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September 4, 2018

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

2016AP658-CRNM State of Wisconsin v. Robina Janice Sterling (L.C. # 2014CF2381)
2016AP659-CRNM State of Wisconsin v. Robina Janice Sterling (L.C. # 2014CF3074)

Before Brennan, Brash and Dugan, JJ.

In these consolidated appeals, Robina Janice Sterling appeals from two judgments of conviction. She pled guilty to a total of five felonies including: two counts of armed robbery with the threat of force, as a party to a crime; one count of criminal damage to property (reduction in property value greater than $2500); and two counts of second-degree recklessly endangering safety. *See* WIS. STAT. §§ 943.32(2), 939.05, 943.01(2)(d), and 941.30(2) (2013-

14).[1] Sterling's appellate counsel, Hans P. Koesser, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Sterling has not filed a response. We have independently reviewed the record in each case and the no-merit report, as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We, therefore, summarily affirm Sterling's convictions.

At issue are Sterling's convictions in two Milwaukee County Circuit Court cases that are related only because the plea agreements in each case provided that the State would recommend that the sentences imposed in each case be concurrent to each other. In addition, Sterling was represented by the same attorney in both cases. We begin by providing background on each case.

Appeal No. 2016AP658-CRNM – Armed Robberies (2014CF2381)

The criminal complaint in 2014CF2381 alleged that in May 2014, Sterling and another individual robbed cashiers at two restaurants after displaying a firearm. The criminal complaint also referenced two additional uncharged armed robberies involving the same two actors.

Sterling entered a plea agreement with the State pursuant to which she pled guilty as charged, and the two uncharged armed robberies were read in for sentencing purposes. The State agreed to recommend a global sentence of ten years of initial confinement and five years of extended supervision. The State further agreed to recommend that the sentences be concurrent to Sterling's sentences in 2014CF3074.

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

The trial court conducted a plea colloquy with Sterling, accepted Sterling's guilty pleas, and found her guilty.[2] A presentence investigation (PSI) report was not ordered. The sentencing hearing was held in the morning on May 8, 2015, several hours before Sterling was sentenced in the other criminal case. Trial counsel urged the trial court to impose a total sentence of three years of initial confinement and three years of extended supervision. Trial counsel's sentencing argument discussed not only Sterling's strengths but also the fact that she was providing assistance to the State in another criminal matter.

The trial court imposed two sentences of eight years of initial confinement and four years of extended supervision, to be served concurrent with each other and with the sentences imposed in 2014CF3074. The trial court also ordered Sterling to provide a DNA sample and pay the applicable surcharges, which included a mandatory $250 DNA surcharge for each felony conviction. *See* WIS. STAT. § 973.046(1r) (imposing a mandatory $250 DNA surcharge for each felony conviction for all defendants sentenced on or after January 1, 2014).[3]

[2] The Honorable M. Joseph Donald accepted Sterling's pleas and sentenced her in this case.

[3] Two mandatory DNA surcharges were assessed in the judgment of conviction for 2014CF2381, and three mandatory DNA surcharges were assessed in the judgment of conviction for 2014CF3074. Because of the multiple DNA surcharges, we previously put these appeals 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 his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument. These cases were then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __. ***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 would be no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges in Sterling's cases.

Appeal No. 2016AP659-CRNM – Apartment Fire (2014CF3074)

The criminal complaint in 2014CF3074 alleged that in June 2014, Sterling and an unknown individual set a fire outside the apartment door of Sterling's former roommate. The fire spread, requiring evacuation of the eight-unit apartment building and "render[ing] the building uninhabitable." Sterling was charged with one count of arson of a building and two counts of first-degree recklessly endangering safety (for endangering two specific residents).

Sterling entered a plea agreement with the State pursuant to which she pled guilty to reduced charges. In exchange for her guilty pleas to one count of criminal damage to property and two counts of second-degree recklessly endangering safety, both sides were free to argue for an appropriate sentence, but the State agreed to recommend that Sterling's sentences be concurrent to her sentences in 2014CF2381. Sterling appeared before the trial court on January 21, 2015, to enter her pleas, but after the plea colloquy began, the hearing was continued to the next day so that Sterling could again consult with her trial counsel.

On January 22, 2015, Sterling appeared before the trial court and said that she was ready to plead guilty. The trial court started the plea hearing "from the beginning." At the outset, the trial court confirmed with the parties that pursuant to the plea agreement, "both parties are free to argue, but the State is going to argue that whatever sentence they argue for is concurrent to her current conviction." The State, trial counsel, and Sterling all agreed with the trial court's summary of the plea agreement.

The trial court conducted a plea colloquy with Sterling, accepted Sterling's guilty pleas, and found her guilty.[4] As with the other criminal case, a PSI report was not ordered. The sentencing hearing was held several hours after Sterling was sentenced in the armed robbery case. Asked to restate the plea agreement, the State said that it was "free to argue for any sentence as long as … it [is] concurrent to what she's doing for the armed robbery conviction[s]." The State said it intended to recommend a twenty-year sentence.

The trial court confirmed the terms of the plea agreement with trial counsel and then had the following exchange with Sterling:

> THE COURT: That was your understanding, Ms. Sterling, that the State was free to argue for any sentence concurrent to your armed robbery sentence?
>
> [Sterling]: Concurrent. But 20 years wasn't concurrent to my armed robbery.
>
> THE COURT: Okay. The State didn't give a number ever, right, [trial counsel]?
>
> [Trial counsel]: No.
>
> THE COURT: They had always said they were free to argue for a sentence, but they said it would be concurrent to the armed robbery.
>
> [Trial counsel]: Right. And twenty [years] I assume is the total.
>
> THE COURT: Okay. With something initial confinement and something extended supervision.
>
> [Trial counsel]: Right.

[4] The Honorable Rebecca F. Dallet accepted Sterling's pleas and sentenced her in this case.

> THE COURT: You didn't have a number from the State, Ms. Sterling, but they were free to argue and whatever they argued, they had to argue that it run concurrent with the armed robbery.
>
> [Sterling]: Yes. I understand.

While the State urged the trial court to impose a total sentence of ten years of initial confinement and ten years of extended supervision, trial counsel urged the trial court to impose three concurrent sentences totaling three years of initial confinement and three years of extended supervision, concurrent with the sentences in the other criminal case. As he had done in the morning, trial counsel asked the trial court to consider the fact that Sterling had provided assistance to the State in an unrelated criminal matter.

The trial court followed the State's recommendation, explaining that it believed the State's recommendation was "quite fair" and that it was "important" that Sterling serve "a little bit of additional time" for these crimes over what she was serving in her other criminal case. The trial court ordered Sterling to provide a DNA sample and pay the applicable surcharges, which included a mandatory $250 DNA surcharge for each felony conviction. *See* ***id.***

The trial court also addressed restitution. Sterling stipulated to owing $10,000 in restitution to the apartment building owner, which represented the owner's insurance deductible. However, she contested a request for restitution from tenants in the apartment building, as well as the insurance company's request for $162,000. The trial court denied the insurance company's request after finding that Sterling lacked the ability to pay it, but it set a restitution hearing concerning the tenants' claims. According to online court records, the State told the trial court at the subsequent restitution hearing that "it is no longer seeking additional restitution."

Therefore, the judgment of conviction was not amended and the only restitution Sterling has been ordered to pay is that to which she stipulated: $10,000 to the building owner.

Analysis

The no-merit report analyzes three issues: (1) whether Sterling's pleas in the two criminal cases were knowingly, intelligently, and voluntarily entered; (2) whether there would be any basis to argue that the State agreed to recommend concurrent sentences in the apartment fire case that did not exceed the sentences imposed in the armed robberies case; and (3) whether the trial court erroneously exercised its sentencing discretion or imposed sentences that were unduly harsh or unconscionable. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues.

We begin with Sterling's pleas. There is no arguable basis to allege that Sterling's 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). In both cases, she completed a plea questionnaire and waiver of rights form, which the trial courts referenced during the plea hearings. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the applicable jury instructions and an addendum signed by Sterling and her attorney that outlined additional understandings, such as the fact that Sterling was giving up certain defenses. Each trial court conducted a thorough plea colloquy that addressed Sterling's understanding of the plea agreement and the charges to which she was pleading guilty, the penalties she faced, and the constitutional rights she was waiving by entering

her pleas. *See* § 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.

Both trial courts referenced the guilty plea questionnaire and the jury instructions, and both also went through the elements of each crime with Sterling. Each trial court confirmed with Sterling that she knew the trial court was not bound by the plea agreement and could impose the maximum sentence. The trial courts also discussed with Sterling the constitutional rights she was waiving, such as her right to a jury trial and her right to testify in her own defense.

Based on our review of the record, we conclude that the plea questionnaires, waiver of rights forms, Sterling's conversations with her trial counsel, and the trial courts' plea colloquies appropriately advised Sterling of the elements of each of the crimes and the potential penalties she 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 Sterling's pleas in either criminal case.

Next, we turn to the no-merit report's discussion of an issue related to Sterling's pleas. The report states that Sterling "now takes the position that the terms of the plea agreement required the State to recommend a sentence before Judge Dallet [for the apartment fire crimes] that would have resulted, if followed by the [c]ourt, in [Sterling] serving no additional time than what she received from Judge Donald [for the armed robberies]." Postconviction/appellate counsel explains that Sterling believes once Judge Donald sentenced her, "the State was prohibited from recommending anything more than 8 years of initial confinement followed by 4 years of supervision (concurrent) in the sentencing hearing before Judge Dallet." Counsel continues:

> [Sterling] indicates it was her understanding that "concurrent" meant not only that the sentences would begin and start running at the same time, but also that they would end at the same time. Consequently, she maintains that she either misunderstood the meaning of "concurrent" sentences, or alternatively, she did understand the meaning of "concurrent" and that the State breached its agreement with her when it recommended 10 years in, 10 years out.

We agree with postconviction/appellate counsel's detailed analysis concluding that there would be no merit to challenging Sterling's pleas or the State's adherence to the plea agreement. Although neither plea colloquy included a discussion of the possibility that Sterling could receive a longer sentence from Judge Dallet, the plea agreements were clearly stated, including the fact that the State was "free to argue" in the arson case but had agreed to recommend "a concurrent sentence to her armed robbery case." Moreover, when the issue arose at sentencing before Judge Dallet, she explained the State's obligations to Sterling, and Sterling said she understood. Sterling offered no objection and asked no questions when the State proceeded to recommend a sentence of ten years of initial confinement and ten years of extended supervision. Thus, the record belies Sterling's suggestion that she believed the recommendation would be limited to the length of the sentence she received from Judge Donald. We discern no basis upon which Sterling could challenge her guilty pleas or allege that the State breached the plea agreement.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial courts erroneously exercised their sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 trial 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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, both trial courts applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Both trial courts considered Sterling's criminal history, which included a 2005 conviction for armed robbery. The trial courts also discussed the seriousness of the crimes for which Sterling was being sentenced and indicated that confinement in prison was necessary to protect the public.

Our review of the sentencing transcripts leads us to conclude that there would be no merit to challenge the trial courts' compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Sterling was facing up to eighty years of imprisonment for the armed robberies, but she received far less; she was sentenced to two concurrent terms of eight years of initial confinement and four years of extended supervision. In the second case, Sterling was facing a total of twenty-three and one-half years of imprisonment and was given a total of ten years of initial confinement and ten years of extended supervision. Moreover, the sentences in the second case are concurrent to the sentences in the first case, so Sterling will serve only two additional years of initial confinement

for the criminal charges associated with the apartment fire. The sentences were "well within" the maximum total sentences, and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hans P. Koesser is relieved of further representation of Sterling 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