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**DISTRICT I**

February 14, 2018

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

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2017AP293-CRNM State of Wisconsin v. Angelica D. Belen (L.C. # 2013CF1798)

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).**

Angelica D. Belen pled guilty to three counts of child neglect resulting in death. The circuit court imposed three consecutive, evenly-bifurcated twelve-year terms of imprisonment and a $250 DNA surcharge. The circuit court also found Belen eligible to participate in the Wisconsin substance abuse program and the challenge incarceration program. Appointed appellate counsel filed an appeal and a no-merit report but then requested voluntary dismissal of

the appeal to pursue a postconviction motion on Belen's behalf. We granted the requested relief. *See* ***State v. Belen***, No. 2014AP2253-CRNM, unpublished op. and order (WI App Jan. 23, 2015). The State Public Defender thereafter appointed Attorney Marcella De Peters as successor postconviction and appellate counsel. Attorney De Peters filed a postconviction motion seeking plea withdrawal or, alternatively, relief from the $250 DNA surcharge imposed at sentencing. The circuit court denied plea withdrawal but vacated the DNA surcharge. Belen appeals.

Attorney De Peters filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Belen did not respond. We have considered the no-merit report, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for appeal. We summarily affirm the judgment of conviction and the postconviction order. *See* WIS. STAT. RULE 809.21 (2015-16).

As set forth in the criminal complaint, Belen went to work on April 11, 2013, and left three of her children, a daughter born June 7, 2007, and two sons born December 27, 2008, locked in a bedroom of the family's apartment. A fire broke out in the home, and the three children died. The State charged Belen with three counts of child neglect causing death. *See* WIS. STAT. § 948.21(1)(d). She quickly decided to resolve the case with a plea bargain.

We first consider whether Belen could pursue an arguably meritorious appellate challenge to the postconviction order denying her motion seeking plea withdrawal on the ground that the circuit court did not fulfill its obligation at the plea hearing to establish her understanding

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

of the range of punishments she faced upon conviction. *See* WIS. STAT. § 971.08(1)(a); ***State v. Brown***, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. We conclude she could not do so.

A postconviction motion alleging the circuit court failed to fulfill its duties during the plea colloquy warrants an evidentiary hearing if: (1) the defendant makes a *prima facie* showing that the circuit court accepted the plea without completing statutory and other mandatory procedures; *and* if (2) the defendant alleges that in fact he or she did not know or understand the information that should have been provided during the plea colloquy. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *see also* ***Brown***, 293 Wis. 2d 594, ¶2. If the defendant fails to satisfy both prongs of a ***Bangert*** motion, the circuit court may deny the motion for plea withdrawal without a hearing. *See* ***State v. Brown***, 2012 WI App 139, ¶¶10-11, 345 Wis. 2d 333, 824 N.W.2d 916.

Here, Belen faced twenty-five years of imprisonment and a $100,000 fine for each conviction. *See* WIS. STAT. §§ 948.21(1)(d), 939.50(3)(d). In postconviction proceedings, she moved for plea withdrawal alleging that the circuit court failed to advise her about the potential fines she faced. She did not allege, however, that she lacked knowledge or understanding of those potential fines. The circuit court therefore denied her plea withdrawal motion without a hearing. Because Belen's postconviction motion was plainly insufficient to satisfy the second ***Bangert*** requirement, no arguably meritorious basis exists for challenging the circuit court's decision.

Moreover, when a defendant successfully makes a *prima facie* showing under ***Bangert***, the burden shifts to the State to show by clear and convincing evidence that the plea was

knowingly and voluntarily entered. ***Id.***, 131 Wis. 2d at 274. Whether the State has met this burden of proof is a question of law. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987). Here, the existing record satisfies the State's burden. As the circuit court pointed out in its postconviction order, Belen signed a guilty plea questionnaire and waiver of rights form that she filed at the time of her pleas. The form reflects that she faced both three twenty-five-year prison terms and three $100,000 fines upon conviction. Belen also told the circuit court during the plea colloquy that she was familiar with the criminal complaint, and she filed an addendum to the guilty plea questionnaire stating both that her lawyer had read the complaint to her and that she had read it herself. The complaint states the maximum penalties, including the $100,000 fines, that Belen faced if convicted. Additionally, Belen was present in court for her initial appearance when the presiding court commissioner expressly stated that the maximum penalties she faced for each crime were twenty-five years in prison and a $100,000 fine. Accordingly, further proceedings to challenge the circuit court's postconviction order denying plea withdrawal would lack arguable merit. *See* ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482 (reflecting that a defect in the circuit court's description of the statutory criminal penalty during a plea colloquy is insubstantial and does not raise a question about the validity of the plea when the record shows the defendant knew and understood the penalty).

We next consider whether Belen could pursue any other arguably meritorious challenge to the validity of her guilty pleas. At the outset of the plea proceeding, the State described the parties' plea bargain. Belen would plead guilty as charged and would pay reasonable restitution

if it was requested.[2] The State would recommend three consecutive terms of "substantial confinement" and would move to dismiss and read in for sentencing purposes the misdemeanor charges pending against her in another case.[3]

Belen agreed that the State correctly described the terms of the plea bargain, and she said that she had not been threatened or promised anything else to induce her guilty pleas. The State and the circuit court both advised Belen that she faced twenty-five years of imprisonment for each conviction, and Belen said she understood. The circuit court told Belen that it was not bound by the plea bargain and that she could receive a maximum sentence on each count. Belen said she understood.

The circuit court warned Belen that if she was not a citizen of the United States, her guilty plea exposed her to the risk of deportation, exclusion from admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Belen said she understood. Although the circuit court did not caution Belen 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.

[2] In later proceedings, the State advised that no restitution was at issue in this case, and the circuit court did not order any restitution.

[3] A copy of the complaint filed in the misdemeanor matter is in the appellate record. That complaint reflects that Belen was facing six counts of misdemeanor child neglect, three of which arose on February 25, 2013, and three of which arose on March 13, 2013.

Slight deviations from the statutory language do not undermine the validity of a plea.[4] *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

The record contains a signed guilty plea questionnaire and waiver of rights form with attachments. The plea questionnaire reflects that Belen was twenty-five years old at the time of her pleas, had a high school education, and had taken some college classes. The questionnaire further reflects Belen's understanding of the charges she faced, the rights she waived by pleading guilty, and, as we have seen, the penalties she faced upon conviction. A signed addendum attached to the questionnaire reflects Belen's acknowledgment that by pleading guilty she would give up her right to raise certain defenses, to challenge the sufficiency of the complaint, and to seek suppression of the evidence against her.

The circuit court told Belen that by pleading guilty she would give up the constitutional rights listed on the plea questionnaire, and the circuit court highlighted some of those rights. The circuit court further explained that by pleading guilty, Belen would give up the right to bring motions, including motions to suppress evidence, and the opportunity to raise defenses to the charges against her. Belen said she understood.

"[A] circuit court must establish that a defendant understands every element of the charges to which he [or she] pleads." ***Brown***, 293 Wis. 2d 594, ¶58. Here, Belen filed with her

[4] 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 Belen could make such a showing.

guilty plea questionnaire a copy of the jury instruction stating the elements of neglecting a child resulting in death. Belen told the circuit court that she had reviewed the jury instruction and discussed it with her lawyer. The circuit court then summarized the elements of the crime on the record. Belen said she understood.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, trial counsel told the circuit court it could rely on the facts in the criminal complaint. The circuit court properly established a factual basis for Belen's guilty pleas. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (factual basis established when trial counsel stipulates on the record to the facts in the criminal complaint).

The record reflects that Belen entered her guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08, and ***Bangert***, 131 Wis. 2d at 266-72; *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 pleas.

We next consider whether Belen could pursue an arguably meritorious challenge to her sentences. 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 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 stated that punishment, deterrence, and rehabilitation were the primary sentencing goals, and the circuit court discussed the factors it deemed relevant to those goals.

The circuit court discussed the gravity of the offenses, describing the case as "horrific." The court observed that the children—all younger than six years old—"were nowhere near old enough to be left alone unsupervised," but Belen rationalized her actions "by equating safety [with] locking them in the room[]." In considering Belen's character, the circuit court recognized that Belen loved her children but emphasized that she nonetheless failed to take care of them. The court noted a history of reports to the Bureau of Milwaukee Child Welfare that Belen was not meeting the medical and therapeutic needs of her children, that they were living in an unclean environment, and that they were eating out of the garbage. The circuit court considered the safety of the public, reminding Belen that "everyone in the community has a stake in ... our children."

The court rejected Belen's recommendation for a three-to-five year term of initial confinement. The circuit court found that Belen required a "significant amount of rehabilitation ... in a confined setting," and that she should be punished separately for her conduct as to each child. Further, the circuit court concluded that consecutive twelve-year sentences were required to deter others from engaging in neglectful actions that endanger the children of the community.

The circuit court identified the factors that it considered in choosing sentences in this matter. The factors are proper and relevant.[5] Moreover, the sentences are 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 penalties imposed are 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, Belen's sentence is not

[5] A COMPAS risk assessment was attached to the presentence investigation report filed in this matter. COMPAS is a tool used, in part, to predict recidivism. *See* ***State v. Loomis***, 2016 WI 68, ¶¶13-14, 371 Wis. 2d 235, 881 N.W.2d 749. Long after the circuit court sentenced Belen, the supreme court released ***Loomis*** to resolve a challenge to the use of a COMPAS risk assessment at sentencing. The ***Loomis*** court concluded that a sentencing court may consider a COMPAS risk assessment, *see* ***id.***, ¶¶8-9, but the assessment may not be determinative in deciding whether an offender is incarcerated, or in deciding the severity of the offender's sentence, or in deciding whether the offender could be supervised safely and effectively in the community, *see* ***id.***, ¶¶98, 109. In the present case, the sentencing court indicated that it had reviewed the COMPAS risk assessment but did not otherwise discuss it. Therefore, we conclude that no arguably meritorious basis exists to contend that COMPAS was determinative in sentencing.

unduly harsh or excessive. We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Based on an independent review of the record, we conclude there are no additional potential issues warranting discussion. Any further proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2015-16).

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Angelica D. Belen on appeal. *See* WIS. STAT. RULE 809.32(3) (2015-16).

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

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*Diane M. Fremgen*
*Acting Clerk of Court of Appeals*