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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

January 23, 2018

To:

Hon. Rebecca F. Dallet
Circuit Court Judge
821 W. State St.
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Hon. Janet C. Protasiewicz
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233-1425

Jesse James Brunilson 596736
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

John Barrett
Room 114
821 W. State Street
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Carl W. Chesshir
Chesshir Law Office
S101 W34417 Hwy LO, Ste. B
Eagle, WI 53119

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

2016AP1326-CRNM State of Wisconsin v. Jesse James Brunilson
(L.C. # 2013CF1152)

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).

Jesse James Brunilson appeals from judgments of conviction, entered upon his guilty pleas, for arson of a building, felony intimidation of a victim, stalking, violation of a domestic abuse temporary restraining order, and violation of a domestic abuse injunction. *See* WIS. STAT.

§§ 943.02(1)(a), 940.45(2), 940.32(2), 813.12(3), & 813.12(4) (2011-12).[1] Fifteen additional charges against Brunilson were dismissed and read in at sentencing. Brunilson also appeals the order denying, in part, his postconviction motion.[2] Brunilson's postconviction/appellate counsel, Carl W. Chesshir, filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Brunilson responded raising eleven issues. Following our initial review of the case, we directed counsel to file a supplemental no-merit report addressing Brunilson's claims related to newly discovered evidence and sentence credit. Counsel did so, and Brunilson filed an additional response. We have independently reviewed the record and the submissions as mandated by ***Anders***, and we conclude there are no arguably meritorious issues. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

Background

According to the criminal complaint, which served as the factual basis for Brunilson's pleas, a domestic abuse temporary restraining order was issued on March 22, 2012, in favor of J.L. and against Brunilson. The restraining order remained in effect until April 5, 2012. The restraining order required Brunilson to refrain from committing acts of domestic violence against J.L., to avoid her residence, and to avoid contacting her.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. This appeal was previously held in abeyance pending our request for a supplemental no-merit response from counsel. The hold is now lifted.

[2] The Honorable Rebecca F. Dallet presided over the plea proceedings and sentenced Brunilson. The Honorable Janet Protasiewicz entered the order denying, in part, Brunilson's postconviction motion.

A domestic abuse injunction was then issued on April 5, 2012, which was effective until April 5, 2016. The injunction ordered Brunilson to refrain from committing acts of domestic violence against J.L., to avoid her residence, and to avoid contacting her.

The twenty-page, twenty-count complaint then detailed the numerous crimes and violations of the terms of the restraining order and injunction with which Brunilson was charged. The allegations in the complaint included the following: text messages and phone calls to J.L. from Brunilson's cell phone; J.L.'s report to police that while she was working, Brunilson was nearby looking at her; J.L.'s reports that one of the tires on her vehicle was slashed while she was at her residence and that, in a subsequent incident, someone had placed charcoal under her vehicle and ignited it; J.L.'s report that someone had placed a small pile of coals next to her garage door and lit it on fire, which burned a corner of the door; J.L.'s statement to police that Brunilson showed up at her home three times in one day; J.L.'s report that as she walked to her children's school to pick them up, she saw Brunilson and heard him say, "Go ahead and call the cops. I'll burn your house down and I'll kill you and the kids[.]" Acquaintances of Brunilson's told police Brunilson had admitted to starting fires and harassing J.L. Witnesses reported that they believed J.L.'s life was in danger.

The case was scheduled for a jury trial. *Voir dire* began shortly before the pool of jurors was excused for lunch. Following the break, Brunilson advised the circuit court that he wanted to accept the State's plea offer. Pursuant to the plea negotiations, Brunilson entered guilty pleas to arson of a building, felony intimidation of a victim, stalking, violation of a domestic abuse temporary restraining order, and violation of a domestic abuse injunction. In exchange, the State moved to dismiss and read in the remaining counts. The State additionally recommended full

restitution for the victim and advised that it would not recommend a specific sentence, leaving that to the discretion of the circuit court. The circuit court accepted Brunilson's pleas.

Ten days later, the circuit court held a hearing and granted Brunilson's trial counsel's motion to withdraw. Successor trial counsel then filed a motion to withdraw Brunilson's pleas.

The circuit court held evidentiary hearings where both Brunilson and his prior trial counsel, Attorney John Wasielewski, testified. In denying the motion, the circuit court explained: "So I have not heard a fair and just reason at all from Mr. Brunilson. I think this record is very clear that this was an attempt to just manipulate the system by Mr. Brunilson."

