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

2015AP1991-CRNM State of Wisconsin v. Melissa J. Vervooren (L.C. #2014CF927)

Before Kessler, Brennan and Brash, JJ.

Melissa J. Vervooren entered a no-contest plea to one count of causing injury by operating a vehicle while intoxicated. *See* WIS. STAT. § 940.25(1)(a) (2013-14).[1] The circuit

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

court imposed a bifurcated sentence of five years and six months, comprised of eighteen months of initial confinement and four years of extended supervision. Following a restitution hearing, the circuit court also ordered Vervooren to pay restitution in the amount of $40,703. Vervooren then moved for sentence modification on the ground that any prison sentence was unduly harsh. The circuit court denied the motion without a hearing, and Vervooren appeals.

Appellate counsel, Attorney Donna Odrzywolski, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Vervooren 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, Vervooren drove her car off the viaduct at 641 S. 35th Street in Milwaukee, Wisconsin, early in the morning of February 26, 2014. The car landed on its roof underneath the bridge. Vervooren's passenger, J.W., suffered extensive injuries. Vervooren acknowledged to police that she spent the evening drinking in a tavern and left the bar to drive home with J.W. at closing time. A test of her blood revealed an alcohol concentration of .103 grams per 100 milliliters of blood.

The State charged Vervooren with: (1) causing injury by operating a vehicle while intoxicated, *see* WIS. STAT. § 940.25(1)(a); (2) causing injury by operating a vehicle while having a prohibited alcohol concentration, *see* § 940.25(1)(b); (3) operating a motor vehicle while intoxicated as a second or subsequent offense, causing injury, *see* WIS. STAT. §§ 346.65(3p), 346.63(2)(a)1.; (4) operating a motor vehicle while having a prohibited alcohol concentration as a second or subsequent offense, causing injury, *see* §§ 346.65(3p), 346.63(2)(a)2.; (5) reckless driving causing great bodily harm, *see* WIS. STAT. § 346.62(4);

(6) operating a motor vehicle while intoxicated as a second offense, *see* §§ 346.63(1)(a), 346.65(2)(am)2.; and (7) operating a motor vehicle while having a prohibited alcohol concentration as a second offense, *see* §§ 346.63(1)(b), 346.65(2)(am)2. Vervooren quickly decided to resolve the charges with a plea bargain.

We first consider whether Vervooren could pursue an arguably meritorious challenge to her no-contest plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain: Vervooren would plead guilty to one count of causing injury by operating a vehicle while intoxicated, the State would move to dismiss and read in the other six charges, and the State would request incarceration without recommending a specific period of imprisonment. Vervooren and her lawyer agreed that the State correctly recited the terms of the parties' agreement but subsequently clarified that Vervooren wished to enter a no-contest plea. The State did not object to the no-contest plea.

The circuit court explained to Vervooren that she faced twelve and a half years of imprisonment, a $25,000 fine and a two-year revocation of her driving privileges. *See* WIS. STAT. §§ 940.25(1)(a), 939.50(3)(f), 343.31(3)(f). The circuit court told Vervooren 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. Vervooren said she understood.

The circuit court warned Vervooren that if she was not a citizen of the United States, her no-contest plea exposed her to the risk of deportation, exclusion from admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Vervooren said she understood. Although the circuit court did not caution Vervooren 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 plea questionnaire and waiver of rights form with attachments. Vervooren confirmed that she reviewed the form and attachments with her trial counsel and that she understood them. The plea questionnaire reflects that Vervooren was thirty-two years old and had a high school diploma. The questionnaire further reflects that Vervooren understood the charge she faced, the rights she waived by pleading no contest, the penalties that the circuit court could impose, and that she had not been threatened or promised anything outside of the terms of the plea bargain to induce her no-contest plea. A signed addendum reflects Vervooren's acknowledgment that by pleading no contest she would give up her rights to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of her statements and other evidence.

The circuit court told Vervooren that by pleading no contest she would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed those rights on the record. Vervooren said she understood. The circuit court explained that by pleading no contest, Vervooren would give up her available defenses to the charge and her potential challenges to the complaint and to the evidence against her. Vervooren said she understood.

[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 [her] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Vervooren could make such a showing.

A copy of the jury instructions describing the elements of the offense are attached to the plea questionnaire, and Vervooren's initials appear on the first page of those instructions. Vervooren told the circuit court that she had discussed the elements with her lawyer and that she understood them. The circuit court then reviewed the elements on the record. Vervooren said she understood.

A 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). Vervooren and her trial counsel agreed that the circuit court could rely on the facts alleged in the criminal complaint. The circuit court properly found a factual basis for the no-contest plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Vervooren entered her no-contest 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 Vervooren could pursue an arguably meritorious challenge to her 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.

Our review of a sentencing decision includes consideration of both the circuit court's explanation given during the sentencing proceeding and any additional explanation that the circuit court provided in response to the defendant's postconviction motion for relief from the sentence. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). We recognize, however, that the amount of explanation needed for a sentencing decision varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court discussed the gravity of the offense, stating that Vervooren was driving sixty-five miles an hour while intoxicated and caused "a horrendous crash, 145 feet in the air this vehicle flew.... It's amazing that anybody survived this." The circuit court added that the injuries J.W. suffered

in the accident had "completely changed his life." In discussing Vervooren's character, the circuit court noted that she had been employed as a home health care worker and that she had also been self-employed. The circuit court further took into account that she had two adolescent children. The circuit court considered the need to protect the public, pointing out that Vervooren had a prior conviction for operating while intoxicated only a few years before the current incident and that, as noted by the State in its sentencing remarks, she committed the new crime with a detectable amount of marijuana as well as alcohol in her blood.

The circuit court identified protection of the public as the primary sentencing goal, emphasizing in the postconviction order that, although Vervooren had no prior criminal convictions, she had "engage[d] in operating a vehicle while intoxicated previously. She should have learned her lesson ... but instead, she repeated her conduct, which the court found to be a significant risk to the community." The circuit court reminded Vervooren that she was fortunate not to have hit "an apartment building that was just feet away." Accordingly, the circuit court rejected her requests, made both at sentencing and in postconviction proceedings, for a probationary disposition. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). The circuit court concluded instead that the gravity of the offense and the risk she posed required a term of imprisonment.

The circuit court identified the factors that it considered in choosing a 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, Vervooren's sentence is not unduly harsh or excessive. We conclude that a further challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.[3]

We also conclude that Vervooren could not pursue an arguably meritorious challenge to the amount of restitution ordered in this case. Restitution is governed by WIS. STAT. § 973.20. "A request for restitution, including the calculation as to the appropriate amount of restitution, is addressed to the circuit court's discretion." ***State v. Gibson***, 2012 WI App 103, ¶8, 344 Wis. 2d 220, 822 N.W.2d 500. Our standard of review is "highly deferential." *See* ***State v. Fernandez***, 2009 WI 29, ¶8, 316 Wis. 2d 598, 764 N.W.2d 509. We search the record for reasons to sustain the circuit court's exercise of discretion. *See* ***State v. Hershberger***, 2014 WI App 86, ¶43, 356 Wis. 2d 220, 853 N.W.2d 586.

[3] For the sake of completeness, we note that the circuit court found Vervooren statutorily eligible for the challenge incarceration program but statutorily ineligible for the substance abuse program. A person convicted of any crime specified in WIS. STAT. ch. 940, however, is statutorily ineligible to participate in either program. *See* WIS. STAT. §§ 302.045(2)(c); 302.05(3)(a). Because the circuit court's eligibility determinations do not provide an arguably meritorious basis for seeking any form of relief, we discuss this matter no further.

The parties agreed at the restitution hearing that J.W. incurred a hospital bill of $117,046.78 and home health care bills totaling $703. Vervooren conceded that she could pay $703 in restitution but she disputed her ability to pay the total amount of $117,749.78 that the State requested. *Cf.* ***State v. Madlock***, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999) (defendant has burden to prove inability to pay restitution). The circuit court must consider the defendant's ability to pay restitution, *see* WIS. STAT. § 973.20(13)(a), but the restitution amount ordered need not be limited to what the defendant has the ability to pay during the term of the sentence, *see* ***Fernandez***, 316 Wis. 2d 598, ¶¶5, 64. The record here shows that Vervooren has a substantial employment history, including more than five years as a home health care worker earning $12.00 an hour, as well as shorter periods in which she worked as a nanny and as a customer service representative. During periods when she was not employed, she earned money independently by cutting hair and selling crafts. The circuit court found that, in light of Vervooren's work history, she had the ability to pay a portion of the amount claimed as restitution, and the court ordered her to pay $40,703. The court's order was consistent with the purpose of WIS. STAT. § 973.20, which '"reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution."' *See* ***Gibson***, 344 Wis. 2d 220, ¶10 (citation omitted). Further pursuit of this issue would lack arguable merit.

Based on an independent review of the record, we conclude there are no additional potential issues warranting discussion. Any further proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction and the postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.[4]

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved of any further representation of Melissa J. Vervooren on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] We observe that record item R.10 has no connection to this case. Upon remittitur, the circuit court shall oversee removal of R.10 from this record and direct the clerk of circuit court to refile the item as appropriate. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (courts may correct clerical errors at any time).