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

2016AP1185-CRNM State of Wisconsin v. Charlie D. Johnson (L.C. # 2015CF277)

Before Brennan, P.J., Kessler and Dugan, JJ.

Charlie D. Johnson pled guilty to one count of felony murder, with armed robbery as the underlying felony. *See* WIS. STAT. §§ 940.03 (2015-16),[1] 943.32(2). The circuit court imposed a

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

twenty-year term of imprisonment bifurcated as thirteen years of initial confinement and seven years of extended supervision. The circuit court also ordered Johnson to pay $7955 in restitution. He appeals.

Appellate counsel, Attorney Thomas J. Erickson, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Johnson 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, Johnson was one of four men who robbed a group of people at a Days Inn motel in Milwaukee, Wisconsin on January 4, 2015. One of the robbers, but not Johnson, fired a gun and killed a woman who was hiding behind a door. The State charged Johnson with one count of felony murder. Johnson decided to resolve the charge with a plea bargain.

At the outset of the plea proceeding, the State explained that, pursuant to the plea bargain, Johnson would plead guilty as charged, and the State would recommend incarceration without specifying a recommended term of either initial confinement or extended supervision. The circuit court told Johnson that it was not bound by the terms of the plea bargain. The circuit court explained to Johnson that he faced a maximum fifty-five year sentence and that the circuit court could impose the maximum penalty if the court deemed such penalty appropriate. Johnson said he understood.

The circuit court warned Johnson that if he was not a citizen of the United States, his guilty plea exposed him to the risk of deportation, exclusion from admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Johnson said he understood. Although

the circuit court did not caution Johnson 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 guilty plea questionnaire and waiver of rights form and an addendum, both signed by Johnson and his trial counsel. The form and addendum describe the constitutional rights that Johnson would give up by pleading guilty, and Johnson told the circuit court that he understood those rights. *See* ***State v. Hampton***, 2004 WI 107, ¶24, 274 Wis. 2d 379, 683 N.W.2d 14 (record must show that defendant understood the rights he or she would give up by pleading guilty). We have considered that Johnson failed to check the preprinted box next to the statement on the plea questionnaire acknowledging that by pleading guilty he would give up the right to make the State prove him guilty beyond a reasonable doubt. We are satisfied that this omission does not provide a basis for further postconviction proceedings in light of the totality of the plea proceedings. Johnson assured the circuit court that he understood all of his constitutional rights, and the signed addendum to the guilty plea questionnaire expressly includes Johnson's acknowledgment that "by pleading I am giving up my right to make the State prove me guilty beyond a reasonable doubt as to each of the elements of each crime charged." Further, the circuit court told Johnson that, by pleading guilty, he would give up the right to a jury trial at which all twelve jurors would have to "agree unanimously as to a verdict. That means they must

[2] We observe that, before a defendant may seek plea withdrawal based on the circuit court's failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Johnson could make such a showing.

all agree beyond a reasonable doubt as to every single element of the offense." The record thus demonstrates that Johnson understood his right to make the State prove him guilty beyond a reasonable doubt. *See* ***id.***

The circuit court told Johnson that by pleading guilty he would give up any applicable defenses, as well as the right to challenge the evidence against him and the sufficiency of the criminal complaint. Johnson said he understood. Johnson told the circuit court that he had not been promised anything to induce his guilty plea and that he had not been threatened.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, copies of the jury instructions describing the elements of felony murder and the underlying offense of armed robbery were attached to the plea questionnaire. The circuit court confirmed that Johnson had reviewed the elements with his trial counsel, and the circuit court explained those elements on the record. Johnson said he understood.

A guilty 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). Here, trial counsel agreed that the circuit court could rely on the facts in the criminal complaint. 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 Johnson entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 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 pleas.[3]

We next consider whether Johnson could challenge the sentence imposed in this matter. 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

[3] The court is aware of a pending appeal in which a convicted defendant argues he is entitled to withdraw his guilty pleas because the circuit court did not advise him during the plea colloquy that, pursuant to WIS. STAT. § 973.046(1r), he faced multiple mandatory DNA surcharges. *See* ***State v. Odom***, No. 2015AP2525-CR, *cert. denied* (WI Jan. 9, 2017). We have therefore considered whether Johnson could pursue an arguably meritorious challenge to his guilty plea on the ground that the circuit court did not advise him he was subject to a single mandatory $250 DNA surcharge. *See* ***State v. Sutton***, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146 (stating that the circuit court is required during a plea colloquy to "advise the accused of the 'range of punishments' associated with the crime") (citation omitted). We conclude that such a challenge is not available to Johnson. A single $250 DNA surcharge does not constitute punishment. ***State v. Scruggs***, 2015 WI App 88, ¶19, 365 Wis. 2d 568, 872 N.W.2d 146, *aff'd*, 2017 WI 15, ¶49, __ Wis. 2d __, __ N.W.2d __.

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 as the primary sentencing goal and discussed the factors relevant to that objective. The circuit court described the crime as "horrific" and noted that a woman's life ended "for absolutely no good reason." Turning to Johnson's character, the circuit court recognized that Johnson was only eighteen years old and that he did not have a criminal record. On the other hand, the circuit court took into account the sentencing report prepared by Johnson's sentencing expert, which reflected that Johnson had been adjudicated delinquent four times. Referring to the description of those offenses, which included criminal damage to property, burglary, obstructing/resisting an officer, and possession of a controlled substance, the circuit court found that Johnson had an ongoing "history of undesirable behavior patterns." *Cf.* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court considered the need to protect the public, observing with concern that the treatment and supervision Johnson received as a juvenile had not deterred him from further antisocial activity. The circuit court added that the crime stemmed from greed and that the nature of the offense and Johnson's rehabilitative needs required a significant period of confinement in a secure setting.

The circuit court identified the factors that it considered in choosing the 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 penalty imposed is far less than the law allows. Johnson faced a maximum of fifty-five years of imprisonment upon conviction for felony murder with armed robbery as the underlying crime. *See* WIS. STAT. §§ 940.03, 943.32(2), 939.50(3)(c). "'[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, Johnson'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.[4]

We next consider whether Johnson could pursue an arguably meritorious argument that the trial court erred by ordering that he pay restitution of $7955. Johnson stipulated to the amount of restitution ordered. *See* WIS. STAT. § 973.20(13)(c). Therefore, he could not mount an arguably meritorious challenge to the order. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Finally, we consider the sentencing remarks offered by Johnson's sister, M.T. After telling the circuit court that Johnson was a good person who knew he did the wrong thing, she said that Johnson was "on medication. They say he['s] bipolar and everything. Like, he's not competent to stand trial."

[4] During the sentencing hearing, the State moved to dismiss a pending misdemeanor charged in another case, stating only that, in the State's view, further prosecution of the misdemeanor was unwarranted. The circuit court granted the motion. The record of proceedings involving the misdemeanor is not otherwise before this court. We note for the sake of completeness that nothing in the instant record suggests any basis to believe that dismissal of the misdemeanor at sentencing gives rise to an arguably meritorious appellate issue here.

We are satisfied that the record offers no basis for a claim that Johnson lacked competency to proceed. "A person is competent to proceed if: 1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and 2) he or she possesses a rational as well as factual understanding of a proceeding against him or her." ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). In this case, Johnson's trial counsel responded to M.T.'s remarks, assuring the circuit court that Johnson was "fully competent" and able to consult with counsel throughout the pendency of the case. Additionally, the defense expert's sentencing report reflected that Johnson carried diagnoses of Attention Deficit Hyperactivity Disorder and Tourette's syndrome but did not suggest that Johnson lacked competency. 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of any further representation of Charlie D. Johnson. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals