



OFFICE OF THE CLERK
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 II

May 2, 2018

To:

Hon. Ralph M. Ramirez
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Gina Colletti
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Chris M. Bailey
Bailey Law Office, L.L.C.
4810 S. 76th St., Ste. 202
Greenfield, WI 53220

Susan Lee Opper
District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

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

Khiry J. Wade 651275
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2017AP1617-CRNM State of Wisconsin v. Khiry J. Wade (L.C. # 2016CF1453)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Khiry J. Wade appeals from a judgment of conviction for an operator fleeing or eluding an officer causing property damage and from an order denying his postconviction motion for sentence modification. His appellate counsel has filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Wade received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment and order may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

At 12:47 a.m., a deputy sheriff observed a car going 98 mph in a 70 mph zone on an interstate highway. The car was pulled over after it exited the highway. As the deputy began to exit his squad car, the car sped off. A chase ensued involving multiple squad cars, speeds in excess of 90 mph, running of red lights, and the employment of tire deflation devices. The car's headlamps were turned off by the driver at one point. As officers tried to maneuver their vehicles to slow the car, it struck the side of a squad car causing damage. Eventually the officers were able to pin the car between two squads. There were three persons in the car. Wade was the driver of the car. Wade indicated that he had fled because he had no driver's license and was driving a rental car rented by someone else. Upon arrest, Wade was found to be in possession of a small amount of marijuana. Wade was charged with fleeing or eluding an officer causing property damage, a class H felony because of the property damage, and misdemeanor possession of marijuana.

Wade entered a guilty plea to the fleeing charge and the possession charge was dismissed as a read in at sentencing. As part of the plea agreement, the prosecution could argue for a "substantial period" of prison time. Of the six-year maximum, Wade was sentenced to eighteen

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

months' initial confinement and two years' extended supervision. Wade filed a postconviction motion requesting that he be made eligible to participate in the Challenge Incarceration Program (CIP) and eligible for expunction,² both of which the sentencing court denied at the time of sentencing. The court denied Wade's motion to reconsider the sentence.

The no-merit report addresses the potential issues of whether Wade's plea was freely, voluntarily, and knowingly entered, whether the sentence was the result of an erroneous exercise of discretion, and whether the motion for sentence modification should have been granted. The report's discussion of these issues is not sufficiently cohesive to be summarily adopted as demonstrative that no issue of arguable merit exists.

To be constitutional, a guilty plea must affirmatively be shown to be knowing, voluntary, and intelligent. *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). At the plea hearing, the trial court must address the defendant personally and fulfill several duties outlined in *Bangert*, WIS. STAT. § 971.08, and additional case law. *State v. Brown*, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. These duties include ascertaining whether any promises or threats were made in connection with the plea; establishing the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself; ascertaining whether a factual basis exists to support the plea; informing the defendant of the constitutional rights he is waiving and verifying that he understands that he is giving up these rights; establishing personally that the defendant understands that the trial court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement; notifying the defendant of the

² Wade was twenty-years-old on the day of sentencing.

direct consequences of his plea; and notifying the defendant that if he is not a citizen of the United States, his guilty plea could result in deportation, exclusion from admission to this country, or the denial of naturalization. *State v. Cross*, 2010 WI 70, ¶18, 326 Wis. 2d 492, 786 N.W.2d 64; *Brown*, 293 Wis. 2d 594, ¶35. The trial court may refer to a plea questionnaire, but may not rely on it as a substitute for a personal, in-court colloquy. *State v. Hoppe*, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. During the plea hearing the circuit court fulfilled each of the required duties. No issue of merit exists from the plea taking.

Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion, and the sentencing court is presumed to have acted reasonably. *Id.*, ¶18. An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. *Id.*, ¶17. In addition, in order to properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. *Id.*, ¶39 (citation omitted). The court found the offense to be extremely serious given the distance Wade drove, the rate of speed he travelled, and the risk of injury to himself, his passengers, the officers, and the public. In mitigation the court considered Wade's age and his lack of any prior criminal history. However, the seriousness of the offense outweighed the mitigating factors and led the court to conclude that probation, expungement, or CIP eligibility were not warranted and eighteen months of initial confinement was. The sentence was based on the facts of record and appropriate considerations. The sentence is well within the maximum and cannot be considered excessive. *See State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("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.”). No basis therefore exists to disturb the sentence.

In his postconviction motion for sentence modification, Wade argued that the passage of time meant that Wade would serve the entire eighteen months of initial confinement even if the court were to modify the sentence to allow for CIP eligibility. Wade argued that he would benefit from the programming available through CIP even if it did not result in his earlier release from confinement. He also argued that expunction was appropriate so he would have the opportunity to obtain employment that a felony conviction might preclude. Wade did not directly designate his motion as one presenting new factors. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (A new factor “refers to a fact or 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.”). Wade’s postconviction motion was, as the sentencing court recognized, akin to a motion for reconsideration. “A trial court should not reduce a sentence on ‘reflection’ alone or simply because it has thought the matter over and has second thoughts. It must base its modification on ‘new factors’ brought to its attention.” *State v. Foellmi*, 57 Wis. 2d 572, 582, 205 N.W.2d 144 (1973), *overruled on other grounds as recognized by Korpela v. State*, 63 Wis. 2d 697, 702 n.4, 218 N.W.2d 368 (1974). Other reasons that allow a sentencing court to change a valid sentence are a determination that it erroneously exercised its discretion, imposed a sentence that was unduly harsh or unconscionable, imposed a sentence that was impossible to carry out, or to correct formal or clerical errors. *See State v. Robinson*, 2014 WI 35, ¶118, 354 Wis. 2d 351, 847 N.W.2d 352 (Abrahamson, C.J., dissenting).

Wade's motion presented none of these reasons for modifying the sentence and the denial of the motion presents no issue of arguable merit.

We have considered whether the prosecution fulfilled the plea agreement by making the agreed-upon sentencing recommendation. It did. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and the order denying the postconviction motion, and discharges appellate counsel of the obligation to represent Wade further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Chris Bailey is relieved from further representing Khiry J. Wade in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals