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January 22, 2016

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

2015AP1780-CRNM State of Wisconsin v. Jamael J. Coley (L.C. #2014CF667)

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

Jamael J. Coley pled guilty as charged to two felonies: (1) possessing with intent to deliver more than fifteen grams of cocaine but not more than forty grams of cocaine; and (2) possessing with intent to deliver more than three grams of heroin but not more than ten grams of heroin. *See* WIS. STAT. §§ 961.41(1m)(cm)3. (2013-14)¹; 961.41(1m)(d)2. As to the cocaine

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

offense, the trial court imposed an eleven-year term of imprisonment, bifurcated as four years of initial confinement and seven years of extended supervision. As to the heroin offense, the trial court imposed a concurrent, evenly bifurcated eight-year term of imprisonment. The trial court declared Coley ineligible for the Wisconsin substance abuse program but eligible for the challenge incarceration program after serving two years of confinement. He appeals.

Appellate counsel, Attorney Russell D. Bohach, filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738 (1967). Coley 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.

We first consider whether Coley could pursue an arguably meritorious challenge to the validity of his guilty pleas. At the start of the plea proceeding, the State described the terms of the parties' plea bargain. The State explained that Coley would plead guilty as charged, and the State would recommend a global disposition of five to seven years of initial confinement and eight years of extended supervision. Coley, by counsel, confirmed that the State correctly described the parties' agreement.

The trial court described on the record the charges Coley faced and the elements of each crime. Coley told the trial court that he understood the charges and the elements and that he had discussed them with his trial counsel. The trial court explained to Coley that, for the offense involving cocaine, he faced a twenty-five year term of imprisonment and a \$100,000 fine, and that for the offense involving heroin, he faced a fifteen-year term of imprisonment and a \$50,000 fine. *See* WIS. STAT. §§ 961.41(1m)(cm)3., 961.41(1m)(d)2., 939.50(3)(d)-(e). The trial court told Coley 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. Coley said he understood.

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

The record contains a signed guilty plea questionnaire and waiver of rights form. Coley confirmed that he reviewed the form with his trial counsel and that he understood its contents. The form reflects that Coley was thirty-two years old at the time of his plea and had a college education. The form further reflects that Coley understood the charges he faced, the rights he waived by pleading guilty, and the penalties that the trial court could impose. A signed addendum to the form reflects Coley's acknowledgment that by pleading guilty he would give up his rights to raise defenses and to challenge the constitutionality of any police action in the case.

The trial court told Coley that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire, and the trial court reviewed those rights on the record. Coley said he understood. The trial court also told Coley that by pleading guilty, he

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 the defendant's deportation, exclusion from admission to this country or denial of naturalization.” *See* § 971.08(2). Nothing in the record suggests that Coley could make such a showing.

would give up his available defenses to the charges and his opportunity to pursue motions seeking suppression of the evidence against him. Coley said he understood.

A guilty plea colloquy must include an inquiry sufficient to satisfy the trial court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, counsel stipulated to the facts in the criminal complaint, and Coley told the trial court that the facts alleged in the criminal complaint were true. According to the complaint, police executed a search warrant at Coley's home in Milwaukee, Wisconsin, on February 6, 2014. During the search, police recovered 23.53 grams of cocaine base, 4.51 grams of heroin, a digital scale that contained cocaine residue, and a quantity of packaging material. The trial 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 Coley entered his guilty pleas 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 pleas.

We next consider whether Coley could seek postconviction relief on the ground that the State modified its sentencing recommendation after the plea hearing ended. At the outset of the sentencing proceeding, the State advised that it would seek four to five years of initial confinement and seven and one-half years of extended supervision, a more lenient global disposition than that described at the time of the guilty pleas. Coley told the trial court that he

did not object to the modification. Therefore, he cannot pursue the issue on appeal. *See State v. Paske*, 121 Wis. 2d 471, 472, 360 N.W.2d 695 (Ct. App. 1984) (holding that a defendant who expressly agrees to the State’s modified sentencing recommendation cannot later rely on the modification as a basis for seeking either plea withdrawal or specific enforcement of the original plea bargain).

We turn to whether Coley could pursue an arguably meritorious challenge to his sentences. 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 “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 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.

The record here reflects an appropriate exercise of sentencing discretion. The trial court identified deterrence, punishment, and protection of the public as the sentencing goals, and the trial court discussed the factors that it deemed relevant to those goals.

The trial court discussed the gravity of the offenses. In assessing this factor, the trial court considered the amount of controlled substances at issue and further took into account that, although the police did not uncover any guns or ammunition when executing the search warrant, Coley subsequently surrendered a gun to police. The trial court concluded that the offenses fell within “an intermediate range of offense severity.”

The trial court discussed Coley’s character at some length. The trial court praised Coley’s scholastic achievements, recognizing that Coley had a high school diploma and a bachelor’s degree. The trial court also commended him for choosing to work with children who are in foster care and for serving as a mentor and as a teacher-coordinator. Further, the trial court noted that his criminal record was limited to two misdemeanors. On the other hand, the trial court viewed Coley’s stated “profit motive” for his crimes as a “true poor sign of character.” The trial court was disturbed that, despite his education and work experience, he nonetheless chose to involve himself in drug dealing. The trial court told Coley that his education and familiarity with foster families put him in a “better position than most defendants ... to truly understand the destruction” that illegal drugs cause in the community.

The trial court considered the need to protect the public. The trial court observed that drug distribution and use are factors underlying many other crimes. Additionally, the trial court explained that Coley made a deliberate choice to involve himself in the drug trade, and therefore

the community needed protection from him “even with other good signs of character [he] showed.”

The trial court did not adopt Coley’s recommendation for a probationary disposition. *Cf. Gallion*, 270 Wis. 2d 535, ¶25 (trial court should consider probation as the first sentencing alternative). The trial court determined that probation would not suffice to meet the sentencing goals. Further, in the trial court’s view, probation in this case would “significantly unduly depreciate the severity or seriousness” of the offenses and the risk they pose to the community.

The trial court identified the factors that it considered in fashioning Coley’s sentences. The factors are proper and relevant. Moreover, the sentences are 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 sentences here are not unduly harsh or excessive. We conclude that a challenge to the trial court’s exercise of sentencing discretion would lack arguable merit.

We last consider whether Coley could mount an arguably meritorious challenge to the trial court’s decisions denying him eligibility for the substance abuse program and delaying the start of his eligibility for the challenge incarceration program until after he serves two years of

initial confinement. 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 trial court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the trial 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).

We are satisfied that Coley could not mount an arguably meritorious challenge to the trial court's exercise of discretion in deciding his eligibility for prison treatment programs. Coley, by counsel, explained that he had some need for substance abuse treatment but that his use of controlled substances did not "rise[] to the level of a substantial problem in his life." The trial court therefore reasonably found Coley ineligible for the substance abuse treatment program. The trial court's concerns about Coley's character, however, support the decision to find him eligible for the multi-faceted regimen of the challenge incarceration program. That program offers some substance abuse treatment and education while also encompassing character-building components, including personal development counseling. *See* WIS. STAT. § 302.045(1).

The record also supports the trial court's decision to delay the start of Coley's eligibility for the challenge incarceration program. The trial court's sentencing remarks reflect that the trial court intended that Coley have an incentive to complete the program and thereby earn a reduced term of initial confinement but also intended to ensure that Coley spend sufficient time in prison to meet the sentencing goals. 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 Russell D. Bohach is relieved of any further representation of Jamael J. Coley on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals