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**DISTRICT I**

August 25, 2016

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

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2015AP2604-CRNM State of Wisconsin v. Jonathan Harris (L.C. # 2013CF2537)

Before Kessler, Brennan and Brash, JJ.

Jonathan Harris pled guilty to failing to comply with the reporting requirements of the sex offender registration statute. *See* WIS. STAT. §§ 301.45(2)-(4), 301.45(6)(a)1. (2013-14).[1] The trial court imposed an evenly bifurcated three-year term of imprisonment consecutive to a sentence Harris was already serving. Harris appeals. His appellate counsel, Attorney Andrew Rider, has filed and served a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v.***

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

***California***, 386 U.S. 738 (1967). Harris 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 Harris could pursue an arguably meritorious challenge to the validity of his guilty plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain. The State explained that Harris would plead guilty to a failure to comply with the reporting requirements of the sex offender registration statute. In exchange, the State would recommend incarceration without specifying jail or prison, without proposing a specific period of confinement, and without recommending a consecutive or concurrent sentence. Additionally, the State would move to dismiss and read in a charge of tampering with a global positioning system tracking device. Harris, by counsel, confirmed that the State correctly described the parties' agreement.

The trial court described on the record the elements of the crime of failing to comply with the reporting requirements of the sex offender registration statute. Harris told the trial court that he understood the elements and that he had discussed them with his lawyer. The trial court explained to Harris that, upon conviction of the charge, he faced a six-year term of imprisonment and a $10,000 fine. *See* WIS. STAT. §§ 301.45(6)(a)1., 939.50(3)(h). Harris said he understood. The trial court told Harris it could impose the maximum statutory penalties if it chose to do so and confirmed that Harris understood it was not bound by the terms of the plea bargain or by any sentencing recommendations. Harris assured the trial court that he had not been promised anything outside of the plea bargain to persuade him to plead guilty and that he had not been threatened. The trial court then warned Harris in the language required by WIS. STAT. § 971.08(1)(c) that, if he was not a citizen of the United States, his guilty plea exposed him to the

risk of deportation or exclusion from admission to this country, or denial of naturalization under federal law. Harris said he understood.

The record contains a signed guilty plea questionnaire and waiver of rights form. Harris confirmed that he reviewed the form with his lawyer and understood its contents. The form reflects that Harris was thirty years old at the time of his plea, had a high school diploma and some post-secondary-school education. The form further reflects that Harris 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 Harris's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the sufficiency of the complaint, and to dispute the constitutionality of any police action in the case.

The trial court told Harris that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire and waiver of rights form, and the trial court reviewed those rights on the record. Harris said he understood. The trial court also told Harris that by pleading guilty, he would give up his available defenses to the charges and his opportunity to pursue pretrial motions. Harris 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. According to the criminal complaint, Harris was convicted of second-degree sexual assault of a child in April 2004 and therefore was required to comply with the sex offender registration statute, including the provisions of WIS. STAT. § 301.45(2)-(4). On or about March 25, 2013, he failed to give required information to the Department of Corrections, and subsequently he failed to respond to written requests for the

information. The trial court questioned Harris about the allegations, and he described in his own words the ways in which he knowingly failed to comply with the requirements of the sex offender registration statute. 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 Harris 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 Harris could pursue an arguably meritorious challenge to his sentence. In this regard, appellate counsel first examines whether Harris could argue he is entitled to resentencing on the ground that the State breached the plea bargain. The record shows that the State fully abided by the terms of the plea bargain. Appellate counsel's discussion implies, however, that Harris may believe the State acted improperly at sentencing by describing his criminal record and his history of violating conditions of community supervision. If that is Harris's belief, it is incorrect. Not only was the parties' plea bargain silent about the scope of the State's opportunity to discuss his background at sentencing but, more critically, public policy prohibits agreements by prosecutors not to reveal relevant and pertinent information to a trial judge charged with the duty of imposing an appropriate sentence upon a convicted person. *See* ***State v. Neuaone***, 2005 WI App 124, ¶13, 284 Wis. 2d 473, 700 N.W.2d 298. Accordingly, the State's sentencing remarks were entirely proper. A claim for resentencing based on an alleged breach of the plea bargain would be frivolous within the meaning of ***Anders***.

We turn to whether Harris has any other basis to challenge his sentence. 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 indicated that punishment, rehabilitation, and protection of the public were the primary sentencing goals, and the trial court discussed the factors that it deemed relevant to those goals.

The trial court discussed the gravity of the offense. In assessing this factor, the trial court found that failing to comply with the requirements of the sex offender registration statute is a Class H felony and therefore "near to the bottom of the scale," but found that the crime was

aggravated in this case because Harris tampered with a global position system tracking device during the period of his noncompliance. *Cf.* ***State v. Frey***, 2012 WI 99, ¶68, 343 Wis. 2d 358, 817 N.W.2d 436 (trial court properly considers read-in offenses at sentencing).

The trial court considered Harris's character, recognizing that Harris had "come forward, accepted responsibility for his conduct with his plea." Further, the trial court noted Harris's disclosure that he had mental health problems that included post-traumatic stress disorder. The trial court also considered, however, that Harris had a criminal record beginning in 2001 that included theft, third-degree sexual assault, escape, and second-degree sexual assault of a child. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). Additionally, the trial court took into account that Harris had been noncompliant in several ways with his obligations under the sex offender registration statute.

The trial court considered the need to protect the public. The trial court reminded Harris that he "has been convicted of multiple sexual offenses" and is required to comply with registration requirements to reassure the community that "he's just not out on the loose." The trial court observed that the community is alarmed "when someone who has multiple sex offenses is unaccounted for."

The trial court considered but rejected 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 be a sufficient punishment and that incarceration would provide an opportunity for necessary cognitive intervention to assist Harris in making better decisions.

The trial court identified the factors that it considered in fashioning Harris's sentence. 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 penalty imposed is 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, Harris's sentence is not unduly harsh or excessive. We conclude that a challenge to the trial court's exercise of sentencing discretion would lack arguable merit.

We next conclude Harris could not mount an arguably meritorious challenge to the trial court's decision denying him eligibility for the substance abuse program and the challenge incarceration program. Both programs offer substance abuse treatment and, 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(1), 302.045 (3m)(b), 302.05(1)(am), 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; WIS. STAT. § 973.01(3g)-(3m).[2] In this case, Harris did not make any showing that he had substance abuse treatment needs, and the trial court therefore reasonably found that substance abuse was not "a problem here.... [I]t's more [of a] cognitive matter that needs to be addressed." Further pursuit of this issue would lack arguable merit.

Next, we consider whether Harris can challenge the $250 DNA surcharge imposed on him. The trial court sentenced Harris on November 7, 2014, and, without discussion, ordered him to pay associated surcharges. The judgment of conviction includes a $250 DNA surcharge pursuant to the order.

The law in effect in 2013, when Harris committed his crime, allowed a trial court to impose a DNA surcharge as a discretionary matter when imposing a sentence for most felonies, including a conviction under WIS. STAT. § 301.45. *See* WIS. STAT. § 973.046(1g) (2011-12); *see also* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.[3] When exercising discretion, the trial court was required to consider "any and all factors pertinent to the case before it, and ... set forth in the record the factors and the rationale underlying its decision for imposing the DNA surcharge in that case." ***Id.***, ¶9. Among the factors that a trial court might consider were: "(1) whether the defendant provided a DNA sample in connection with the case;

[2] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. § 302.05; 973.01(3g).

[3] When we decided ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, the governing version of WIS. STAT. § 973.046(1g) was identical to the version in effect when Harris committed the crime at issue here.

(2) whether the case involved any evidence that needed DNA analysis; [and] (3) the financial resources of the defendant." ***State v. Ziller***, 2011 WI App 164, ¶10, 338 Wis. 2d 151, 807 N.W.2d 241.

The legislature has since repealed the law permitting a discretionary DNA surcharge and current law mandates imposition of a $250 DNA surcharge for each felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55. Mandatory surcharges under the new law were first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes of conviction. *See* 2013 Wis. Act 20, § 9426(1)(am); *see also* WIS. STAT. § 973.046(1r) (2013-14).

Litigation in this court has addressed *ex post facto* challenges to mandatory DNA surcharges imposed after January 1, 2014, for offenses committed before that date. *See* ***State v. Radaj***, 2015 WI App 50, ¶¶1, 4-5, 35, 363 Wis. 2d 633, 866 N.W.2d 758 (concluding that multiple mandatory DNA surcharges imposed after January 1, 2014 for multiple crimes committed before that date had a punitive effect and violated the prohibition against *ex post facto* punishment); ***State v. Scruggs***, 2015 WI App 88, ¶¶ 3, 9, 13-14, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (single mandatory DNA surcharge imposed after January 1, 2014 for single offense committed before that date not an *ex post facto* violation where defendant had not previously provided a sample in connection with a felony conviction and therefore imposing a mandatory surcharge to pay for the cost of collecting the sample and administrating the DNA data bank did not have a punitive effect). Assuming *arguendo* that Harris could show that a mandatory DNA surcharge constitutes an *ex post facto* violation here, his remedy would be application of the law in effect at the time of his offense. *See* ***Radaj***, 363 Wis. 2d 633, ¶38. Further proceedings to pursue such a remedy would lack arguable merit because application of the prior law affords Harris no relief.

As we have seen, Wisconsin law allowed a discretionary DNA surcharge as a matter of the sentencing court's discretion at the time Harris committed his offense, but "'regardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion.'" *See* ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation and brackets omitted). Indeed, we are obliged to search the record to determine whether in the exercise of proper discretion a sentencing decision can be affirmed. *See* ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). In this case, Harris explained during his sentencing allocution that at the time he committed his offense, he was sufficiently solvent to pay $1,000 a month to people who were making demands on him. As the ***Ziller*** court made clear, a trial court appropriately exercises its discretion when it imposes a $250 DNA surcharge on a defendant who is capable of making the payment. ***Id.***, 338 Wis. 2d 151, ¶11. The record shows that Harris is such a defendant.

Moreover, the trial court clarified in the written judgment of conviction that Harris is required to pay a DNA surcharge only if he has not previously paid a surcharge. We have approved a similar order as a proper exercise of discretion. *Cf.* ***State v. Jones***, 2004 WI App 212, ¶7, 277 Wis. 2d 234, 689 N.W.2d 917 (approving trial court's decision to condition an order vacating DNA surcharge on proof that defendant previously provided a DNA sample and paid a surcharge). Here, a certified copy of a judgment of conviction attached to the criminal complaint shows that Harris was previously ordered to give a DNA sample and pay a $250 DNA surcharge in connection with his 2004 sexual assault conviction, so he appears to have no obligation to pay a DNA surcharge pursuant to the order in the instant case. Thus, for multiple reasons, further pursuit of this issue would lack arguable merit.

Last, we consider whether Harris can pursue an arguably meritorious claim that trial counsel was ineffective. We assess claims of ineffective assistance of counsel under the familiar two-prong test described in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Id.*** If a defendant fails to satisfy one prong of the ***Strickland*** test, a court need not consider the other. *See* ***id.*** at 697.

In the no-merit report, Attorney Rider explains his conclusion that Harris's trial counsel was not ineffective at sentencing. We agree with that conclusion for the reasons discussed in the no-merit report. Additionally, we briefly consider the issue of trial counsel's effectiveness in regard to a potential challenge to the criminal complaint.

The criminal complaint states that it includes as an attachment a "Sex Offender Registration Form" signed by Harris. No such form is actually attached to the complaint. Nonetheless, we conclude trial counsel did not perform deficiently by failing to challenge the criminal complaint on that basis.

The sufficiency of a criminal complaint is a question of law for our *de novo* review. *See* ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. To resolve the question, we examine the document to determine "whether there are facts or reasonable inferences set forth that are sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it." ***Id.***, ¶12. The complaint is sufficient if it answers five questions: "'(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?'" ***Id.*** (citation omitted). The test is one "of

minimal adequacy, not in a hypertechnical but in a common sense evaluation." ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968).

Although a Sex Offender Registration Form is not attached to the complaint, nonetheless, the complaint describes the Form in detail. The complaint recites that Harris signed the Form and thereby acknowledged he had been notified of his duties to register and to report as a sex offender in accordance with Wisconsin law. The complaint further identifies by name the person listed on the Form who explained to Harris his duty to register, the reporting requirements, and the penalties he would face for failure to comply. The complaint goes on to describe the specific ways and the specific time period in which, according to the records of the Department of Corrections, Harris failed to comply with the reporting requirements of the sex offender registration statute. Accordingly, the complaint was sufficient as a matter of law, notwithstanding the omission of a referenced attachment. A challenge to the sufficiency of the complaint therefore would have failed. Counsel does not perform deficiently by forgoing a motion that would have been denied. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

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 Andrew Rider is relieved of any further representation of Jonathan Harris on appeal. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*