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July 21, 2016

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

2015AP963-CRNM State of Wisconsin v. Cecil Tremal Kahill (L.C. # 2013CF170)

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

Cecil Tremal Kahill pled guilty to one count of first-degree reckless injury by use of a dangerous weapon as an act of domestic abuse. *See* WIS. STAT. §§ 940.23(1)(a), 939.63(1)(b), 968.075(1)(a) (2013-14).[1] The circuit court imposed a thirty-year term of imprisonment,

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

bifurcated as twenty years of initial confinement and ten years of extended supervision. The state public defender appointed Attorney Hannah Schieber Jurss to represent Kahill in postconviction and appellate proceedings. With Attorney Jurss's assistance, Kahill filed a postconviction motion to withdraw his guilty plea on the ground that his trial counsel was ineffective. Alternatively, Kahill moved for additional sentence credit and to correct the judgment of conviction. Following a hearing, the circuit court ordered the sentence credit Kahill requested and otherwise denied relief.[2] Kahill appeals.

Attorney Jurss filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. In the report, Attorney Jurss discussed the validity of the guilty plea and the circuit court's exercise of sentencing discretion. Kahill responded, disputing Attorney Jurss's conclusions regarding the merits of a claim for plea withdrawal and additionally asserting a claim for relief based on his trial counsel's temporary law license suspension during the pendency of the circuit court proceedings. In reply, Attorney Jurss filed a supplemental no-merit report explaining her conclusion that trial counsel's license suspension does not present a meritorious issue for appeal. We have considered the no-merit reports and Kahill's response, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for appeal. We summarily affirm the judgment of conviction and the postconviction order, subject to the correction of a clerical error in the judgment that we discuss in the final paragraphs of this opinion. *See* WIS. STAT. RULE 809.21.

[2] The Honorable Mel Flanagan presided over the guilty plea proceeding. The Honorable Rebecca F. Dallet presided over the sentencing and postconviction proceedings.

We take the facts from the complaint filed on January 6, 2013, and from the amended complaint filed on April 3, 2013. The State alleged that Kahill was living with his girlfriend R.R. in 2012 when he punched her in the face and, in a separate incident, broke her collarbone. Based on these allegations, the State charged Kahill with misdemeanor battery and with felony battery causing substantial bodily harm, both as acts of domestic abuse. *See* WIS. STAT. §§ 940.19(1)-(2) (2011-12); 968.075(1)(a) (2011-12).

The State further alleged that R.R. began an online relationship with "James" after ending her relationship with Kahill and, on January 2, 2013, she agreed to meet "James." When she entered the lobby of her apartment complex, she encountered Kahill, who had been pretending to be "James." They talked, and Kahill indicated he was afraid R.R. would disclose his ongoing unauthorized use of her mother's credit card. When R.R. attempted to walk away, Kahill seized her from behind, threatened to kill her and her family, and stabbed her repeatedly, breaking two knives in the process. Kahill next produced a gun and dragged R.R. at gunpoint to the basement of the apartment complex where he hid the broken knives. Kahill then moved R.R. outside. When police arrived, Kahill told them he did not know R.R. and that a "white guy" had stabbed her, but, after she was in the ambulance, she said Kahill was the attacker. During a search of the scene, police found two knife handles and a blade in the apartment complex basement and a loaded 40-caliber Glock handgun in the bushes. Police also found a bloody knife blade in Kahill's pocket. Based on the foregoing, the State charged Kahill with attempted first-degree intentional homicide, first-degree reckless injury, and endangering safety, all by use of a dangerous weapon and as acts of domestic abuse. *See* WIS. STAT. §§ 940.01(1)(a), 939.32(1)(a), 940.23(1)(a), 941.20(1)(c), 939.63(1)(b), 968.075(1)(a). Additionally, because further

investigation revealed that the gun Kahill used to threaten R.R. had been stolen, the State charged Kahill with one count of misdemeanor theft. *See* WIS. STAT. §§ 943.20(1)(a) & (3)(a).

Pursuant to a plea bargain, Kahill pled guilty to first- degree reckless injury by use of a dangerous weapon as an act of domestic abuse. The circuit court dismissed the remaining charges and read them in for sentencing purposes.

We begin by examining whether Kahill could pursue an arguably meritorious challenge to the denial of his claim for plea withdrawal based on the alleged ineffectiveness of his trial counsel. A defendant who alleges ineffective assistance of counsel must make a two-prong showing that counsel performed deficiently and that the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. In the context of a guilty plea, the defendant must demonstrate prejudice by showing '"a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."' ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

In postconviction proceedings, Kahill alleged his trial counsel was ineffective for failing to explain to him that he had a defense to the charge of first-degree reckless injury. The crime requires proof that the defendant acted under circumstances showing utter disregard for human life. *See* WIS JI CRIMINAL—1250. According to Kahill, his trial counsel failed to explain that certain after-the-fact actions he took, including allowing R.R. to call 911, taking the phone

himself to tell the dispatcher R.R. was dying, and staying with her at the scene, constituted a defense to the charge of first-degree reckless injury because the actions arguably showed he did not act with utter disregard for human life. *See* ***State v. Burris***, 2011 WI 32, ¶¶32-41, 333 Wis. 2d 87, 797 N.W.2d 430 (explaining that the circumstances a factfinder should consider may include relevant after-the-fact conduct).

Following a hearing, the circuit court rejected Kahill's claim for plea withdrawal. First, the circuit court concluded that Kahill showed no deficiency in trial counsel's performance. The circuit court believed trial counsel's testimony that counsel and Kahill discussed the totality of the circumstances surrounding the stabbing, including Kahill's actions after the violence ended. The circuit court further believed Kahill understood that a jury would consider the totality of those circumstances when assessing guilt. The circuit court therefore determined that Kahill decided to enter his guilty plea to first-degree reckless injury with a full understanding that, if the charge went to trial, the jury could consider his after-the-fact conduct when determining guilt.

Additionally, assuming some error on trial counsel's part in explaining the element of utter disregard for human life, the circuit court found incredible Kahill's testimony that he would not have entered his guilty plea but for the error. The circuit court instead concluded that Kahill "made a very conscious and calculated decision based on all these facts" and that a more explicit statement about the jury's duty to consider the totality of the circumstances would not "have caused [Kahill] not to enter this plea on that date."

In light of the foregoing, we agree with appellate counsel's conclusion that further pursuit of this issue would lack arguable merit. "When the [circuit] court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each

witness's testimony." ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). Therefore, this court will not reweigh the testimony of the witnesses to reach a conclusion regarding credibility contrary to that reached by the circuit court. *See* ***id.*** at 669. Here, the circuit court did not believe Kahill's testimony that he would have gone to trial but for his attorney's actions. Accordingly, Kahill cannot show he was prejudiced by trial counsel's alleged failure to explain how a jury assesses "utter disregard for human life." Absent prejudice, Kahill cannot prevail on a claim of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687. An appeal challenging trial counsel's effectiveness in this regard would be frivolous within the meaning of ***Anders***.

We next consider whether Kahill could pursue any other arguably meritorious challenge to the validity of his guilty plea. At the outset of the plea proceeding, the State described the parties' plea bargain. Kahill would plead guilty to first-degree reckless injury by use of a dangerous weapon as an act of domestic abuse, and the State would move to dismiss the remaining charges and to read them in for sentencing purposes. The State made no sentencing concessions, and the parties were free to argue regarding an appropriate sentence. Kahill agreed that the State correctly described the terms of the agreement and said that he had not been threatened or promised anything else to induce his guilty plea.

The circuit court asked Kahill if he had reviewed the charging documents with his attorney, and Kahill confirmed that he had done so. The circuit court explained to Kahill that he faced a thirty-year term of imprisonment and a $100,000 fine upon conviction of first-degree reckless injury while armed with a dangerous weapon. *See* WIS. STAT. §§ 940.23(1)(a), 939.63, 939.50(3)(d). The circuit court told Kahill 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. Kahill said he understood.

The record contains a signed guilty plea questionnaire and waiver of rights form. Kahill confirmed that he reviewed the form with his trial counsel and that he understood its contents. The form reflects that Kahill was twenty-three years old at the time of his plea, had a high school diploma, and had completed two years of post-secondary school education. The circuit court explained to Kahill that by pleading guilty he would give up the constitutional rights listed on the form, and the circuit court reviewed those rights. Kahill told the circuit court that he understood his rights and had no questions about them.

Kahill also told the circuit court that he had reviewed and understood the addendum to the plea questionnaire. The addendum bears the signatures of both Kahill and his trial counsel. It reflects Kahill's acknowledgment that he had read the complaint and that, by pleading guilty, he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of his statements and other evidence. Copies of the jury instructions describing the elements of first-degree reckless injury while armed are attached to the plea questionnaire and its addendum. Kahill told the circuit court that he had discussed the elements with his trial counsel and that he understood them.

A circuit court is required to warn a defendant at the time of a guilty plea that if he or she is not a citizen of the United States, the guilty plea may lead to deportation or exclusion from this country. *See* WIS. STAT. § 971.08(1)(c). The circuit court in this case failed to give Kahill the required deportation warnings, but a defendant cannot move for postconviction relief based on such failure unless the defendant can show that "the plea is likely to result in the defendant's

deportation." *See* ***State v. Douangmala***, 2002 WI 62, ¶¶4, 25, 253 Wis. 2d 173, 646 N.W.2d 1. Here, the record does not include anything to suggest Kahill is subject to deportation. To the contrary, the record shows he was born in Chicago, Illinois. The failure to give deportation warnings therefore provides no basis for further postconviction proceedings.

The circuit court conducted an inquiry during the guilty plea colloquy to ensure that Kahill committed first-degree reckless injury while armed as an act of domestic abuse. *See* WIS. STAT. § 971.08(1)(b). Counsel stipulated to the facts in the criminal complaint, and Kahill personally admitted that the facts alleged in the criminal complaint were true. The circuit 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 Kahill entered his guilty 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 Kahill can pursue an arguably meritorious claim based on trial counsel's temporary law license suspension during a portion of the time that this case was pending in circuit court. The record shows that trial counsel, Attorney Michael Hicks, first appeared as Kahill's counsel at the preliminary examination on January 13, 2013. The supreme court temporarily suspended Hick's license to practice law on February 12, 2013, and reinstated the license on March 11, 2013. *See* ***OLR v. Hicks***, 2016 WI 9, ¶14, 366 Wis. 2d 512, 875

N.W.2d 117. During the suspension period, the circuit court did not conduct any hearings in Kahill's case. Attorney Hicks next appeared in the courtroom with Kahill on April 9, 2013, at which time the circuit court and the parties discussed the license suspension at length. As relevant here, Kahill said he wished to continue with Attorney Hicks as trial counsel, and the circuit court conducted a colloquy with Kahill regarding that decision. Kahill told the circuit court he had not received any threats or promises to induce him to continue with Attorney Hicks as counsel and that he made the decision freely with the understanding that Attorney Hicks might eventually face criminal charges based on his court appearances in other matters unrelated to Kahill during the period of the license suspension. Following the colloquy, the circuit court permitted Kahill to continue with Attorney Hicks as trial counsel.

As appellate counsel explains, the United States Supreme Court holds that a lawyer's breach of an ethical standard does not itself render the lawyer ineffective. *See* ***Nix v. Whiteside***, 475 U.S. 157, 165 (1986). Rather, a defendant must show deficiency and resulting prejudice to prove ineffective assistance of counsel. *See* ***id.*** at 164-65. Moreover, a Wisconsin circuit court has the authority to permit "a lawyer to represent an indigent defendant even though (1) the lawyer was not admitted to practice law in Wisconsin, and (2) the lawyer was not 'in association with an active member of the state bar of Wisconsin' … as required by SCR 10.03(4)." ***State v. Dwyer***, 181 Wis. 2d 826, 833-34, 512 N.W.2d 233 (Ct. App. 1994) (citation omitted). The ***Dwyer*** court, considering the ramifications of permitting a law student to represent a defendant without obtaining the defendant's written approval, concluded that the applicable principle was "no harm, no foul." *See* ***id.*** at 832-34.

Nothing in the record supports a claim that Kahill suffered prejudice as a consequence of Attorney Hicks's temporary law license suspension. Further, Kahill does not demonstrate that

anything outside of the record is relevant to the analysis. Although Kahill claims he was neither "aware of the ramifications" of agreeing to continue with Attorney Hicks nor told about "the rights he may have been wa[i]ving," Kahill does not identify any way in which the license suspension actually harmed his defense.[3] Accordingly, we agree with appellate counsel that the record fails to support an arguably meritorious claim based on Attorney Hicks's temporary license suspension during the pendency of this case.

We next consider whether Kahill could pursue an arguably meritorious challenge to his 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

[3] Attorney Hicks was subsequently disciplined in ***OLR v. Hicks***, 2016 WI 9, 366 Wis. 2d 512, 875 N.W.2d 117, and ***OLR v. Hicks***, 2016 WI 31, 368 Wis. 2d 108, 877 N.W.2d 848. In the first of those disciplinary cases, the supreme court noted Attorney Hicks's disturbing patterns of conduct, including continuing to represent clients while suspended, but also noted the referee's conclusion that Attorney Hicks "otherwise appeared to be an intelligent and competent attorney." *See* ***Hicks***, 366 Wis. 2d 512, ¶56.

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.

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

The circuit court considered the gravity of the offense, describing it as "one of the worst domestic violence cases that has come through this court." In the circuit court's view, the conduct was aggravated by the amount of planning involved, including the steps Kahill took to pretend to be someone else so he could lure R.R. out of her apartment. In considering Kahill's character, the circuit court took into account that Kahill "cared about [R.R.] to some level," and the circuit court determined that Kahill's decision not to abandon R.R. after he stabbed her reflected that he has "compassion and empathy." The circuit court discussed the need to protect the public, stating that Kahill's intelligence permitted him to manipulate others and then finding that his capacity for rage and his need for control rendered him a "danger to anyone that gets close to [him]."

The circuit court determined that probation would unduly depreciate the gravity of the offense. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). Instead, the circuit court concluded that the amount of planning involved in the crime required "a punishment that is significant," and that Kahill posed a risk necessitating

the maximum term of imprisonment. The circuit court explained that "anything less ... does not protect the community in the way that it needs to be protected."

The record shows that the circuit court identified the various factors it considered in fashioning a sentence. The factors were appropriate and relevant. The circuit court therefore properly exercised its sentencing discretion. An appeal of the sentence would lack arguable merit.

We also conclude that Kahill could not pursue an arguably meritorious challenge to the 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.

The circuit court found that R.R. had incurred medical bills of $80,000. The State explained that the Crime Victims Compensation Fund had negotiated with the medical providers to accept $40,000, which the Fund would pay at the rate of $10,000 per year. The State therefore requested that Kahill reimburse the Fund $40,000 as restitution. Kahill agreed that the amount requested represented the reasonable and necessary cost of treating the injuries he inflicted on R.R., but he suggested that awarding restitution to the Fund would be premature because it had not paid the entire $40,000 and might decline to fulfill its agreement in the future. The circuit court rejected that argument, finding that the Fund had committed itself in writing to pay the

$40,000 and would pay that amount. Moreover, restitution may be ordered for special damages, *see* WIS. STAT. § 973.20(5)(a), which includes future medical expenses, *see* ***State v. Loutsch***, 2003 WI App 16, ¶17, 259 Wis. 2d 901, 656 N.W.2d 781, *overruled on other grounds by* ***Fernandez***, 316 Wis. 2d 598, ¶¶4-5. Further objection to restitution on the ground that the Fund has not yet completed paying for R.R.'s medical treatment would lack arguable merit.

Kahill also disputed his ability to pay the $40,000. *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 amount ordered need not be limited to the amount the defendant can pay during the term of the sentence, *see* ***Fernandez***, 316 Wis. 2d 598, ¶¶5, 64. The record here shows that Kahill is young and healthy and that he attended several semesters of community college, where he joined the track team. From the age of eighteen, he worked at short-term jobs through temporary agencies. The circuit court found that, in light of his age and his prospects, Kahill could reasonably expect to work for at least twenty years after his release from prison and could reasonably contribute $2000 a year towards restitution. Further, the circuit court waived all of the court costs, fees, and assessments incident to this case to maximize his ability to pay restitution. We are satisfied that the court's order was consistent with the purpose of § 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). In light of our deferential standard of review, further pursuit of this issue would lack arguable merit.

Last, we address the entry on the judgment of conviction describing Kahill's sentence as "consecutive to any other sentence." The circuit court did not order a consecutive sentence in

this case and, as appellate counsel points out, sentences are presumed to run concurrently unless otherwise indicated by statute or judicial decree. *See* ***State v. Coles***, 208 Wis. 2d 328, 332, 559 N.W.2d 599 (Ct. App. 1997).

In postconviction proceedings, the circuit court declined to correct the judgment of conviction, stating that Kahill "wasn't serving another sentence so it's irrelevant." Appellate counsel similarly concludes that the erroneous description of the sentence in the judgment is a scrivener's error that does not appear to have any practical effect and therefore does not present a meritorious issue for appeal. We agree that the misinformation in the judgment of conviction appears to have no immediate impact on Kahill, but a clerical error of this kind presents a risk of confusion and perhaps worse in the future. Therefore, we conclude that the judgment of conviction must be amended to reflect the circuit court's order. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (court may correct clerical error at any time). Upon remittitur, the circuit court shall oversee the entry of an amended judgment of conviction that omits the erroneous description of the sentence imposed in this case as "consecutive." *See* ***id.***, ¶5 (circuit court may correct clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

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

IT IS ORDERED that, upon remittitur, the circuit court shall amend the judgment of conviction or direct the circuit court clerk to amend the judgment of conviction so that it no longer includes the erroneous description of the sentence imposed in this case as "consecutive to any other sentence."

IT IS FURTHER ORDERED that the judgment of conviction and postconviction order are summarily affirmed upon amendment of the judgment of conviction as discussed in this opinion and order. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hannah Schieber Jurss is relieved of any further representation of Cecil Tremal Kahill, effective on the date that an amended judgment of conviction as required by this opinion and order is entered in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals