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November 13, 2017

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

2016AP545-CRNM State of Wisconsin v. Reinaldo Jojes Acosta (L.C. # 2013CF2414)

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

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).

Reinaldo Jojes Acosta appeals from a judgment of conviction, entered upon his guilty plea, on two counts of impersonating a peace officer with intent to commit a crime. Appellate counsel, Eileen T. Evans, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S.

738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Acosta was advised of his right to file a response, but he has not responded. At this court's request, counsel also filed a supplemental no-merit report. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's reports, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

In May 2013, the Milwaukee Police Department received an "aldermanic complaint" about an individual pretending to be an immigration agent and demanding money from people. G. B.-O., who had complained to his alderman, reported that on May 2, 2013, there was a knock at his apartment door. A visiting friend answered. A man wearing a suit entered and began asking questions of the friend and G. B.-O.'s roommate before turning his attention to G. B.-O. The man identified himself as "Federal Police, Secret Immigration Police" and asked G. B.-O. for identification. G. B.-O. produced his Mexican Consulate identification card. The man told G. B.-O. that eight people from the lower unit had been arrested the night before, and they said that G. B.-O. was dealing drugs, so the man was there to investigate. He directed G. B.-O. to show a pay stub, which G. B.-O. did not have. The man said he would return the next day.

When the man returned on May 3, G. B.-O. produced a pay stub, but the man made him show the check. When G. B.-O. showed the check, the man said the check needed to be cashed to prove its legitimacy and drove G. B.-O. to a check-cashing store. From there, the man took G. B.-O. to the Police Administration Building, telling G. B.-O. that he would need to pay a $300

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

fine. Once inside the building, the man told G. B.-O. he needed another $400. G. B.-O. complied with both requests. After a stop at a restaurant, the man drove G. B.-O. home.

On May 6, the man returned while G. B.-O. was in the process of moving out. The man demanded G. B.-O.'s new address. This time, G. B.-O. requested the man's identification and badge number. The man first refused, then said he would go get the information, then left and did not return.

G. B.-O. provided the license plate number of the vehicle the man was driving. The vehicle was registered to Acosta, who was on extended supervision for impersonating a peace officer. G. B.-O., his roommate, and his friend each identified Acosta from a photo array.

On May 19, 2013, S.M. spotted a man walking up the stairs to his home. S.M. went to the door, where the man identified himself as a federal agent named "Jose Rodriguez." He claimed to be investigating a robbery and said the suspect lived in S.M.'s building. The man asked for identification; S.M. produced his Mexican Consulate identification card. The man then frisked S.M., removing his wallet. The man took cash out of S.M.'s wallet and set it on the table next to the wallet. S.M. asked the man for identification. The man initially ignored S.M., then said his identification was in his car, then grabbed the cash and S.M.'s identification card and left. S.M. was shown a photo array from which he identified Acosta.

During an interview with police, Acosta denied the accusations. He said a drug cartel had attempted to recruit him, but he refused, so the cartel was now making false accusations to frame him.

Acosta was charged in a criminal complaint with two counts of impersonating a peace officer with the intent to commit a crime, a class H felony.[2] *See* WIS. STAT. § 946.70(1)(a), (2) (2013-14). A second amended information added one count of misdemeanor theft and one count of theft from a person, a class G felony. *See* WIS. STAT. § 943.20(1)(a), (3)(a), (3)(e) (2013-14).

The State indicated its intent to use other acts evidence against Acosta—he had four prior convictions for impersonating a peace officer, arising from similar circumstances. After a hearing, the circuit court determined the evidence would be admissible at trial.

Acosta dismissed his first attorney; his second attorney moved to dismiss either the two impersonation charges or the two theft charges, alleging they were multiplicitous. The attorney also requested a competency evaluation for Acosta and requested that the examiner additionally evaluate the viability of a not-guilty-by-reason-of-mental-disease-or-defect (NGI) plea. The doctor's reports indicated that Acosta was competent to proceed and that an NGI plea was not supported. Acosta did not challenge the reports. After a hearing, the circuit court denied the multiplicity motion.

Acosta then filed a motion to sever the charges, but decided to resolve the case through a plea before the circuit court ruled on the motion. In exchange for Acosta's guilty pleas to the impersonation counts, the State would move to dismiss the theft counts outright. The State would recommend a term of prison and extended supervision with the length and a determination of concurrent or consecutive terms left up to the circuit court. The circuit court accepted

[2] "'Peace officer' means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes." WIS. STAT. § 939.22(22) (2013-14).

Acosta's guilty pleas and dismissed the theft counts. At sentencing in July 2015, the circuit court imposed the maximum three years' initial confinement and three years' extended supervision on each impersonation count, to be served consecutively to each other and to any other sentence. The circuit court further imposed $700 in restitution, to which Acosta had stipulated, and two DNA surcharges. No sentence credit was awarded. Acosta appeals.

Counsel identified two potential appellate issues: whether there is any basis for a challenge to the validity of Acosta's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Acosta's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Acosta 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), in which he acknowledged that his attorney had explained the elements of the offenses. The applicable jury instructions, with the elements highlighted, were attached. The plea questionnaire form correctly acknowledged the maximum penalties Acosta faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

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. Our review of the plea hearing transcript satisfies us that the colloquy complied with the requirements

of ***Bangert*** and ***Hampton*** for ensuring a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.[3]

The other issue counsel raises is whether 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. At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of additional factors. *See* ***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. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that Acosta's criminal record stretched back "far too long." The court was uncertain whether Acosta could be rehabilitated, but noted a need to deter Acosta and others as well as a need to protect the community. The court explained that it was "just unacceptable, period," for Acosta to take advantage of a vulnerable population and that he did so while on supervision for the same offense. The court expressed concern that Acosta did not

[3] Because the guilty pleas were valid, any further challenges to the State's other acts evidence, denial of the multiplicity dismissal motion, or the severance matter were waived. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

seem to understand why his behavior was wrong and concluded that the only way to keep him from wrongdoing was to keep him out of society.

Acosta's six-year sentences do not exceed the maximum allowed by law. *See* WIS. STAT. §§ 939.50(3)(h), 973.01(2)(b)8., 973.01(2)(d)5., 973.13. In light of the sentencing factors articulated by the circuit court, all of which were proper considerations, the sentence imposed would not shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, there would be no arguable merit to a challenge to the circuit court's sentencing discretion in setting the terms of imprisonment.

At sentencing, Acosta requested 325 days' sentence credit, which the circuit court denied, explaining that the credit should have been awarded against Acosta's revocation sentence. Because we could not confirm, on this record, whether Acosta had received the sentence credit elsewhere, we asked counsel to file a supplemental report addressing sentence credit. Counsel has obtained documentation confirming that Acosta received appropriate credit against his revocation sentence. Because Acosta's sentences in this case are consecutive to the revocation sentence, he is not entitled to additional or dual credit in this case. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). There is no arguable merit to a challenge to the denial of sentence credit.

The circuit court also ordered Acosta to pay a DNA surcharge on both counts. At the time of Acosta's crimes in 2013, a circuit court sentencing a defendant for a felony conviction could impose a $250 DNA surcharge as an exercise of discretion unless the crime was one for which the surcharge was mandatory. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.

In July 2013, the legislature repealed the discretionary surcharge under WIS. STAT. § 973.046(1g) (2011-12) and revised § 973.046(1r) to require the circuit court to impose a $250 surcharge for each felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55. The mandatory surcharges were first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes of conviction. *See* ***id.***, § 9426(1)(am). However, in ***State v. Radaj***, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758, this court later held that the mandatory DNA surcharge for felony convictions, imposed on a per-count basis, was an unconstitutional *ex post facto* punishment as applied to defendants sentenced for multiple felonies after January 1, 2014, for crimes committed before that date.

Acosta had filed a *pro se* motion to vacate the DNA surcharges, asserting that the circuit court had failed to exercise its discretion under ***Cherry***. The circuit court vacated one of the surcharges under ***Radaj***, but declined to vacate the remaining surcharge, stating it was mandatory and, thus, ***Cherry*** did not apply. There is, however, no arguable merit to the remaining surcharge even though Acosta has apparently previously given a DNA sample and paid the surcharge. *Cf.* ***State v. Williams***, 2017 WI App 46, ¶26, 377 Wis. 2d 247, 900 N.W.2d 310 (holding it is an *ex post facto* violation to impose a mandatory surcharge for a felony conviction if the surcharge was discretionary when the crime was committed and if the defendant has already given a DNA sample).

The remedy for the *ex post facto* imposition of a mandatory surcharge would be to apply the law in effect at the time of Acosta's offenses, when imposing the DNA surcharge for most felony convictions was discretionary. Here, the record already contains an explanation for the discretionary imposition of the surcharge. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983) (this court may search the record for reasons to support a discretionary

decision). The circuit court explained that the DNA surcharge, and other items to be paid, "are all part of your punishment, yes; but it's also part of your rehabilitation to the extent that you're gonna be held accountable for these things and you're gonna understand that you cannot do this type of behavior and then go away unscathed[.]"

Rehabilitation and punishment are appropriate sentencing objectives; accordingly, there is no arguable merit to a challenge to the single DNA surcharge remaining in this matter. *See* ***State v. Ziller***, 2011 WI App 164, ¶12, 338 Wis. 2d 151, 807 N.W.2d 241 (imposition of surcharge part of sentencing discretion; defendant has burden to show imposition of surcharge unreasonable).

Our independent review of the record reveals no other potential issues of arguable merit.[4]

Upon the foregoing, therefore,

IT IS ORDERED that the hold previously imposed in this matter is lifted.

IT IS FURTHER ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[4] By order dated July 16, 2015, the circuit court, in response to a letter from the Department of Corrections, ordered Acosta's judgment of conviction amended to reflect that he had been convicted under WIS. STAT. § 946.70(1)(a) and (2), to indicate that Acosta's offense was a felony, because a violation of § 946.70(1)(a) by itself is only a misdemeanor. It does not appear that the judgment was ever amended to correct this scrivener's error. Upon remittitur, the clerk of the circuit court shall amend the judgment of conviction in accordance with the circuit court's prior order. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

IT IS FURTHER ORDERED that Attorney Eileen T. Evans is relieved of further representation of Acosta in this matter. *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