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

2015AP1796-CRNM State v. Gill Roberto Morales
(L.C.#2013AP4285)

Before Kessler, Brennan and Brash, JJ.

Gill Roberto Morales appeals from an amended judgment entered after he pled guilty to two felonies: (1) second-degree reckless homicide by use of a dangerous weapon; and (2) second-degree recklessly endangering safety by use of a dangerous weapon. *See* WIS. STAT. §§ 940.06(1), 941.30(2), 939.63(1)(b) (2013-14).[1] He also appeals from an order denying his postconviction petition to vacate his sentence and for resentencing. Morales's postconviction

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

and appellate lawyer, Ann Auberry, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Morales was sent a copy of the report and he filed a response, which prompted counsel to file a supplemental no-merit report. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's submissions, and Morales's response, we conclude that, subject to the modification of the judgment as described herein, there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the amended judgment of conviction and the order. *See* WIS. STAT. RULE 809.21.

Morales was originally charged with one count of first-degree reckless homicide by use of a dangerous weapon and first-degree recklessly endangering safety by use of a dangerous weapon, both as a party to a crime. According to the complaint, Jordan Henderson drove a car in the direction of Morales and his co-actor, Miguel Mercado, upon seeing Mercado riding a bike that had been stolen from Henderson's younger brother.[2]

Morales fired a gun at that car. Henderson suffered a gunshot wound to the head and died as a result. One of the passengers in the car suffered a gunshot wound to his shoulder and survived.

The parties ultimately reached a plea agreement. The State filed an amended information charging Morales with second-degree reckless homicide by use of a dangerous weapon and second-degree recklessly endangering safety by use of a dangerous weapon. In exchange, Morales pled guilty. The State agreed to recommend a substantial length of initial confinement

[2] In a statement to police, Mercado admitted he stole the bike.

in prison, leaving the specific length to the circuit court's discretion and with an understanding that the defense would be free to argue as to the sentence Morales should receive. The circuit court accepted Morales's plea and sentenced him to twenty-five years of initial confinement and ten years of extended supervision.

Morales subsequently filed a petition to vacate his sentence and for resentencing. The circuit court allowed the petition to be filed under seal due to the confidential and sensitive information it contained. In the petition, Morales explained that he erroneously took the advice of fellow inmates and refused to speak to the presentence investigation (PSI) report writer. The PSI writer ultimately submitted a partial PSI, which omitted a great deal of information about his childhood and background that he believed the circuit court would have found relevant and important during sentencing. The circuit court denied the motion.

In her no-merit report, counsel addresses whether there would be arguable merit to an appeal on four issues: (1) the validity of Morales's pleas; (2) the circuit court's denial of Morales's pre-sentence motion to withdraw his guilty pleas; (3) the circuit court's exercise of sentencing discretion; and (4) the circuit court's denial of Morales's postconviction petition to vacate his sentence and for resentencing.

For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursing these issues on appeal. Additionally, we will address the circuit court's imposition of the DNA surcharge and Morales's assertion that postconviction counsel was ineffective because she failed to investigate his claim that he suffers from post-traumatic stress disorder (PTSD).

Plea

Counsel first addresses whether Morales has an arguably meritorious basis for challenging his pleas on appeal. To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Morales completed a plea questionnaire and waiver of rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The form listed the maximum sentence Morales faced, and the circuit court confirmed that Morales understood. The form, along with an addendum, further specified the constitutional rights that Morales was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, 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. There would be no arguable merit to challenging the validity of Morales's guilty pleas.

Denial of Presentence Plea Withdrawal Motion

Counsel also address whether Morales has an arguably meritorious basis for challenging the circuit court's denial of his presentence plea withdrawal motion. A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The decision

to grant or deny a presentence motion for plea withdrawal is committed to the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

On the day Morales was to be sentenced, his trial counsel informed the circuit court that Morales had written the Office of the State Public Defender asking for the appointment of successor counsel to represent him in attempting to withdraw his previously entered guilty pleas. Trial counsel expressed concern about his "ability to advocate vigorously" on Morales's behalf.

