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November 30, 2017

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

2017AP877-CRNM State of Wisconsin v. Dennis Warren, Jr.
(L.C. # 2016CF1227)

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

Dennis Warren, Jr., entered a guilty plea to one count of possessing a firearm while a felon. *See* WIS. STAT. § 941.29(1m)(a) (2015-16).[1] The circuit court imposed a concurrent, evenly bifurcated four-year term of imprisonment. Warren appeals.

Appellate counsel, Attorney Brian Borkowicz, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Warren 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, police stopped Warren on March 20, 2016, while he was driving a car with a front head lamp that was not functioning. During the stop, police noted that Warren was trembling and breathing rapidly, and then Warren "began to yell and shout." After observing a bulge in Warren's pocket, police conducted a pat-down search and discovered a loaded pistol. As reflected by the certified copy of a judgment of conviction attached to the criminal complaint, Warren had previously been convicted of a felony. The State charged Warren with possessing a firearm while a felon. Warren quickly decided to resolve the charge with a plea bargain. He pled guilty on May 9, 2016.

We first consider whether Warren could pursue an arguably meritorious challenge to his guilty plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain: Warren would plead guilty as charged, and the State would recommend a bifurcated prison sentence "as determined appropriate by the court." Warren, by counsel, agreed that the State accurately recited the terms of the plea bargain.

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

The circuit court placed Warren under oath and conducted a colloquy with him regarding his plea. The circuit court explained to Warren that he faced ten years of imprisonment and a $25,000 fine upon conviction. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g). Warren said he understood. He told the circuit court that he had not been promised anything to induce his guilty plea and that he had not been threatened. The circuit court told Warren that it was not bound by the terms of the plea bargain or the parties' sentencing recommendations and that the circuit court could impose any sentence up to the maximum allowed by statute. Warren said he understood.

The circuit court warned Warren 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). Warren said he understood. Although the circuit court did not caution Warren about the risks described in § 971.08(1)(c) using the precise words required by the statute, the deviations from the statutory language were minor. Slight 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 signed plea questionnaire and waiver of rights form with attachments. Warren confirmed that he reviewed the form and attachments with his trial counsel and that he understood them. The plea questionnaire reflects that Warren was thirty-three years old at the time of his guilty plea, and he had a high school education. The questionnaire further

[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 the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Warren could make such a showing.

reflects Warren's understanding of the charge he faced, the rights he waived by pleading guilty, and the prison sentence he faced upon conviction.[3] A signed addendum attached to the questionnaire reflects Warren's acknowledgment that by pleading guilty he would give up his right to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of the evidence against him.

The circuit court told Warren that by pleading guilty he would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed those rights on the record. Warren said he understood his constitutional rights. The circuit court explained that by pleading guilty, Warren would give up the right to bring motions, including motions to suppress evidence, and the opportunity to raise defenses to the charge against him. Warren said he 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. Here, a copy of the jury instruction stating the elements of possessing a firearm while a felon was attached to the guilty plea questionnaire. Warren told the circuit court he had reviewed the instruction and discussed it with his lawyer. The circuit court then described each element of the crime on the record. Warren said he 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, Warren told the

[3] The guilty plea questionnaire does not contain an express disclosure that Warren could be fined upon conviction, but the omission is irrelevant because, as we have seen, the circuit court personally ensured Warren's understanding of the potential financial penalty. *See* ***State v. Brandt***, 226 Wis. 2d 610, 621, 594 N.W.2d 759 (1999) (when circuit court does not rely on the plea questionnaire for a component of the colloquy, the adequacy of that component of the colloquy rises or falls on the circuit court's discussion at the plea hearing).

circuit court that the facts in the criminal complaint were true. Additionally, trial counsel stipulated to the facts in the criminal complaint. The circuit court properly established a factual basis for Warren's guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Warren 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.[4]

In the no-merit report, appellate counsel considers whether Warren could pursue an arguably meritorious claim that he was stopped or searched in violation of his rights under U.S. CONST. amend. IV and WIS. CONST. art. I, § 11. We agree with appellate counsel that Warren could not mount an arguably meritorious challenge to the search and seizure. Warren did not file a suppression motion in this case, and his valid guilty plea constitutes a forfeiture of the right to raise nonjurisdictional errors and defects that preceded that plea, including claimed violations of

[4] This court is aware of an appeal pending in the supreme court 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 DNA surcharges. *See* ***State v. Odom***, No. 2015AP2525-CR, *cert. granted* (WI Sept. 12, 2017). We have therefore considered whether Warren could pursue an arguably meritorious challenge to his guilty plea on the ground that the circuit court did not advise him that he was subject to a single $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 Warren. 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.

his constitutional rights. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

Citing ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31, appellate counsel asserts that claims of error that were not raised in circuit court may be considered within the rubric of ineffective assistance of counsel, and, accordingly, appellate counsel considers whether Warren could pursue a claim that his trial counsel was ineffective for failing to file a suppression motion. We agree with appellate counsel that any such challenge would lack arguable merit.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Here, the record does not reflect a reasonable probability that a suppression motion would have been successful. To the contrary, the record shows that police observed Warren violating WIS. STAT. § 347.06(3), by operating a car with a headlamp that was not working. Police may lawfully stop a driver if they reasonably suspect an equipment violation. *See* ***State v. Griffin***, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994). Police conducted a stop based on such suspicion here, and the record shows that the stop was recorded on video. Although the video recording was not entered into the circuit court record, trial counsel told the circuit court at sentencing that the recording shows Warren "acting weird." The criminal complaint, the facts of which Warren stated under

oath are true, describes that "weird" behavior. Based on Warren's suspicious and unusual behavior, police ordered Warren to get out of his car. *See* ***State v. Floyd***, 2017 WI 78, ¶24, 377 Wis. 2d 394, 898 N.W.2d 560 (stating that a *per se* rule allows an officer to order a person out of his or her vehicle during a valid traffic stop). When the car door opened, police observed a bulge in Warren's pocket. Warren's behavior and the observations made by the police justified the frisk for officer safety that uncovered the pistol he was carrying. *See* ***Pennsylvania v. Mimms***, 434 U.S. 106, 111-12 (1977). Accordingly, Warren could not pursue an arguably meritorious claim that his trial counsel was ineffective for failing to pursue a motion challenging either the stop or the protective search. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583 (holding that "[c]ounsel does not render deficient performance for failing to bring a suppression motion that would have been denied").

We next consider whether Warren could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *See* ***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 the goals of its sentence were punishment, community protection, rehabilitation, and deterrence, and the circuit court discussed the factors it deemed relevant to those goals. The circuit court considered the gravity of the offense and determined that the chief aggravating factor was that the gun Warren carried was loaded. In assessing Warren's character, the circuit court expressed concern about his criminal record, which stretched back to 1999 and included serious felonies for which he spent thirteen years in prison. *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). The circuit court also took into account, however, that Warren had a high school equivalency degree, a history of gainful employment, and that he quickly took responsibility for his crime in this case. The circuit court discussed the need to protect the public, observing that Warren's actions had contributed to the "huge problem" that guns create in the community.

The circuit court appropriately considered whether to impose probation as a disposition here. *See* ***Gallion***, 270 Wis. 2d 535, ¶25 (stating that the circuit court should consider probation as the first sentencing alternative). The circuit court concluded, however, that probation would unduly depreciate the gravity of the offense, particularly because Warren was serving a term of extended supervision at the time of the instant offense and had failed to comply with the law.

The circuit court determined that the sentencing factors warranted imposing a concurrent sentence in the "lower middle end of the statutory range." Accordingly, the circuit court imposed a concurrent, evenly bifurcated four-year term of imprisonment.

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 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, Warren'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 Warren could pursue an arguably meritorious claim that the circuit court erred by delaying his eligibility for two prison programs, the Wisconsin substance abuse program and the challenge incarceration program, until he completed one year of initial confinement. We conclude that he could not do so. The circuit court imposed sentence on July 5, 2016, and Warren has thus already completed a year of confinement in this matter. *See* WIS. STAT. § 973.15(1) (providing that sentences begin at noon on the day of sentence). Accordingly, any challenge to the one-year delay in his eligibility for prison programs has been rendered moot by the passage of time. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3,

233 Wis. 2d 685, 608 N.W.2d 425 (explaining that "[a]n issue is moot when its resolution will have no practical effect on the underlying controversy"). As a general rule, courts do not consider moot issues. *See* ***id.*** Although some exceptions to the rule exist, *see* ***id.***, nothing in the record suggests that those exceptions are applicable here.

Based on our independent review of the record, no other issues warrant discussion.[5] 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 Brian Borkowicz is relieved of any further representation of Dennis Warren, Jr., on 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

[5] For the sake of completeness, we note that the circuit court imposed a $250 DNA surcharge but ordered that Warren was not required to pay it if he had paid a DNA surcharge in the past. The record in this case shows that Warren previously was ordered to pay a $250 DNA surcharge in connection with a past felony conviction. Thus, it appears that the effect of the circuit court's order was to relieve Warren of the obligation to pay a DNA surcharge here. It is an open question whether a circuit court has discretion to waive the DNA surcharge required by WIS. STAT. § 973.046. *See* ***State v. Cox***, No. 2016AP1745-CR , *cert. granted* (WI Oct. 17, 2017). If the circuit court erred by relieving Warren of the obligation to pay a DNA surcharge, however, he is not aggrieved by that error. Accordingly, the error, if any, does not provide a basis for further proceedings. *See* WIS. STAT. RULE 809.10(4) (appeal brings before this court only those rulings that are adverse to the appellant).