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December 8, 2017

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

2017AP627-CRNM State of Wisconsin v. Samuel Marquis Redmond
(L.C. # 2013CF5387)

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).

Samuel Marquis Redmond pled guilty to felony murder. The circuit court imposed a seventeen-year term of imprisonment bifurcated as eleven years of initial confinement and six years of extended supervision. The circuit court ordered that Redmond serve his sentence concurrently with the sentence he was already serving. Redmond appeals.

Appellate counsel, Attorney Angela Conrad Kachelski, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Redmond 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 (2015-16).

The criminal complaint reflects that at approximately 9:00 p.m. on September 19, 2013, two masked men attempted to rob H.F. at gunpoint. At the time, H.F. was approaching a car operated by Jesse Griffin, who had previously arranged to buy marijuana from H.F. During the course of the attempted armed robbery, H.F. shot the two masked men. One of them, Joseph Hardmon, died at the scene from the wounds he sustained. The other masked man fled. Approximately thirty minutes later, Griffin brought Redmond to the hospital to be treated for gunshot wounds. The next day, a citizen found a black mask near the scene of the homicide. An analyst with the Wisconsin State Crime Laboratory tested the DNA found on the mask. The analyst "determined that [Redmond] is the source of the [DNA] profile located on the mask … with a ratio of being rarer than one in seven trillion."

In February 2014, the State charged Redmond with one count of felony murder as a repeat offender, alleging that he caused Hardmon's death while attempting to commit armed robbery. Redmond quickly decided to resolve the charge with a plea bargain.

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

We first consider whether Redmond could pursue an arguably meritorious challenge to his guilty plea. At the start of the plea proceeding, the parties described the plea bargain: Redmond would plead guilty to felony murder; the State would move to dismiss the repeater allegation; and the State would ask the circuit court to impose a prison sentence without recommending a specific term of imprisonment. Redmond said he understood the terms of the agreement.

The circuit court explained to Redmond that he faced thirty-five years of imprisonment upon conviction. *See* WIS. STAT. §§ 940.03; 943.32(2); 939.50(3)(c); 939.32(1g)(b)1. Redmond told the circuit court that he understood the maximum penalty. He said that he had not been promised anything to induce his guilty plea and that he had not been threatened.

The circuit court warned Redmond 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). Redmond said he understood. Although the circuit court did not caution Redmond 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.

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

The record contains a signed plea questionnaire and waiver of rights form with attachments. Redmond confirmed that he reviewed the form and attachments with his trial counsel and that he understood them. The plea questionnaire reflects that Redmond was twenty-two years old and had completed the eleventh grade. The questionnaire further reflects Redmond's understanding of the rights he waived by pleading guilty, the penalty he faced upon conviction, and the circuit court's freedom to impose the maximum statutory penalty for the crime. The signed addendum to the guilty plea questionnaire reflects Redmond'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 Redmond 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. Redmond said he understood his rights. The circuit court explained that by pleading guilty, Redmond would give up the opportunity to bring motions and to raise defenses. Redmond said he understood. The circuit court told Redmond that it was not bound by the plea bargain and could impose the maximum sentence. Redmond said he understood.

"[A] circuit court must establish that a defendant understands every element of the charge[] to which he 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, including by "refer[ence] to a document signed by the defendant that includes the elements." *See* ***id.***, ¶56. Here, Redmond filed signed copies of WIS JI—CRIMINAL 1031 (Felony Murder: Underlying Crime Attempted) and WIS JI—CRIMINAL 1480 (Armed Robbery), which describe the elements of the charge he faced. In response to the circuit court's inquiries,

Redmond acknowledged that the signatures on the jury instructions were his, that he had reviewed the elements with his trial counsel, and that he understood them.

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

The record reflects that Redmond 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.

We next consider whether Redmond could pursue an arguably meritorious claim that the circuit court wrongly disregarded his *pro se* request to withdraw his guilty plea before sentencing. We conclude he could not do so. The circuit court properly exercised discretion by refusing to consider a motion for plea withdrawal that Redmond submitted *pro se* while he was

represented by counsel. *See* ***State v. Wanta***, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999).[3]

We next consider whether Redmond 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. ***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] For the sake of completeness, we note that the circuit court conducted a colloquy with both Redmond and his trial counsel after Redmond submitted his *pro se* motion, and Redmond said he wanted a new lawyer. The circuit court granted that request. Successor counsel was appointed and subsequently advised that Redmond did not wish to pursue plea withdrawal. Redmond was present in the courtroom when successor counsel provided this information, and Redmond did not dispute the assertion. A defendant is bound by strategic decisions that he or she explicitly or tacitly approved. *See* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971).

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 observed that the crime Redmond committed was "obviously serious" because it involved the loss of life. The circuit court discussed Redmond's character, crediting him with promptly accepting responsibility for the crime. The circuit court also recognized that Redmond was young, but the circuit court noted that he had neither an employment history nor a high school diploma or its equivalent. The circuit court considered the protection of the public, observing that Redmond was on probation at the time of the offense and nonetheless took the risk of participating in an armed robbery, choosing a victim who was unlikely to report the crime to police. Acknowledging Redmond's explanation that he acted on the "spur of the moment," the circuit court concluded that Redmond posed a danger to the community because he had not learned to control his impulses.

The circuit court appropriately considered probation as the first sentencing alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. The circuit court rejected that option, however, finding that probation would unduly depreciate the magnitude of the offense. The circuit court further concluded that, because Redmond was on probation for an armed robbery when he committed the crime in this case, he must be confined in order to address his rehabilitative needs.

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 was 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, Redmond'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.

Last, we consider whether Redmond could challenge the $250 DNA surcharge imposed at sentencing. The circuit court imposed the surcharge without explicitly stating a reason for doing so. The law in effect when Redmond committed his crime in September 2013 gave the circuit court discretion to impose a $250 DNA surcharge when imposing a sentence for most felonies, including the one at issue here. *See* WIS. STAT. § 973.046(1g) (2011-12); *see also* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.[4] Effective January 1, 2014, the legislature amended the law to require a mandatory $250 DNA surcharge for each felony conviction at sentencing, irrespective of when the crime was committed. *See* 2013 Wis. Act 20, §§ 2353-55, 9426(1)(am); *see also* WIS. STAT. § 973.046(1r).

[4] When we decided ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, the governing version of WIS. STAT. § 973.046(1g) was identical to the version in effect when Redmond committed the crime at issue here.

The circuit court sentenced Redmond on October 9, 2014. He was therefore subject to a mandatory surcharge pursuant to WIS. STAT. § 973.046(1r). To be sure, we have recently held that when sentencing a defendant who previously provided a DNA sample, a circuit court must normally exercise discretion before imposing a DNA surcharge for a crime committed before January 1, 2014.[5] *See* ***State v. Williams***, 2017 WI App 46, ¶27, 377 Wis. 2d 247, 900 N.W.2d 310. That rule is inapplicable here, however. It applies only when "no DNA-analysis related activity occurs in relation to the particular conviction for which the surcharge is imposed." *See* ***id.***, ¶¶24-26. In this case, the State conducted DNA testing to connect Redmond to the crime. Accordingly, § 973.046(1r) applied to Redmond.

Moreover, were we to believe that the ***Williams*** rule controls here, we would nonetheless conclude that Redmond cannot pursue an arguably meritorious challenge to the DNA surcharge imposed. "'[R]egardless of the extent of the [circuit] court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the [circuit] court's decision had it fully exercised its discretion.'" ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). We have rejected the notion that the circuit court must use "magic words" when deciding to impose a DNA surcharge. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. The circuit court's entire sentencing rationale may be examined to determine if imposing a DNA surcharge was a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

[5] Because the record shows that Redmond was convicted of a felony in 2011, we must assume that he previously provided a DNA sample. Pursuant to WIS. STAT. § 973.047(1f) (2011-12), a person convicted of a felony in 2011 was required to submit such a sample.

In this case, the circuit court's sentencing remarks expressly included reference to the fact that Redmond had been identified, in part, because his DNA was on the mask abandoned at the scene of the murder. In ***Cherry***, we explained that among the factors that may support a discretionary DNA surcharge is that "the case involved any evidence that needed DNA analysis so as to have caused DNA cost." *See* ***id.***, 312 Wis. 2d 203, ¶10. Given the use of DNA testing in this case, the imposition of a DNA surcharge was a proper exercise of discretion. Accordingly, we are satisfied that a challenge to the imposition of the surcharge would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2015-16).

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved of any further representation of Samuel Marquis Redmond on appeal. *See* WIS. STAT. RULE 809.32(3) (2015-16).

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

Diane M. Fremgen
Clerk of Court of Appeals