The circuit court subsequently sentenced Brunilson as follows: count one, arson, fifteen years of initial confinement and ten years of extended supervision; count two, felony intimidation of a victim, two years of initial confinement and two years of extended supervision, consecutive; count four, stalking, one year and six months of initial confinement and two years of extended supervision, consecutive; count seven, violation of a domestic abuse temporary restraining order, nine months, concurrent; and count nine, violation of a domestic abuse injunction, nine months, concurrent. Brunilson stipulated to $2000 in restitution.

Postconviction, Brunilson moved the circuit court to vacate the DNA surcharges and the domestic abuse surcharges. The circuit court upheld the imposition of a single DNA surcharge and granted the motion to vacate the domestic abuse surcharges.

Counsel concludes in his no-merit report and supplemental no-merit report that there would be no arguable merit to pursue the following issues: (A) the validity of Brunilson's pleas; (B) the circuit court's decision to deny Brunilson's motion to withdraw his guilty pleas; (C) the

circuit court's exercise of its sentencing discretion; (D) the circuit court's imposition of a single DNA surcharge; (E) Brunilson's entitlement to additional sentence credit; and (F) Brunilson's purported newly discovered evidence. This court agrees with postconviction/appellate counsel's description and analysis of these issues and independently concludes that pursuing them would lack arguable merit. In (G) below, we briefly address Brunilson's response.

Discussion

(A.) Brunilson's Guilty Pleas

First, we consider Brunilson's pleas. There is no arguable basis to allege that his guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, as well as an addendum, which the circuit court referenced during the plea hearing.[3] *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The circuit court conducted a plea colloquy that addressed Brunilson's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas, as set forth on the form. *See* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

[3] The plea questionnaire and waiver of rights form lists the applicable jury instructions and indicates that they are attached. During the plea hearing, Brunilson's trial counsel advised the circuit court that Brunilson had reviewed the form "last week in jail. It has the jury instructions." However, the instructions are not in the record. Nevertheless, the plea hearing transcript shows that the circuit court went through the elements of each of the crimes to which Brunilson pled guilty.

Although in terms of the penalties, the circuit court misstated the imprisonment for arson of a building as thirty years, the plea questionnaire form properly noted that the maximum penalty for that charge was forty years of imprisonment. The maximum penalty for that charge was also properly identified in the complaint, which Brunilson acknowledged he had read. Consequently, there would be no arguable merit to a challenge on this basis. *See* ***State v. Taylor***, 2013 WI 34, ¶¶34-39, 347 Wis. 2d 30, 829 N.W.2d 482 (holding that the plea was knowingly, voluntarily and intelligently entered where the record made clear that, despite the court's misstatement at the plea hearing, the defendant knew the maximum penalty that could be imposed). Additionally, while it appears that the circuit court did not expressly notify Brunilson of the direct consequences of his pleas during the hearing itself, those consequences are set forth on the plea questionnaire form. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken).

We ultimately conclude that the plea questionnaire and waiver of rights form and addendum, Brunilson's conversations with his trial counsel, and the circuit court's colloquy appropriately advised him of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Brunilson's pleas.

(B.) Pre-sentence Plea Withdrawal

Counsel also addresses whether the circuit court properly denied Brunilson's motion to withdraw his guilty pleas. A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, and coercion by counsel. ***State v. Shimek***, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The decision to grant or deny a presentence motion for plea withdrawal is committed to the circuit court's discretion. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

Here, the circuit court held an evidentiary hearing during which both Brunilson and his trial counsel testified. Brunilson argued that he was entitled to plea withdrawal because Attorney Wasielewski was not prepared and, as summed up by his then newly retained trial counsel, "he felt that he was backed into a corner" and had no choice but to plead guilty.

In its oral ruling, the circuit court set forth the applicable standards on the record. Insofar as Brunilson's motion hinged on what he perceived to be Attorney Wasielewski's lack of preparation and failure to secure witnesses on his behalf, the circuit court explained: "[T]he case is what it is. You can only do so much with what you have. And that is what I got from [Attorney Wasielewski's] testimony." The circuit court concluded: "So I have not heard a fair and just reason at all from Mr. Brunilson. I think this record is very clear that this was an

attempt to just manipulate the system by Mr. Brunilson. So I am denying the motion to withdraw."

Ultimately, the circuit court determined that none of the reasons for which Brunilson wanted to withdraw his pleas were credible. We apply a deferential, clearly erroneous standard to a circuit court's credibility determinations. *See* ***id.***, 303 Wis. 2d 157, ¶33. "If 'the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" ***Id.***, ¶34 (citation omitted). There is no arguable merit to a challenge to the circuit court's denial of Brunilson's motion for plea withdrawal.

(C.) Sentencing

The next issue we consider is sentencing. We conclude there would be no arguable basis to assert that 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, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***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* ***Gallion***, 270 Wis. 2d 535, ¶41.

In arriving at its decision, the circuit court highlighted the "extremely serious allegations" and the fact that "[t]hey show a very persistent course of behavior. I have not seen something so persistent in terms of destruction." The circuit court noted that Brunilson went beyond a threat: "And it was a scary step further. It was the step of making threats of setting people and property on fire and then carrying through with the threats with respect to the property." The circuit court was clear that two of its goals in sentencing Brunilson were that he be punished and that he receive treatment.

There would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The maximum possible sentence Brunilson could have received exceeded fifty years of imprisonment. The sentences he actually received, which totaled eighteen years and six months of incarceration and fourteen years of extended supervision, were 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.

(D.) Imposition of Single DNA Surcharge

Initially the circuit court imposed $1150 in DNA surcharges against Brunilson for the three felony charges and the two misdemeanor charges. The circuit court, however, subsequently vacated all but one of the DNA surcharges totaling $250.[4] *See* ***State v. Radaj***,

[4] The circuit court also vacated the domestic abuse surcharges on counts two and four.

2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758; ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756. We have therefore considered whether Brunilson could pursue an arguably meritorious challenge to his guilty plea on the ground that the circuit court did not advise him he was subject to a single mandatory $250 DNA surcharge. *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 Brunilson. A single $250 DNA surcharge does not constitute punishment. ***State v. Scruggs***, 2017 WI 15, ¶49, 373 Wis. 2d 312, 891 N.W.2d 786.

(E.) Sentence Credit

We specifically asked counsel to address Brunilson's claim that he was entitled to additional sentence credit. Brunilson claimed that he should have been credited with 508 days of custody at sentencing instead of the 253 days of credit that he was given.[5] Counsel filed a supplemental no-merit report asserting that Brunilson is not entitled to any additional sentence credit.

On January 9, 2013, Brunilson was taken into custody for an alleged probation violation of Milwaukee County Case No. 2012CM5948. With his no-merit response, Brunilson submitted a decision of the Division of Hearings and Appeals (DHA) dated March 25, 2013, indicating that he was not ultimately revoked in that case.

[5] Brunilson does not adequately explain how he arrived at the conclusion that he was entitled to 508 days.

The pretrial incarceration credit worksheet in this case reflects that Brunilson was on a probation revocation hold from January 9, 2013, to June 14, 2013, which totaled 156 days. Consequently, 156 days were deducted from his total of 409 days in custody, leaving him with 253 days of sentence credit. At the sentencing hearing, Brunilson's trial counsel explained to the circuit court:

> I can advise the court that as of now he has been in custody 409 days. Although with the sentence credit, I talked with the prosecutor about this, we have this situation that—that he actually self-revoked in—I think it was May of 2013, which triggered a nine[-]month stayed sentence. He did the entirety of that sentence while in custody over this case, and by my calculations he had 30 days, 60 days pre-sentence credit coming from that misdemeanor, and he also got jail good time credit. So what you will see on the calculation sheet, that he had 409 days he had been in custody, and 253 days that I believe are applicable here. But what is the—of some importance is that the matter over which he self-revoked was a violation of injunction case against [J.L.,] which took place at a point in time during the time period of—I think it was during the time period of Count 3, the stalking charge. That is Count 4. He actually has already done nine months worth of punishment for what went on during that time period, that he is also charged with stalking, but he pled guilty to that and has done time over so far already.

No additional comments were made as to sentence credit, and the judgments of conviction reflected that the circuit court granted Brunilson the 253 days his trial counsel requested.

In his supplemental no-merit report, counsel submits that *following* DHA's decision not to revoke Brunilson's probation, Brunilson self-revoked in May 2013. As support, counsel cites CCAP records and the PSI report. The PSI report specifically indicates: "The [DHA in Milwaukee County Case No. 12CM5948] did not revoke Mr. Brunilson's supervision, however he remained in custody due to the present offenses. In May of 2013, Mr. Brunilson waived a revocation hearing and decided to have his supervision revoked." At the sentencing hearing, the circuit court specifically asked Brunilson and his counsel whether there were any corrections to

the PSI. Brunilson advised the circuit court that he had reviewed it with counsel and that the information it contained was true and accurate.

The period of time when Brunilson was held in relation to the probation revocation was properly deducted from the total days he was in custody to arrive at the credit calculation in this case. The judgment reflects that Brunilson's sentences for arson of a building, felony intimidation of a victim, and stalking were consecutive to any other sentence he was serving, and he is not entitled to dual credit. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 100, 423 N.W.2d 533 (1988) (where consecutive sentences are imposed, time spent in custody shall not be duplicatively credited to more than one sentence; credit will be applied to the sentence first imposed). There would be no arguable merit to this claim.

(F.) Newly Discovered Evidence

We also asked counsel to address Brunilson's newly discovered evidence claim in a supplemental no-merit report. With his response, Brunilson submitted a letter from the Wisconsin Department of Justice indicating that the state fire marshal's office holds no records of any fire of incendiary origin on the date and at the location that related to the arson charge against him. The letter is dated July 17, 2015, more than one year after the original judgments of conviction were entered in this case. Had there been an arson, Brunilson contends that state law mandates it would be of record at the state marshal's office. *See* WIS. STAT. § 165.55(1).[6]

[6] WISCONSIN STAT. § 165.55(1) provides:

(continued)

Consequently, Brunilson submits that he should have been charged with criminal damage to property.[7] *See* ***State v. Thompson***, 146 Wis. 2d 554, 561, 431 N.W.2d 716 (Ct. App. 1988) (holding "that criminal damage to property is a lesser included offense of arson"). He insists that the fire damage to J.L.'s garage, which formed the basis for the arson charge to which he pled, "was in fact caused by self-heating and self[-]ignition (natural causes/spontaneous combustion[)], which is criminality free."

In the supplemental no-merit report, counsel goes through the elements of the crime of arson of a building by setting forth the statutory language and the applicable jury instruction language. *See* WIS. STAT. § 943.02(1)(a) (2011-12); WIS JI-CRIMINAL 1404. Counsel points out that neither the statute nor the jury instruction requires proof of state fire marshal records. Consequently, the lack of such records is not material to an issue in the case, and would not support a claim for a new trial based on newly discovered evidence. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (alleging newly-discovered evidence requires a

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> The chief of the fire department or company of every city, village and town in which a fire department or company exists, and where no fire department or company exists, the city mayor, village president or town clerk shall investigate or cause to be investigated the cause, origin and circumstances of every fire occurring in his or her city, village or town by which property has been destroyed or damaged when the damage exceeds $500, and on fires of unknown origin he or she shall especially investigate whether the fire was the result of negligence, accident or design. *Where any investigation discloses that the fire may be of incendiary origin, he or she shall report the same to the state fire marshal.*

(Emphasis added.)

[7] In his response, Brunilson casts this as a new factor warranting sentence modification. There is no arguable merit to pursuing this claim under that theory. The lack of state fire marshal records was not "'a fact or set of facts highly relevant to the imposition of sentence[.]'" *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

defendant to prove: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) *the evidence is material to an issue in the case*; and (4) the evidence is not merely cumulative.'" Upon making that showing, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.") (citation omitted; emphasis added).

(G.) Brunilson's Response

In his response to the no-merit report, Brunilson raises numerous issues. Some of his claims relate to the sufficiency of the complaint. Other claims relate to what Brunilson contends were violations of his due process rights by the police officers who investigated the events that resulted in the arson charge.

Brunilson, however, forfeited his right to appeal these issues when he pled guilty. Under the "guilty-plea-waiver rule," a defendant "'waives all nonjurisdictional defects, including constitutional claims'" by knowingly pleading guilty or no contest. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (citation omitted). The addendum to the plea questionnaire and waiver of rights form, which Brunilson signed, additionally made clear that among other things, by pleading guilty, Brunilson was giving up his rights to challenge the constitutionality of any police action and to challenge the sufficiency of the complaint.

WISCONSIN STAT. § 971.31(10) carves out an exception to the guilty-plea-waiver rule and permits appellate review of an order denying a motion to suppress evidence. However, that exception is not in play in this case because Brunilson did not file a suppression motion, so there

is no order denying such a motion. Brunilson does not accuse his trial counsel of ineffective assistance for failing to file a suppression motion.

Our independent review of the record reveals no other potential issues of arguable merit. This court has reviewed and considered the plethora of issues raised by Brunilson in his submissions. To the extent they are not specifically addressed, this court has concluded that they lack sufficient merit or importance to warrant individual attention.

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 Carl W. Chesshir is relieved of further representation of Brunilson 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