The circuit court personally addressed Morales and asked why it was that he wished to withdraw his pleas. Morales's explanation amounted to little more than a desire "to get back the plea." However, as stated above, for plea withdrawal to be warranted Morales's reason had to be more than his change of mind and desire to have a trial. *See* ***Canedy***, 161 Wis. 2d at 583. There would be no arguable merit to challenging the circuit court's exercise of discretion in denying Morales's motion for plea withdrawal.[3]

Sentencing

The next issue the no-merit report discusses is the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that 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, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

[3] The circuit court also found any veiled implication that Morales's counsel somehow forced Morales to enter guilty pleas to be "beyond preposterous." The circuit court made clear that it was confident that trial counsel could advocate on Morales's behalf.

At sentencing, the circuit court must consider the principal objectives of sentencing, including the protection of 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit 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 it may consider several subfactors. ***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. ***Gallion***, 270 Wis. 2d 535, ¶41.

In sentencing Morales, the circuit stressed the fact that the victims were shot over a bicycle. Specifically, a nineteen-year-old man was shot and killed because he was trying to retrieve a bicycle that was stolen from his younger brother. The circuit court acknowledged that Morales's co-actor may have instigated the situation by telling Morales to shoot, but that it was Morales who ultimately complied. Additionally, the circuit court noted as an aggravating factor, the fact that Morales was on probation at the time.

The circuit court concluded that Morale's horrible behavior in "murdering another citizen for no reason, whatsoever, … deserve[d] significant, serious punishment." The circuit court also reflected on the trauma to the other victim, who suffered not only a gunshot wound but the loss of his best friend/cousin who was with him in the car. On a scale of one to ten, the circuit court concluded that the gravity of the offense was a ten. The circuit court also found that Morales presented a danger to the public given that all it took to prompt him to shoot multiple shots into a moving vehicle was another person telling him to do it.

The circuit court sentenced Morales to twenty years of initial confinement and five years of extended supervision on the charge of second-degree homicide by use of a dangerous weapon. It imposed a sentence of five years of initial confinement and five years of extended supervision on the charge of second-degree recklessly endangering safety by use of a dangerous weapon. The sentences were ordered to run consecutively to each other and to a revocation sentence Morales was serving at the time. The circuit court could have sentenced Morales to thirty years of initial confinement and fifteen years of extended supervision. *See* WIS. STAT. §§ 940.06(1), 941.30(2), 939.50(3)(d) & (g), 973.01(2)(b)4., 7., & (d)3., 4., & 939.63(1)(b).

Morales's sentence is within the 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 as to shock the public's sentiment, *see* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

We note, however, that there is an issue with the DNA surcharges imposed in this matter. When Morales committed these crimes in 2013, imposition of a $250 DNA surcharge for a felony conviction was a matter of discretion for the sentencing court. WIS. STAT. § 973.046(1g) (2011-12). The surcharge statute was amended that same year, and WIS. STAT. § 973.046(1r)(a) now requires that a convicted felon pay a mandatory $250 surcharge per felony conviction for sentences imposed on or after January 1, 2014. *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). Morales was sentenced on July 17, 2014. The circuit court ordered the DNA surcharge at sentencing, stating: "He's to provide a DNA sample and pay the DNA surcharge. The surcharge is now required. It's also punishment and deterrence and part of the defendant's rehabilitation." The summary of obligations listed on the judgment of conviction reflects a total DNA surcharge of $500 (two felonies x $250).

In ***Radaj***, we held that the new mandatory, per-conviction, DNA surcharge was an unconstitutional ex post facto law as applied to a defendant convicted of multiple felonies after January 1, 2014, when the underlying crimes were committed before January 1, 2014. *See* ***id.***, ¶35. Here, however, the circuit court appears to have imposed the surcharge, in part, because it believed it was mandatory, and also, as an act of sentencing discretion. As noted above, applying the law in effect at the time of Morales's offenses, the circuit court's discretionary imposition of one DNA surcharge was permissible. Accordingly, there is no arguable merit to a challenge to the imposition of one felony DNA surcharge in this matter. Insofar as the transcript from the sentencing hearing provides that the circuit court used the singular term "surcharge," we will vacate the additional $250 felony DNA surcharge.

Postconviction Petition for Resentencing

In his postconviction petition, Morales set forth additional information regarding his troubled childhood, victimization, and loss, which he contended would have been provided in the PSI report had he cooperated with the PSI writer's investigation. It was Morales's position that he was entitled to resentencing because he has a constitutional right to be sentenced upon accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

The circuit court, in denying the petition, explained that Morales's position was erroneous given that it was Morales himself who failed to cooperate with the presentence writer. The circuit court further concluded:

> Even if the court were required after sentencing to accept and consider a memo of new information about a defendant that could have been unearthed by a presentence investigation had he or she cooperated with the presentence writer, the court would find in this case that it wouldn't have made a singular difference in the outcome. Consequently, the "complete picture of Morales'[s]

> difficult childhood and disadvantage background" which has now been presented does not constitute sufficient reason to resentence him.

The circuit court went on to specifically outline why its sentence would not have been impacted by the information Morales presented in his petition. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (court has additional opportunity to explain sentence when resolving postconviction motion).

This court is unaware of a case supporting the proposition that offenders must be resentenced merely because the circuit court had less than complete information about them. Nothing in ***Tiepelman*** or its progeny transforms the circumstances presented into a due process violation. There would be no arguable merit to challenging the circuit court's order denying Morales's postconviction petition.

PTSD

Lastly, we address Morales's argument that postconviction counsel provided ineffective assistance when she failed to investigate his claim of PTSD before filing a postconviction petition on his behalf. Morales asserts that he panicked when he saw the car with the victims driving toward him because he believed it was gang members who had kidnapped and tortured him on a prior occasion. It was this flashback that prompted him to take out the gun and start shooting at the car. According to Morales, he informed counsel about the kidnapping and torture incident, but it was not until he came to be housed in the same cell block as his step-uncle that Morales appreciated the significance of the incident. Morales's step-uncle wrote a letter to counsel explaining that he believed Morales suffered from urban PTSD and should be evaluated by a psychiatrist.

Counsel responded with a letter advising that she would not include this argument in her postconviction motion because urban PTSD is not recognized as a mental disorder in the DSM-V and because the facts Morales's uncle asserted in his letter did "not correspond with what you related to me in our prior conversations."

Morales now asserts that postconviction counsel was ineffective for not pursuing this issue. He argues that "his possible PTSD would be a 'new factor'" warranting sentence modification.

Counsel filed a supplemental no-merit report advising that Morales never informed her he suffered "flashbacks" or that he had a "flashback" the night of the shootings or that he believed he suffered from PTSD. Moreover, counsel emphasized that that there is no objective evidence that Morales suffered or suffers from PTSD or any other mental illness that would prompt reasonably performing counsel to investigate his claim. Counsel relays that Morales told her he was not prescribed any medication for mental illness. And, while a Department of Corrections report from February 2015, which Morales submitted with his response, reveals that Morales discussed allegations of torture by gang members, the interviewing psychologist found Morales's "mood and affect seemed to be within normal range, which was incongruent, and inconsistent with the content of the session." Counsel submits that extent of the evidence that would support further investigation into Morales's possible mental state before, during, and after the shootings amounts to his step-uncle/fellow inmate's lay opinion that he suffered from urban PTSD.

Alternatively, counsel contends that even if she was somehow deficient, Morales cannot establish he was prejudiced by her decision not to investigate the lay opinion of his step-uncle/fellow inmate. Outlining the basis for Morales's PTSD claim (namely, his relationship

with a gang member, consuming marijuana and stealing from this gang member) in a postconviction motion, would have done little to dissuade that circuit court from its conclusions that Morales's "upbringing was lacking," he had "little or no morals," and he was a serious danger to the community. *See* ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828 (explaining the two-pronged analysis that applies when determining whether sentence modification based on a new factor is appropriate: one prong requires the defendant to show by clear and convincing evidence that a new factor exists, and the other prong requires the defendant to show that the new factor justifies sentence modification).

Morales subsequently requested that we order counsel to supplement her filing with a copy of the letter she received from his uncle. We granted Morales's request and have reviewed the letter. We have not identified an issue of arguable merit with respect to postconviction counsel's performance. Even if we were to conclude that she was deficient for not investigating Morales's claimed PTSD based on nothing more than the letter from his step-uncle/fellow inmate, Morales cannot establish he was prejudiced. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) (establishing prejudice for purposes of ineffective assistance of counsel requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome").

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

Upon the foregoing, therefore,

IT IS ORDERED that, upon remittitur, the amended judgment of conviction shall be modified to vacate one $250 felony DNA surcharge.

IT IS FURTHER ORDERED that the amended judgment, as modified, and the order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals