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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:

2018AP918-CRNM State of Wisconsin v. Robert Steven Diebitz (L.C. # 2016CF3488)

Before Kessler, P.J., 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).

Robert Steven Diebitz appeals from a judgment of conviction, entered upon his guilty pleas, on one count of possession of a firearm by a felon, one count of criminal trespass to a dwelling as an act of domestic abuse, and one count of battery as an act of domestic abuse. Appellate counsel, Russell J.A. Jones, has filed a no-merit report, pursuant to ***Anders v.***

California, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Diebitz was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, Diebitz's wife, S.L.D.,[2] was in the process of divorcing him. Diebitz had been required by the family court to vacate the shared residence. On August 4, 2016, Diebitz showed up at the residence, but left when the couple's sixteen-year-old son reminded Diebitz that he was not supposed to be at the house. Shortly before midnight, the son heard footsteps above his basement bedroom. Believing his mother to be asleep, he went upstairs and found the basement door blocked with a piece of wood. He was able to push the door open, and found Diebitz in the kitchen. S.L.D. then entered the kitchen as well.

Diebitz had entered through the back door of the home, apparently with a key even though S.L.D. had changed the locks. Diebitz was holding a semi-automatic handgun and being verbally abusive. Both S.L.D. and the son struggled with Diebitz in an attempt to disarm him. During the struggle, Diebitz bit S.L.D.'s arm. Diebitz was disarmed and pushed outside, and the police were called. Responding officers found Diebitz nearby; his blood-alcohol level was above .20. Police also recovered bullets outside S.L.D.'s back door and garage, along with several beer bottles.

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

[2] The no-merit report refers to S.L.D. by her full name. We remind appellate counsel that under WIS. STAT. RULE 809.86(4) (eff. July 1, 2015), a brief in any criminal appeal "shall not, without good cause, identify a victim by any part of his or her name but may identify a victim by one or more initials or other appropriate pseudonym or designation."

Diebitz was originally charged with possession of a firearm by a felon; endangering safety with a dangerous weapon while intoxicated; criminal damage to property of less than $2500; misdemeanor disorderly conduct; and misdemeanor battery. An information amended the charges slightly, replacing the endangering safety offense with a charge of burglary, and replacing the property damage offense with a charge of attempted false imprisonment as an act of domestic abuse. The information also added the domestic abuse modifier to the disorderly conduct and battery charges. An amended information changed the burglary charge to criminal trespass to a dwelling as an act of domestic abuse and removed the domestic abuse modifier from the attempted false imprisonment charge.

Diebitz agreed to resolve his case pursuant to a plea bargain. In exchange for his guilty pleas to possession of a firearm by a felon, criminal trespass as an act of domestic abuse, and battery as an act of domestic abuse, the two remaining counts would be dismissed and read in.[3] The State agreed to recommend a global sentence of three years of initial confinement and three years of extended supervision. The circuit court accepted Diebitz's pleas. It sentenced him to thirty-six months of initial confinement and thirty-six months of extended supervision on the felon-in-possession charge, concurrent with a revocation sentence Diebitz was serving; six months in jail for the criminal trespass, concurrent with the possession sentence; and three months in jail for the battery, consecutive to the possession sentence. Diebitz appeals.

[3] The no-merit report indicates that a charge of receiving or concealing stolen property less than $2500 was also dismissed and read in. However, we have located no such charge against Diebitz in this record.

Appellate counsel identifies two potential issues: whether there is any basis to disturb Diebitz's guilty pleas and whether the circuit court acted within its discretion in sentencing. We agree with appellate counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging Diebitz's pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Diebitz completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. Submitted with the questionnaire were two sheets listing the elements for each of Diebitz's offenses; he had initialed the elements for each offense to which he pled. The questionnaire form correctly noted the maximum penalties Diebitz faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court recited each charge and informed Diebitz of the maximum possible penalties. Although the circuit court did not expressly review the elements of each charge with Diebitz, *see* § 971.08(1)(a), it did inquire whether Diebitz understood what the district attorney would have to prove and whether Diebitz had reviewed the elements of his offenses with counsel. Diebitz answered affirmatively. As noted, those elements were listed on supplemental paperwork and expressly acknowledged by Diebitz. The circuit court confirmed Diebitz's understanding that the plea agreement was not binding on the court. It also ensured he understood how the read-in offenses could be used. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750

N.W.2d 835. The circuit court confirmed with Diebitz that the criminal complaint was sufficiently accurate so as to provide a factual basis for his pleas.

The circuit court did not expressly review with Diebitz the constitutional rights he was waiving with his pleas. However, the circuit court confirmed that Diebitz had reviewed the plea questionnaire with counsel and asked Diebitz if he understood "that by signing that form and giving it to the court you would be telling me you wish to give up all the constitutional rights listed on this form[.]" Diebitz answered affirmatively. The circuit court also failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of such an omission, a defendant must show that his pleas are likely to result in deportation, exclusion from admission, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. Nothing in this record suggests that Diebitz is not a citizen of the United States.

Aside from those two omissions, which cannot sustain a challenge to the pleas, the plea questionnaire and waiver of rights form and the court's colloquy appropriately advised Diebitz of the elements of his offenses and the potential penalties he faced, and complied with the remaining requirements of ***Bangert*** and its progeny for ensuring that a plea is knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the pleas' validity.

The other issue appellate counsel raises is whether the circuit court "acted within" its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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

determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider primary factors including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. *See* ***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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The sentences totaling six years and three months of imprisonment are well within the eleven and one-half years authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.[4]

Upon the foregoing, therefore,

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

[4] Upon conviction for a specified crime, including criminal trespass or battery, the circuit court shall impose a $100 domestic abuse surcharge if the court also finds the offense involved an act by the adult defendant against "his or her spouse or former spouse." *See* WIS. STAT. § 973.055(1)(a)1.-2. The circuit court imposed the domestic abuse surcharge for the battery offense and waived it on the criminal trespass charge. *See* § 973.055(4).

While WIS. STAT. § 973.055(1)(a)2. appears to contemplate an express factual finding by the circuit court about the relationship between the victim and the defendant, no express finding appears in the record. However, there is no arguable merit to a challenge to the surcharge because it is obvious from the record, including Diebitz's own statements, that S.L.D. was his spouse at the time of his offenses.

IT IS FURTHER ORDERED that Attorney Russell J.A. Jones is relieved of further representation of Diebitz 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