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November 15, 2017

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

2017AP1072-CRNM State of Wisconsin v. Christopher L. Miller (L.C. #2015CF1057)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christopher L. Miller appeals from a judgment convicting him of one count of manufacture/delivery of cocaine (>1 but <= 5 g) and from an order denying his pro se motion regarding his sentence. His appellate counsel filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Miller did not exercise his right to file a response. After reviewing the no-merit report and the record, we conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

While on extended supervision after his release from prison on a similar drug offense, Miller was charged with manufacture/delivery of cocaine (>1 but <= 5 g), second or subsequent offense. Pursuant to a plea agreement, he pled guilty to the charge without the repeater allegation. The court imposed a twelve-year sentence—seven years' initial confinement and five years' extended supervision—six months shy of the maximum. It also found Miller ineligible for the earned release and challenge incarceration programs (ERP, CIP).

Postconviction, although still represented by appointed counsel, Miller wrote a ten-page letter to the court, most of it fleshing out his troubled, unstable upbringing and criminal history, his realization that he "hate[s] this lifestyle," and his efforts to change. The letter also apologized for the expletive he directed at the court after sentence was pronounced, explaining that he lost control due to "shock" at the sentence imposed, and requested that he be made eligible for ERP and CIP. Treating the letter as a motion for resentencing, the court denied it, finding that "no new factors justif[ied] resentencing." This no-merit appeal followed.

The no-merit report considers whether: (1) Miller's guilty plea was knowingly, intelligently, and voluntarily entered; (2) the court erroneously exercised its sentencing discretion; (3) any new factors support a motion for sentence modification; (4) Miller is entitled

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

to additional sentence credit; and (5) trial counsel was ineffective. As our review of the record satisfies us that, for the most part, the no-merit report properly analyzes these issues as without merit, we address them no further, with the following exception.

While we agree that no new factors warrant sentence modification, the no-merit report should have acknowledged the circuit court's disposition of Miller's postconviction motion. The underpinning of the court's order denying Miller's motion was the absence of a new factor, such that "resentencing" was unwarranted. If the lack of a new factor forms the basis for denial, Miller's motion more properly is construed as one for sentence modification. Resentencing applies when it is necessary to redo an invalid sentence. ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d. 81. Sentence modification, by contrast, employs a new-factor analysis so as to correct specific problems, ***id.***, or considers a claim that a sentence is unduly harsh or unconscionable, *see* ***State v. Stenklyft***, 2005 WI 71, ¶60, 281 Wis. 2d 484, 697 N.W.2d 769, if that is what Miller intended by his assertion of "shock" at the length of his sentence.

On review of a motion for sentence modification, we determine whether the sentencing court erroneously exercised its discretion in sentencing the defendant. ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895. We review the decision to deny a motion for sentence modification under the same standard. ***Id.***

"A new factor is a fact or set of facts both highly relevant to the imposition of sentence, and not known to the sentencing judge at the time of original sentencing." ***State v. Carroll***, 2012 WI App 83, ¶7, 343 Wis. 2d 509, 819 N.W.2d 343. "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***State v. Harbor***,

2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Upon a failure to demonstrate as a matter of law that there is a new factor, the court need go no further to decide the motion. ***Id.***, ¶38.

Except for apologizing to the court for his outburst, Miller's lengthy motion offered nothing that was both unknown to the sentencing judge and highly relevant to the sentence imposed. It simply emphasized points the PSI and Miller's counsel already had made about his difficult youth, periodic homelessness, lack of positive role models, and, more recently, his employment successes. Further, as Miller made his inappropriate comment after sentence was pronounced, it could not have been at all, let alone highly, relevant to the sentence. Miller did not clearly and convincingly demonstrate the existence of a new factor.

If Miller also meant to claim that his sentence is unduly harsh, denying modification likewise was proper on that basis. When a defendant argues that a sentence is excessive or unduly harsh, "a court may find an erroneous exercise of sentencing discretion '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.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). "We will not set aside a discretionary ruling of the trial court if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result [that] a reasonable judge could reach." ***Id.***, ¶30.

While substantial and nearly the maximum, the basis for Miller's prison term is well-supported in the record. The court considered the factors set forth in ***State v. Roubik***, 137 Wis. 2d 301, 311, 404 N.W.2d 105 (Ct. App. 1987), focusing on Miller's character and

rehabilitation needs, the aggravated nature of the crime, and protection of the public. That the circuit court balanced the sentencing factors differently than the way Miller hoped by itself is not an erroneous exercise of discretion. Our inquiry is whether the court's exercise of discretion was reasonable, even if we or another judge might have reached a different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Here, we must sustain the court's sentencing decision. Therefore, whether viewed as a motion based on a new factor or an excessive sentence, we conclude that no issue of arguable merit could arise from its denial.

Finally, Miller's motion asked the court to revisit its decision finding him ineligible for ERP and CIP. Even if Miller met all of the department of corrections' eligibility requirements, deciding eligibility is within the circuit court's sentencing discretion under WIS. STAT. § 973.01(3g) and (3m). *See* ***State v. Owens***, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187 (ERP); ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112 (CIP). We already have determined that the court properly exercised its sentencing discretion and fully articulated the basis for the sentence. The court is not required to make separate findings on the reasons for the eligibility decision as long as it is justified by the overall sentencing rationale. ***Owens***, 291 Wis. 2d 229, ¶9. Here, the court found that Miller was repeatedly noncompliant with AODA programs and rules of supervision and posed a danger to the community. Its sentencing rationale adequately explains why it deemed Miller ineligible for programs that would allow for early release.

Our review of the record discloses no other potential issues for appeal. Miller's guilty plea waived the right to raise nonjurisdictional defects and defenses arising from proceedings before entry of the plea, including claimed violations of constitutional rights. ***State v. Kraemer***, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990). Accordingly, this court accepts the no-

merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Miller further in this appeal. Therefore,

IT IS ORDERED that the judgment of conviction and the order denying sentence modification are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jon Alfonso LaMendola is relieved from further representing Miller in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals