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

2017AP1535-CRNM State of Wisconsin v. Dametrius M. Robinson
(L.C. # 2016CF1253)

Before Kessler, Brash 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).

Dametrius M. Robinson appeals from a judgment of conviction, entered upon his guilty plea, on one count of first-degree reckless injury with a dangerous weapon as a party to a crime. Robinson also appeals from an order denying his postconviction motion for sentence modification. Appellate counsel, Pamela Moorshead, 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] Robinson was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

On or about March 20, 2016, Robinson texted C.D.T. and asked her to come by his residence. She pulled up in her car, and Robinson got into the front passenger seat. He was carrying a handgun in his lap. C.D.T.'s children, three-year-old C.T.L. and one-year-old C.S.T. were in the back seat. C.D.T. and Robinson ran errands before she returned Robinson to his home.

As they returned, a fight broke out in front of Robinson's home. According to the criminal complaint, three or four other cars pulled up. C.D.T. heard Robinson on the phone, stating "send them girls out," and two females came out of his house, getting into a fight with the people who arrived in the cars. C.D.T. and Robinson got out of her vehicle. C.D.T. said that Robinson hit an unknown male who tried to break up the fight. The male then began to run away, and Robinson fired his gun at the male. Later, during the plea colloquy, Robinson told the court that the male actually fired at him first, and Robinson claimed to be returning fire in self-defense.

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

However, because of the angle at which Robinson fired, a bullet went through C.D.T.'s car and struck C.T.L., entering through her temple and exiting under her eye. As a result, C.T.L. lost her right eye. C.S.T. was uninjured.

Robinson was charged with one count of first-degree reckless injury with a dangerous weapon as a party to a crime and one count of first-degree recklessly endangering safety with a dangerous weapon as a party to a crime. He agreed to resolve his case with a plea to the reckless injury charge. In exchange, the State agreed to dismiss and read in the reckless endangerment charge. It also agreed to recommend ten years of initial confinement, with the length of extended supervision left to the circuit court. Robinson would be free to argue for a lesser sentence.

The circuit court conducted a plea colloquy and accepted Robinson's plea. At sentencing, the circuit court imposed ten years' initial confinement and five years' extended supervision, but stated that Robinson could be eligible for the challenge incarceration or substance abuse programs after completing seven years of confinement.

Robinson subsequently moved for sentence modification on new-factor grounds: because he had been convicted of an offense under WIS. STAT. ch. 940, he was statutorily ineligible for either early release program. *See* WIS. STAT. § 973.01(3g), (3m). The circuit court denied the motion, explaining that it did not believe Robinson's ineligibility to be a new factor or, if it was a new factor, sentence modification was not warranted. Robinson appeals.

The first issue counsel discusses in the no-merit report is whether there is any basis for challenging Robinson's guilty plea as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). We agree that this issue lacks arguable merit.

Robinson 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 form correctly acknowledged the maximum enhanced penalty Robinson 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. Although the circuit court did not expressly review the elements of the offense with Robinson, it asked counsel whether he had reviewed the elements with Robinson. Counsel confirmed that he had, and noted that "a copy of the elements of the offense" was attached to the plea questionnaire in the form of jury instructions. Robinson initialed the instructions.[2] During the colloquy, counsel also pointed out that this was a "self-defense case," in that Robinson stated he was shooting in self-defense. Counsel stated, however, that he had explained to Robinson that self-defense was not a defense to the recklessness against C.T.L. The circuit court confirmed with Robinson that he was giving up any sort of self-defense claim by entering the plea; Robinson personally and affirmatively acknowledged that waiver.

[2] In any event, appellate counsel states that even if the circuit court's omission would constitute a *prima facie* violation of its duties during a plea colloquy so as to satisfy the first prong of a plea withdrawal motion, Robinson would not be able to allege the second prong, that "he in fact did not know or understand the information which should have been provided at the plea hearing." *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

The plea questionnaire and waiver of rights form and addendum, the jury instructions, and the court's colloquy appropriately advised Robinson of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

Counsel next discusses 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, the 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 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 it should consider the least restrictive setting for Robinson's needs, but probation was not warranted in this case given the severity of the violence and of the injury to the child. The circuit court stated that Robinson did not have a lengthy criminal history, although a juvenile case of his involved violence, and the court credited Robinson for taking responsibility by pleading guilty. The circuit court acknowledged Robinson's claim of self-defense, but explained that it did not matter: Robinson knew there were children in the car but still shot through the car. The circuit court stated that the crime was serious, as C.T.L. will have

her injury forever, and Robinson was lucky that she was not killed. The circuit court also stated there was a "significant community interest here," as the community has to "put up with" gun violence, and doing so is frustrating.

The maximum possible sentence Robinson could have received was thirty years' imprisonment. The sentence totaling fifteen years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the sentencing court's discretion.

The final issue counsel discusses in the no-merit report is whether there is any arguable merit to a challenge to the circuit court's denial of Robinson's postconviction motion. At sentencing, the circuit court addressed Robinson's mother while she was giving a statement to the court and explained that it was feeling "conflicted" because although Robinson had a lot of people supporting him, the victim in this case was very young. Ultimately, the circuit court noted that it did not disagree with the State that Robinson's crime warranted ten years of confinement. However, the circuit court also stated it would do something "that allows [Robinson] to potentially mitigate or shorten" his sentence, and made him eligible for the challenge incarceration and substance abuse programs, which are early-release programs if successfully completed.

But because Robinson was convicted of an offense under WIS. STAT. ch. 940, he is statutorily ineligible for either program. *See* WIS. STAT. § 973.01(3g), (3m). Robinson thus moved for sentence modification, arguing his ineligibility for the programs was a new factor.

A new factor is a fact, or a set of facts, "'highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citing ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

The circuit court denied Robinson's motion for two reasons. First, it explained that his ineligibility was not "highly relevant" to the imposition of sentence, meaning it was not a new factor. The circuit court had stated twice in its sentencing comments that "it would be up to the Department of Corrections" whether Robinson would have a chance to participate in either program. Thus, the circuit court was fully aware that Robinson might not be given the opportunity for early release. The circuit court also explained that the ten-year confinement portion was the sentence imposed after the court weighed both aggravating and mitigating factors, and if the court "had intended to 'soften' the State's recommendation," it would have imposed less confinement time.

Second, the circuit court explained that even if Robinson's ineligibility did somehow constitute a new factor, sentence modification was not warranted. Robinson had made a series of "bad decisions which had horrific consequences." He brought a loaded firearm, which he was not licensed to carry, into a car with small children, then became involved in a street fight where he exchanged gunfire with someone across the car, "*knowing that there were small children*

inside.… That conduct was so egregious and its consequences were so severe that the court cannot sanction even a 'modest' sentence modification as an appropriate disposition."

Whether a fact or set of facts is a "new factor" is a question of law. ***Harbor***, 333 Wis. 2d 53, ¶36. It suffices for purposes of this opinion to assume that Robinson's ineligibility is a new factor. That means the decision whether to modify the sentence in light of the new factor is left to the circuit court's discretion. Here, we discern no erroneous exercise of that discretion in the denial of Robinson's postconviction motion, so there is no arguable merit to further challenging that denial.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of further representation of Robinson 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
Acting Clerk of Court of Appeals