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

December 22, 2015

To:

Hon. Rebecca F. Dallet
Circuit Court Judge
Branch 40
821 W State St
Milwaukee, WI 53233

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

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

Colleen Marion
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

Brandon Ramon Smith 598048
Chippewa Valley Correctional Treatment Facility
2909 E. Park Ave.
Chippewa Falls, WI 54729

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

2015AP1797-CRNM State of Wisconsin v. Brandon Ramon Smith (L.C. #2013CF3078)
2015AP1908-CRNM State of Wisconsin v. Brandon Ramon Smith (L.C. #2013CF3950)

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

Brandon Ramon Smith appeals from judgments of conviction, entered upon his guilty pleas, on one count of disorderly conduct as a domestic abuse incident as a domestic abuse repeater, four counts of knowingly violating a domestic abuse injunction, and one count of felony intimidation of a witness. Appellate counsel, Colleen Marion, 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] Smith was advised of his right to file a response, but he has not responded. Upon this court's independent review of the

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

records, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

The criminal complaint in Milwaukee County Circuit Court case No. 2013CF3078 (case 3078) alleged that on July 6, 2013, E.C. found Smith in her home, contrary to a previously issued injunction. When E.C. attempted to block Smith from going into another room, he head-butted her, causing a bump on her head. A witness reported that Smith also shoved and threatened E.C. Smith was charged with one count of battery to an injunction petitioner, one count of knowingly violating a domestic abuse injunction, and one count of intentional contact with a victim or witness after a no-contact court order, all as a domestic abuse incident and all as a domestic abuse repeater, plus a count of disorderly conduct.

According to the criminal complaint in Milwaukee County Circuit Court case No. 2013CF3950 (case 3950), after Smith was arrested and in custody for case 3078, he sent six letters and made one phone call to E.C. in an attempt to persuade her to stop cooperating with the prosecution of the earlier case. Smith was charged with seven counts of knowingly violating a domestic abuse injunction, seven counts of intentional contact with a victim or witness after a no-contact court order, four counts of intimidating a witness, and one count of intimidating a victim, all as a domestic abuse incident and all as a domestic abuse repeater.

Smith agreed to resolve his cases with a plea agreement. In case 3078, the felony battery would be amended to misdemeanor disorderly conduct as a domestic abuse incident and as a

domestic abuse repeater, and Smith would plead guilty.[2] The remaining counts in that case would be dismissed and read in. In case 3950, Smith would plead guilty to any four of the misdemeanors—he chose four counts of knowingly violating a domestic abuse injunction—and to one count of intimidation of a witness, which is a felony. The domestic abuse repeater allegations for those offenses would be dismissed, and the remaining fifteen counts would be dismissed and read in. The State would recommend a global sentence of four years' initial confinement and five years' extended supervision, with various conditions. The circuit court accepted the plea and ultimately imposed six months in jail in case 3078 and, to be served consecutively, concurrent and consecutive sentences totaling two years' initial confinement and three years' extended supervision in case 3950.

Postconviction counsel filed a motion challenging the imposition of mandatory DNA surcharges. The circuit court granted the motion with respect to the misdemeanor convictions, vacating those surcharges, but retained the surcharge on the felony conviction. After this court rejected the first no-merit report, counsel filed another postconviction motion in case 3950 to challenge the domestic abuse modifier attached to the charges in that case for not satisfying the statutory definition of domestic abuse. *See* WIS. STAT. § 968.075(1)(a). The circuit court agreed and removed that modifier and related surcharges from all charges in that case. It further ordered corrections of certain scrivener's errors that had been identified.

[2] Under the domestic abuse repeater statute, if a person commits an act of domestic abuse that constitutes a crime, "the maximum term of imprisonment for that crime may be increased by not more than 2 years if the person is a domestic abuse repeater." WIS. STAT. § 939.621(2). Further, "[t]he penalty increase under this section changes the status of a misdemeanor to a felony." ***Id.***

We observe that the judgment of conviction in this case describes Smith's disorderly conduct conviction as a Class B misdemeanor. We decline to order the judgment of correction amended at this time, because it is unclear whether such an amendment is necessary. We note, however, that the circuit court has the authority to order a correction if one is needed. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Counsel identifies three potential issues for appeal: whether there is any basis for a challenge to the validity of Smith's guilty pleas, whether the circuit court appropriately exercised its sentencing discretion, and whether the circuit court should have also vacated the felony DNA surcharge. We agree with counsel's conclusion that these issues lack arguable merit.

There is no basis for challenging whether Smith's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form for each case, *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 offenses. Attached to the forms were applicable jury instructions for disorderly conduct and knowingly violating a domestic abuse injunction; the elements for intimidation of a witness were written on the plea form. The forms correctly acknowledged the maximum penalties Smith faced[3] and the forms also specified the constitutional rights he was waiving with his pleas.

The circuit court 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. In addition to its

[3] In the no-merit report, counsel indicates that the form in case 3950 underreported the potential maximum fine as $29,000 rather than the $65,000 she calculated. However, the $29,000 possible fine was correct.

At the time of Smith's offenses in July and August 2013, the penalty for knowingly violating a domestic abuse injunction, contrary to WIS. STAT. § 813.12(8) (2011-12), was nine months in jail and/or a $1,000 fine. *See* ***id.*** This made the offense an unclassified misdemeanor. *Cf.* WIS. STAT. §§ 939.51(3)(a)-(b) (2011-12) (Class A misdemeanor penalties of nine months and $10,000 fine; Class B misdemeanor penalties of ninety days and $1,000 fine). In April 2012, the legislature enacted 2011 Wis. Act 266, which changed the penalty for a violation of WIS. STAT. § 813.12(8)(a) (2011-12) to nine months and/or a $10,000 fine. *See* 2011 Wis. Act 266, § 5D. That change, however, was not effective until January 1, 2014. *See* 2011 Wis. Act 266, § 16.

The main portion of Smith's potential maximum fine, $25,000, is part of the possible penalty for witness intimidation, a Class G felony. *See* WIS. STAT. § 939.50(3)(g). Counsel calculated the additional $40,000 based on the revised statute, when the additional amount is actually only $4,000, based on the statute in effect at the time of the offenses.

required duties, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, the circuit court also verified that Smith understood the implications of read-in offenses. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835.

Ultimately, the plea questionnaire and waiver of rights forms and the court's colloquy appropriately advised Smith of the elements[4] 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 pleas' validity.

The second 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

[4] Prior to rejecting the first no-merit report in these cases, we issued an order directing counsel to file a supplemental report regarding the domestic abuse modifiers. Although our order discussed the modifier's application in both cases, counsel's supplemental postconviction motion challenging that modifier was filed in case 3950 only. Counsel has not explained in the current no-merit report why a similar challenge in case 3078 would lack arguable merit.

Our concerns in case 3950 stemmed from the nature of Smith's activities and whether they satisfied the statutory definition of domestic abuse: intentional infliction of physical pain, physical injury, or illness; intentional impairment of physical condition; first- through third-degree sexual assault; or "[a] physical act that may cause the other person reasonably to fear imminent engagement" in the three other types of conduct. *See* WIS. STAT. § 968.075(1)(a)1.-4. In case 3078, our concern was similar, but was premised on Smith's disavowal of any physical harm to E.C.—when the circuit court asked if it could use the criminal complaints as the factual basis for the pleas, *see* WIS. STAT. § 971.08(1)(b), Smith would only admit to swearing and yelling at E.C., despite the complaint's allegations that he head-butted and shoved her.

While domestic abuse includes intentional infliction of physical pain or injury, it also includes a "physical act" that may cause the other person to fear intentional infliction of physical pain or injury. Thus, in light of Smith's history of domestic abuse with E.C., his going to her home in violation of an injunction, along with whatever physical posturing accompanies "swearing and yelling," suggests a sufficient "physical act" under WIS. STAT. § 968.075(1)(a)4. to satisfy the definition of domestic abuse and provide a factual basis for the circuit court to accept the guilty plea on the disorderly conduct charge. There is, therefore, no arguable merit to a challenge to the use of the domestic abuse modifier in case 3078.

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 Smith had a "terrible pattern of behavior" with E.C. His behavior indicated problems with domestic violence and with following court orders, and he demonstrated over and over again that court orders do not matter to him. The circuit court rejected probation because Smith had been on probation when he incurred the new charges. Based on his behavior to date, the circuit court expressed concern that it had not yet been impressed upon Smith just how serious his offenses were, particularly the fact that it was not good for his and E.C.'s children to be subject to the violence between their parents. The circuit court explained that it believed its sentence to be significant enough to impart that lesson on Smith, while allowing plenty of time on supervision to make the necessary changes to his behavior and deal with the consequences if he could not.

The maximum possible sentence Smith could have received was fifteen years and ninety days' imprisonment.[5] The sentence totaling five and one-half years' imprisonment is well within the

[5] *See* WIS. STAT. §§ 947.01(1) & 939.51(3)(b) (disorderly conduct as Class B misdemeanor with maximum ninety-day sentence); 939.621(1)(b) & (2) (domestic abuse repeater enhancer allows maximum of two additional years' imprisonment); 813.12(8)(a) (nine months' jail time for knowingly violating domestic abuse restraining order); and 940.43(5) & 939.50(3)(g) (intimidation of witness as Class G felony with maximum ten years' imprisonment).

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.

Counsel also addresses whether the circuit court erroneously denied Smith's motion to vacate the felony DNA surcharge. The circuit court had initially imposed DNA surcharges for all six convictions, presumably pursuant to WIS. STAT. § 973.046(1r) (2014), which took effect for all sentencings occurring on or after July 1, 2014, for both felony and misdemeanor convictions, without regard to when the crimes of conviction were committed. When counsel moved to vacate the surcharges, the circuit court, in an order dated October 28, 2014, agreed that the revised statute was an *ex post facto* law. This court would later reach the same conclusion. *See* ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756 (released May 20, 2015).

The circuit court thus vacated the misdemeanor surcharges but then applied the law in effect when Smith committed his crimes. *See* WIS. STAT. § 973.046(1g) (2011-12) (circuit court *may* impose a $250 surcharge for most felony convictions); *see also* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (permissive language of statute requires exercise of discretion). The circuit court explained that the surcharge was warranted because Smith had no prior felony conviction and, thus, would be providing a biological specimen for the first time.[6] *See* WIS. STAT. § 973.047 (2011-12) (requiring convicted defendants to provide DNA sample). Our review of the record as a whole satisfies us that the circuit court properly exercised its discretion when deciding

[6] The circuit court also noted that if there was documentation that Smith had provided the sample previously and paid the surcharge, it would entertain a reconsideration motion.

that Smith should still pay the $250 felony DNA surcharge. *See* ***State v. Ziller***, 2011 WI App 164, ¶10-13, 338 Wis. 2d 151, 807 N.W.2d 241. There is no arguable merit to challenging it further.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Colleen Marion is relieved of further representation of Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals