggests that, had there been evidence that counseling would be needed in the future, the trial court did not have the authority to order restitution for an

amount that would probably be needed to compensate for that future counseling." ***Loutsch***, 259 Wis. 2d 901, ¶18. Here, K.F. testified about her need for, and intent to attend, counseling. Thus, there is no arguable merit to a challenge to the circuit court's discretion in awarding restitution for K.F.'s counseling co-payments.

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 Hannah Schieber Jurss is relieved of further representation of Banks in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals