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/II

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To:

Hon. Glenn H. Yamahiro
Circuit Court Judge, Branch 34
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233-1425

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

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

Nicholas C. Zales
Zales Law Office
9012 W. Holt Ave.
Milwaukee, WI 53227-4426

Shermaine L. Worthy, #188929
Oakhill Corr. Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2014AP2776-CRNM State of Wisconsin v. Shermaine L. Worthy (L.C. #2012CF6077)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Shermaine L. Worthy appeals from a judgment of conviction entered upon his guilty plea to theft from the person of another, contrary to WIS. STAT. § 943.20(1)(a) and (3)(e) (2013-14).[1] Worthy's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Worthy has filed a response to the no-merit report. Upon consideration of these submissions and an independent review of the record, we conclude

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

that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The State filed a criminal complaint charging Worthy with one count of armed robbery by threat of force, contrary to WIS. STAT. § 943.32(1)(b) and (2), party to a crime, and as a repeater. According to the complaint, the victim discovered that someone broke into his car by shattering the window, and stole bags containing his property. The victim then saw Worthy walking down the street carrying his bags, which were covered in shards of glass. The victim approached Worthy, "demanded his property back," and Worthy placed the bags on the ground. The victim then turned his attention to a whistle coming from another individual standing across the street. When he turned back to Worthy, Worthy stated "You are a crazy motherfucker," and was holding a handgun. The victim said he didn't want any trouble, just his property. The person across the street yelled "They called the police." Worthy then picked up the victim's bags and fled.

Pursuant to a plea bargain, Worthy pled guilty to an amended charge of theft from a person without the repeater enhancer.[2] The State explained that after discussing the case with the victim that morning, "the State is no longer sure we can prove that the defendant actually did have a firearm during the taking of the property." The State further explained the amendment:

> Certainly, there was a break-in into the vehicle. There was some type of confrontation on the street. But I don't think, based on the quantum of evidence I have available to me now, that I can

[2] As part of the parties' agreement, Worthy also agreed to plead to two misdemeanor counts in connection with a separate case, Milwaukee County case No. 2012CM6347. Worthy did not appeal the misdemeanor case.

> prove beyond a reasonable doubt that there was, in fact, an armed robbery.
>
> Based on that and based on the dangerous nature of the theft which is the theft from person statute [which] encompasses taking[s] that involve[] a confrontation or are particularly dangerous for the victim, I'm making the amendment to a theft from person.

On the felony, Worthy received a six-year bifurcated sentence, with three years each of initial confinement and extended supervision. Thereafter, Worthy filed a pro se sentence modification motion. Observing that Worthy was represented by appointed postconviction counsel and that Worthy's pro se motion "may jeopardize his appellate rights [,]" the court denied the motion "without deciding the merits."

The no-merit report addresses whether Worthy's pleas were freely, voluntarily and knowingly entered and whether there was any merit to Worthy's pro se sentence modification motion. We agree with counsel's conclusion that the issues discussed in the no-merit report lack arguable merit. Further, our independent review of the record, including the trial court's exercise of discretion at sentencing, reveals no other possible issue for appeal.[3]

The record shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the trial court properly relied on Worthy's signed plea questionnaire to establish his knowledge and understanding of his plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and

[3] In the future, counsel's no-merit reports should discuss whether the trial court properly exercised its discretion at sentencing.

waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken); ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The parties agreed that, with the exception of the allegation that Worthy possessed a weapon, the trial court could rely on the facts in the complaint to determine the existence of a factual basis for the amended charge. The court determined the complaint established a factual basis for the offense of conviction.[4] No issue of merit exists from the plea taking.

The no-merit report also addresses whether there is any arguable merit to a claim that trial counsel knew the victim would not show up for trial and provided ineffective assistance in allowing Worthy to enter his plea under these circumstances. We are satisfied that the no-merit properly analyzes this issue as without merit and will not discuss it further.

In fashioning the sentence, the court considered the nature of the offense, the defendant's character and history, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court permissibly gave substantial weight to Worthy's negative character as evidenced by his lengthy criminal record and history on supervision. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981)

[4] In determining the existence of a factual basis for the charge, the court asked Worthy "except for the statement that you possessed a weapon, is everything else in that armed robbery complaint true, sir?" Worthy answered "Yes." The complaint alleged that during a confrontation between Worthy and the victim, at the victim's direction, Worthy placed the bags on the grounds. However, upon hearing that the police were called, Worthy grabbed the bags and carried them away without the victim's consent. On these facts, the trial court's factual basis determination was not clearly erroneous. *See* ***State v. Harvey***, 2006 WI App 26, ¶10, 289 Wis. 2d 222, 710 N.W.2d 482 ("Unless it was clearly erroneous, we will uphold the trial court's determination that there existed a sufficient factual basis to accept the plea.") (citation omitted).

(though the trial court must consider the proper sentencing factors, the weight to be given each factor lies within its discretion). The trial court considered that Worthy spent the last twenty years in and out of custody, was revoked eight times, and that his instant offenses occurred two months after his most recent release. The court stated there was no evidence that Worthy's history included any period of time where he made an effort at rehabilitation or stayed out of trouble. Rather, the court noted, Worthy had "subverted almost every attempt [by the Department of Corrections] to help you in the last twenty years." The court determined that based on Worthy's extensive history, its sentence "is the minimum amount of time the Court can order to justify protection of the public based on his record." We conclude that the trial court properly exercised its discretion at sentencing. Further, we cannot conclude that the six-year sentence when measured against the maximum of ten years is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Worthy states "All I want is a lower sentence," alleging that though he did break into the victim's car and steal his bag, he returned the property to the victim during their street encounter. Worthy asserts that the victim made contradictory statements and asks this court to review those statements and lower his sentence or give him a "time cut."[5] However, the WIS. STAT. RULE 809.32 no-merit procedures do not authorize this court to modify a sentence in its discretion. Our review is limited to determining whether any arguably meritorious issues arise from the trial court proceedings. We construe Worthy's

[5] Due to the similarities between Worthy's claims in his no-merit response and those made in his pro se sentence modification motion, we will not address appellate counsel's argument in the no-merit report that the trial court properly denied Worthy's pro se sentence modification motion. We note that the trial court denied Worthy's pro se motion not on the merits, but because he was represented by appointed counsel.

response as a claim that appointed counsel should have filed a sentence modification motion alleging that these grounds constitute a new factor under ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (a new factor is a set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties). We disagree and conclude that as a matter of law, the assertions in Worthy's response do not constitute a new factor. ***Id***., ¶36 (whether a new factor exists is a question of law). Worthy explicitly told the court that with the exception of the gun, the facts in the complaint were true, including that though Worthy initially put the bags down, he then picked them up and took them away from the victim.[6] Regardless of whether Worthy's assertions are true, he was aware of and did not dispute these facts at his plea or sentencing hearings, and they were not "unknowingly overlooked" as required under ***Harbor***. No arguably meritorious issue arises from the assertions in Worthy's response.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Worthy further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[6] Likewise, the testimony at the preliminary hearing was that during his encounter with the victim, Worthy grabbed and carried the bags away, and that the items were never returned to the victim.

IT IS FURTHER ORDERED that Attorney Nicholas C. Zales is relieved from further representing Shermaine L. Worthy in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals