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June 19, 2017

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

2016AP2523-CRNM State of Wisconsin v. Ginger Nicole Kuehling
(L.C. # 2015CF5087)

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

Ginger Nicole Kuehling entered a guilty plea to one count of robbery by threat of force as a party to a crime. *See* WIS. STAT. §§ 943.32(1)(b), 939.05 (2015-16).[1] The circuit court imposed a five-year term of imprisonment, bifurcated as two years of initial confinement and three years of extended supervision, and the circuit court ordered that the sentence be served

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

consecutively to the sentence Kuehling was already serving. The circuit court also ordered Kuehling to pay $277 in restitution and imposed a $250 DNA surcharge. Kuehling appeals.

Appellate counsel, Attorney Robert E. Haney, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Kuehling 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, a gunman and his companion robbed a George Webb Restaurant and then robbed a Griddlers Restaurant on November 18, 2015, in Milwaukee, Wisconsin. A witness to the second robbery told police that the robbers fled in a sport utility vehicle driven by a woman, and the witness recalled the vehicle's license plate number. When police subsequently stopped a vehicle matching the description given by the witness, Kuehling was a passenger. In a statement to police, Kuehling acknowledged that she drove two men to and from the George Webb and the Griddlers restaurants and that she felt "uneasy" because she thought one of the men "was going to rob a guy." She said she received $14.00 in gas and cigarettes for her participation.

The State charged Kuehling with two counts of armed robbery as a party to a crime. Kuehling quickly decided to resolve the charges with a plea bargain.

We first consider whether Kuehling could pursue an arguably meritorious challenge to her guilty plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain: for her participation in the incident at the Griddlers Restaurant, Kuehling would plead guilty to an amended count of robbery by threat of force as a party to a crime; the State would move to dismiss and read in the count of armed robbery related to the incident at the

George Webb Restaurant; and the State would recommend a five-year term of imprisonment to be served concurrently with the sentence that Kuehling was already serving following revocation of her probation in an unrelated case. The State also agreed to read in and not charge Kuehling with robbery of a Home Depot on November 17, 2015, explaining that she drove the get-away car for two men who stole equipment that was subsequently recovered. Kuehling said she understood the terms of the plea bargain.

The circuit court explained to Kuehling that she faced fifteen years of imprisonment and a $50,000 fine upon conviction of robbery by threat of force. *See* WIS. STAT. §§ 943.32(1)(b), 939.50(3)(e). Kuehling said she understood. She told the circuit court that she had not been promised anything outside the terms of the plea bargain to induce her guilty plea and that she had not been threatened.

The circuit court warned Kuehling that if she was not a citizen of the United States, her guilty 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). Kuehling said she understood. Although the circuit court did not caution Kuehling 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.

[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 Kuehling could make such a showing.

The circuit court explained to Kuehling the effect of reading in allegations for sentencing purposes. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. Specifically, the circuit court told Kuehling that the State could not prosecute her for a read-in offense, that the circuit court could consider a read-in offense when fashioning her sentence, and that the circuit court could order her to pay restitution for such an offense. *See* ***id.*** Kuehling said she understood.

The record contains a signed plea questionnaire and waiver of rights form with attachments. Kuehling confirmed that she reviewed the form and attachments with her trial counsel and that she understood them. The plea questionnaire reflects that Kuehling was thirty-four years old and had a high school education. The questionnaire further reflects Kuehling's understanding of the rights she waived by pleading guilty, the penalties she faced upon conviction, and the circuit court's freedom to exceed the terms of the plea bargain and impose the maximum statutory penalties for the crime. The signed addendum to the guilty plea questionnaire reflects Kuehling's acknowledgment that by pleading guilty she would give up her right to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of her statements and other evidence.

The circuit court twice told Kuehling that it was unlikely to impose a concurrent sentence for a crime committed on November 18, 2015, given that the circuit court had sentenced Kuehling in another matter on November 6, 2015, and imposed probation. *See* ***State v. Hampton***, 2004 WI 107, ¶¶42-43, 274 Wis. 2d 379, 683 N.W.2d 14 (circuit court must ensure that defendant understands circuit court's freedom to disregard recommendations based on a plea agreement). The circuit court inquired whether that information made a difference as to how Kuehling wished to proceed. Kuehling decided to continue with the guilty plea. The circuit

court told Kuehling that by pleading guilty she would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed those rights on the record. Kuehling said she understood her rights. The circuit court explained that by pleading guilty, Kuehling would give up the right to bring motions and to raise defenses. Kuehling said she understood.

"[A] circuit court must establish that a defendant understands every element of the charge[] to which he [or she] pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offense[] on the record, or ask defense counsel to summarize the elements of the offense[], or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." ***Id.***, ¶56. Here, a copy of the jury instructions describing the elements of robbery and party-to-a-crime liability were attached to the plea questionnaire. Kuehling told the circuit court she had discussed the elements with her lawyer. As suggested by ***Brown***, the circuit court then reviewed the allegations in the complaint on the record and discussed with Kuehling how they related to the elements of the crime. *See* ***id.*** Kuehling 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). Here, trial counsel stipulated to the facts in the criminal complaint. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (factual basis established when trial counsel stipulates on the record to the facts in the criminal complaint). The circuit court properly established a factual basis for Kuehling's guilty plea.

The record reflects that Kuehling entered her 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.[3]

A defendant who enters a valid "guilty plea waives all 'nonjurisdictional defects' preceding the entry of a plea, including constitutional violations and objections to personal jurisdiction, but does not waive objections to subject matter jurisdiction." ***State v. Schroeder***, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999). Appellate counsel examines whether Kuehling could pursue an arguably meritorious claim that the circuit court lacked subject matter jurisdiction. We agree that any such claim would be frivolous. '"[N]o circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.'" *See* ***City of Eau Claire v. Booth***, 2016 WI 65, ¶18, 370 Wis. 2d 595, 882 N.W.2d 738 (citation omitted).

[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 Kuehling could pursue an arguably meritorious challenge to her guilty plea on the ground that the circuit court did not advise her that she was subject to a single mandatory $250 DNA surcharge upon conviction. *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 Kuehling. 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, 373 Wis. 2d 312, 891 N.W.2d 786. Moreover, the guilty plea questionnaire included Kuehling's acknowledgement that her conviction would subject her to a DNA surcharge in an unspecified amount.

Appellate counsel next discusses whether Kuehling could raise an arguably meritorious claim that the State breached the plea bargain at sentencing by telling the circuit court that Kuehling played a more significant role in the read-in offenses than the prosecutor had originally believed. We agree that such a claim would lack merit. "Prosecutors may provide relevant negative information and, in particular, may provide negative information that has come to light after a plea agreement has been reached." ***State v. Liukonen***, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 686 N.W.2d 689. When, as here, the prosecutor does not suggest the disposition recommended is insufficient, the prosecutor acts appropriately in highlighting negative information about the defendant. *See* ***State v. Bokenyi***, 2014 WI 61, ¶73, 355 Wis. 2d 28, 848 N.W.2d 759.

We next consider whether Kuehling 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.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that punishment, rehabilitation, and deterrence were the primary sentencing goals, and the circuit court discussed the factors it deemed relevant to those goals.

The circuit court considered the gravity of the offense, finding that Kuehling committed a "very serious crime." In assessing Kuehling's character, the circuit court was particularly concerned that she failed to recognize how her actions would affect her children. The circuit court acknowledged that she was a victim of domestic violence and was combatting an addiction to prescription drugs, but the circuit court concluded these facts did not excuse her behavior. The circuit court considered the need to protect the public, observing that a robbery at gunpoint is a terrifying experience for the victims.

The circuit court considered but rejected the recommendation for a concurrent sentence. The circuit court emphasized that Kuehling had pled guilty to burglary and received the privilege of probation less than two weeks before she committed the robbery in this case. In the circuit court's view, a concurrent sentence would depreciate the gravity of the offense.

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, Kuehling'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.

We next consider whether Kuehling could mount an arguably meritorious claim that the circuit court erred by denying her eligibility for the substance abuse program and the challenge incarceration program. Both prison programs offer substance abuse treatment, and an inmate who successfully completes either program may 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 circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit 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).[4] In this case, the circuit court reasonably exercised discretion, concluding that Kuehling should not have the benefit of the programs given the violent nature of the robbery at issue. The gravity of the

[4] 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).

offense is a reasonable basis for refusing to permit a defendant to participate in prison treatment programs. *See* ***State v. Steele***, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112. Further pursuit of this issue would lack arguable merit.

We last consider whether Kuehling could pursue an arguably meritorious claim that the circuit court erred by ordering her to pay $277 in restitution. Kuehling stipulated to the amount of restitution ordered. *See* WIS. STAT. § 973.20(13)(c). Therefore, she 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.

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 Robert E. Haney is relieved of any further representation of Ginger Nicole Kuehling on appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals