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

2016AP1315-CRNM State of Wisconsin v. Deishun Lamont Byrd-McWay (L.C. # 2015CF3124)

Before Blanchard, Kloppenburg and Fitzpatrick, 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).

Deishun Lamont Byrd-McWay appeals a judgment of conviction entered upon his guilty pleas to one count each of burglary and criminal damage to property, both as a party to the crime. Byrd-McWay's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967), addressing the validity of Byrd-McWay's pleas and sentence. Byrd-McWay filed a response to counsel's no-merit report, challenging the validity of his plea to the burglary charge. Appellate counsel filed a supplemental no-merit report addressing Byrd-McWay's complaints. Byrd-McWay filed another response, this time requesting "a sentence modification." By order of October 26, 2017, the appeal was placed on hold pending decisions in two Wisconsin Supreme Court cases, and the hold was lifted at the end of July 2018.[2] Upon consideration of the original and supplemental no-merit reports, Byrd-McWay's responses, and our independent review of the record, we conclude that the judgment 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.

According to the criminal complaint, the owner of a retail sporting goods store was in his closed and locked store after business hours. He had installed concrete posts in front of his entrance gate due to prior incidents of looting. The owner parked his car right in front of the store to alert anyone approaching that someone was inside. Just before 4:00 a.m., he noticed men with guns across the street, and he retrieved his rifle from the office. A van backed through the concrete posts and partially through the locked and gated doors of the store. The van pulled

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

[2] Two mandatory DNA surcharges were assessed on the judgments of conviction. Because of the multiple DNA surcharges, we put this appeal on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of the defendant's plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __ (No. 2015AP2535). ***Freiboth*** holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. ***Id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

forward and again backed into the doors, causing the steel gate to open further. The owner continued to watch as three men tried to crawl through the gate's opening. At least one man got part of his body through the opening and into the store. The owner fired his gun and the men immediately fled the scene. Byrd-McWay sustained three gunshot wounds. The incident was captured on surveillance video. Byrd-McWay was charged as a party to the crimes of burglary with intent to steal and criminal damage to property.

Pursuant to a plea agreement, Byrd-McWay pled guilty to both counts and agreed to pay full restitution to the victim for the damaged gate. In exchange, the State agreed not to charge but to read in a count of operating a motor vehicle without the owner's consent with regard to the car used to batter the gate. There was no agreement as to sentencing. After Byrd-McWay entered his pleas, at his request, the matter immediately proceeded to sentencing. On count one, the circuit court imposed an eleven-year bifurcated sentence, with six years of initial confinement followed by five years of extended supervision. On count two, the court imposed a concurrent two-year sentence, with one year each of initial confinement and extended supervision. Byrd-McWay was ordered to pay restitution in the amount of $14,337.16. The court found Byrd-McWay ineligible for the Earned Release Program (ERP) and the Challenge Incarceration Program (CIP) based on the seriousness of the offenses.

Counsel's no-merit report discusses the plea-taking procedures in this case. We agree with appellate counsel's conclusion that any challenge to the entry of Byrd-McWay's pleas would be without arguable merit. The circuit court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon Byrd-

McWay's signed plea questionnaire, attachments, and addendum to establish his knowledge and understanding of his pleas. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Finally, based on the allegations in the criminal complaint and the agreed-upon facts stated on the record at the plea hearing, the circuit court properly found a factual basis for Byrd-McWay's guilty pleas.

In his response, Byrd-McWay concedes he is guilty of criminal damage to property but asserts that, as to the burglary, only one element was satisfied. He states that "the only element that I met was that part of a leg climbed [through] the door," the shoe on the surveillance video does not match the shoes he was wearing when arrested, and no merchandise was actually taken. Appellate counsel's supplemental no-merit report explains why this issue lacks merit. We agree with counsel's analysis and reasoning. To the extent Byrd-McWay claims there was an insufficient factual basis for his plea to the burglary, or that he did not know which facts supported the elements, he has not set forth a potentially meritorious issue. When the plea-taking court summarized the nature of the crimes and how Byrd-McWay's conduct fit the elements, Byrd-McWay affirmatively stated he understood what the State would have to prove. Thereafter, the parties clarified on the record that no one actually obtained any merchandise, there was only partial entry into the store, and none of the actors were able to get their entire body inside the property. Byrd-McWay affirmatively agreed that those facts occurred and confirmed his understanding of what the State would have to prove at trial. Both Byrd-McWay and his trial attorney told the court they had discussed the case and any possible defenses. Trial counsel stated they particularly discussed "the issue of an attempted burglary or burglary" and that Byrd-McWay understood the discussion. As addressed on the record at the plea hearing and

in appellate counsel's no-merit report, the taking and carrying away of stolen property is not an element of burglary, and a partial entry "of any part of the body is sufficient." *See* ***State v. Barclay***, 54 Wis. 2d 651, 655 n.10, 196 N.W.2d 745 (1972). Further, Byrd-McWay was charged with and pled to acting as a party to the crime of burglary, rendering irrelevant whether any part of his body entered the premises. The record amply demonstrates his understanding of the party to a crime modifier.[3]

The no-merit report also discusses the sentencing court's exercise of discretion. We agree with appellate counsel's conclusion that a challenge to Byrd-McWay's sentence would lack arguable merit. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character, and the needs of the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court stated its sentencing objectives, including restitution, punishment, and general and specific deterrence. *See* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197 (the court is to identify the general objectives of most importance). The sentence was a demonstrably proper exercise of discretion. Further, we cannot conclude that the eleven-year sentence when measured against the possible maximum of sixteen years is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his second response, Byrd-McWay complains about his sentence, stating that he was "wrongly sentenced" to eleven years "for a Burglary. A commercial Burglary at that." Byrd-

[3] For these reasons, Byrd-McWay's suggestion that trial counsel provided ineffective assistance by failing to fully inform him of what the State would have to prove or his likelihood of success at trial lacks arguable merit. Appellate counsel's no-merit report more fully analyzes Byrd-McWay's suggested ineffective assistance claims as without arguable merit, and we will not further discuss the issue.

McWay ignores that the circuit court determined this was "not an ordinary burglary of a business," and that it was aggravated by the circumstances and effect on the victim:

> You guys used a stolen car to break in when you knew somebody was there. Some of you were armed. I don't know if you were, but some of the guys you were with were armed. You caused a law-abiding citizen to reach for a semi-automatic rifle and protect himself because he thought he was going to die because this has happened before. He has seen his brother get shot in a robbery.

Any challenge to the circuit court's exercise of its sentencing discretion is without merit.

Byrd-McWay also complains that the court found him ineligible for the ERP and the CIP because it believed Byrd-McWay was armed with a firearm even though no firearms were found. It was well within the circuit court's discretion to find Byrd-McWay ineligible for the CIP and the ERP based on the severity of the offense. Additionally, that the perpetrators were armed is supported by the record, including the criminal complaint. The victim reported that he saw men with guns, the victim's attorney stated at Byrd-McWay's sentencing that the surveillance video showed that "one of them clearly has a handgun," and the State informed the sentencing court that a bullet not belonging to the victim was found at the point of entry. Further, the sentencing court specifically stated it did not know if Byrd-McWay was himself armed.

Our review of the record discloses no other potential issues for appeal.[4] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Byrd-McWay in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved from further representing Deishun Lamont Byrd-McWay in this appeal. *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

[4] Byrd-McWay's plea forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. The signed addendum to his plea questionnaire demonstrates his understanding that by entering a guilty plea, he was giving up his "right to challenge the constitutionality of any police action" and his ability to raise defenses such as "self-defense, intoxication, alibi, coercion or necessity."