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**DISTRICT I**

October 2, 2018

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

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2017AP778-CRNM      State of Wisconsin v. Phalon L. East (L.C. # 2015CF003874)  
2017AP779-CRNM      State of Wisconsin v. Phalon L. East (L.C. # 2016CF00197)

Before Brennan, 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).**

In these consolidated appeals, Phalon L. East appeals from judgments of conviction for one count of delivering ten to fifty grams of heroin, one count of conspiracy to commit delivery of a controlled substance, and one count of felony bail jumping. *See* WIS. STAT.

§§ 961.41(1)(d)3, 961.41(1)(a) and (1x), and 946.49(1)(b) (2015-16).<sup>1</sup> East's appellate counsel, Jeffrey W. Jensen, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). East has not filed a response. We have independently reviewed the record and the no-merit report as mandated by *Anders*. We conclude that there is no issue of arguable merit that could be pursued on appeal. We summarily affirm the judgments.

In August 2015, when East was seventeen years old, he was the subject of a narcotics investigation. He was subsequently charged with three felonies in Milwaukee County Circuit Court Case No. 2015CF3874: delivering heroin, theft as a party to a crime, and possession of a short-barreled rifle. According to the criminal complaint, East sold a confidential informant heroin on August 17, 2015. One week later, when the confidential informant and an undercover officer tried to conduct another drug buy with East, a woman who was acting as a courier for East took the buy money and drove away without providing any heroin, which led to the theft charge. Finally, officers searched East's home on August 27 and recovered a short-barreled rifle.

East posted \$1000 cash bail on August 29, 2015, and was released on GPS monitoring. On September 18, 2015, East's release was revoked due to a GPS monitoring violation, and his bail was forfeited. He subsequently retained counsel, and on October 14, 2015, he was again released on GPS monitoring after posting \$10,000 cash bail.

In January 2016, East was arrested and charged with conspiracy to commit delivery of narcotics, robbery with use of force as a party to a crime, and felony bail jumping. The complaint in Milwaukee County Circuit Court Case No. 2016CF197 alleged that on January 14,

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

2016, East offered to sell a different confidential informant Percocet pills and arranged to have another man deliver them to the confidential informant. The robbery charge was based on the allegation that the man who was delivering the Percocet pills for East grabbed the confidential informant's money, pushed the confidential informant, and fled without providing the Percocet pills. The bail jumping charge was based on East's failure to comply with the terms of his bond in 2015CF3874, which prohibited him from committing new crimes.

On January 22, 2016, the trial court granted East's motion to suppress evidence, including the short-barreled rifle that was seized from his home without a warrant on August 27, 2015. On March 22, 2016, East entered a plea agreement with the State resolving the charges in both cases. In 2015CF3874, the State agreed to dismiss outright the rifle possession charge. East agreed to plead guilty to delivery of heroin, and the theft charge was dismissed and read in for sentencing purposes. In 2016CF197, East agreed to plead guilty to both conspiracy to commit delivery of narcotics and felony bail jumping, and the robbery charge was dismissed and read in for sentencing purposes. The State agreed to recommend prison sentences with the length of the sentences left to the trial court, and East was free to argue for what he felt was an appropriate sentence.

The trial court conducted a plea colloquy with East, accepted East's guilty pleas, and found him guilty. In 2015CF3874, the trial court sentenced East to seven years of initial confinement and four years of extended supervision, and it ordered him to pay a fine of \$500. The trial court also ordered East to pay \$1880 in restitution, which represented buy money that

was not recovered from East.<sup>2</sup> In 2016CF197, the trial court imposed a sentence of three years of initial confinement and two years of extended supervision for the conspiracy count, as well as a \$500 fine, and it ordered that the sentence be served consecutive to the sentence in 2015CF3874. The trial court imposed a concurrent sentence of two years of initial confinement and two years of extended supervision for the bail jumping count. East was also ordered to pay three mandatory \$250 DNA surcharges for his three felony convictions.<sup>3</sup>

After a notice of intent to pursue postconviction relief was filed, trial counsel filed a motion asking the trial court to reconsider East's sentences and impose a shorter period of initial confinement. The trial court issued an order indicating that it was declining to consider the merits of the motion so that East could consider all of his options for postconviction relief with postconviction counsel. This appeal follows.

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<sup>2</sup> The State submitted a written restitution request detailing the amount of pre-recorded currency used for two controlled drug buys and the amount of currency not previously recovered from East. Trial counsel acknowledged receipt of the restitution request and did not contest either the amount of the restitution request or East's ability to pay restitution. Under the circumstances, there would be no arguable merit to challenge the restitution order. See *State v. Szarkowitz*, 157 Wis. 2d 740, 749-50, 460 N.W.2d 819 (Ct. App. 1990) (allowing trial court to proceed with a restitution order in the absence of an objection by the defendant to the amount of restitution requested or the defendant's assertion of his or her inability to pay).

<sup>3</sup> Because East was ordered to pay three mandatory DNA surcharges, we delayed deciding these appeals until the Wisconsin Supreme Court could decide *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. We continued to delay deciding East's appeals until the issuance of *State v. Freiboth*, 2018 WI App 46, \_\_\_ Wis. 2d \_\_\_, 916 N.W.2d 643. *Freiboth* held 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. See *id.*, ¶12. Consequently, there would be no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges in East's cases.

The no-merit report analyzes two issues: (1) whether there would be arguable merit to filing a postconviction motion seeking plea withdrawal; and (2) whether the trial court erroneously exercised its sentencing discretion. This court agrees with 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 East's pleas. There is no arguable basis to allege that East'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). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). East signed an addendum to the plea questionnaire indicating that he was giving up additional rights and defenses, and the jury instructions stating the elements of each crime were made a part of the record. The trial court confirmed with trial counsel that she reviewed the contents of the plea questionnaire and addendum with East. The trial court also discussed with East the ramifications of allowing a crime to be read in, and it went through the elements of each crime with East.

The transcript and the plea hearing documents demonstrate that the trial court conducted a thorough plea colloquy that addressed the charges to which East was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* WIS. STAT. § 971.08; *State v. Hampton*, 2004 WI 107, ¶¶20-24, 38, 274 Wis. 2d 379, 683 N.W.2d 14; *Bangert*, 131 Wis. 2d at 266-72. We conclude that the plea questionnaire, waiver of rights form, East's conversations with his trial counsel, and the trial court's plea colloquy appropriately

advised East of the elements of the crimes and the potential penalties he 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 East's pleas.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its 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 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 trial court's discretion. *See Gallion*, 270 Wis. 2d 535, ¶43.

Here, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The trial court considered trial counsel's assertion that East should be given a lesser sentence because East "was exposed to a drug lifestyle" at an early age by his family. The trial court gave East credit for accepting responsibility and noted that his past criminal record included only a juvenile

adjudication for a 2014 battery, which was resolved by a consent decree. The trial court also discussed the seriousness of East's crimes, adding: "I can't remember the last time I have had a 17[-]year-old [defendant] with this extensive amount of drug dealing." The trial court said that confinement was "necessary to protect the community" and that East "needs some correctional treatment ... in a confined setting."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with *Gallion*. Further, there would be no merit to assert that the sentences were excessive. See *Ocanas*, 70 Wis. 2d at 185. East was facing up to twenty-eight years of initial confinement and eighteen years of extended supervision. East's sentences totaling ten years of initial confinement and six years of extended supervision are well within the maximum total sentence, 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.").

Finally, we briefly address an issue that was not discussed in the no-merit report. When the trial court assessed two \$500 fines against East, it explained the reason for doing so, stating: "Because there's certainly an economic component with these crimes I'm also going to issue some penalties that are economic as well to show you that in the long run dealing with the drugs does not pay." While the trial court explained the reason for imposing the fines, it did not explicitly make a finding regarding East's ability to pay the fines. See *State v. Ramel*, 2007 WI App 271, ¶15, 306 Wis. 2d 654, 743 N.W.2d 502 (stating that it is necessary for a sentencing court to determine whether a defendant has the ability to pay a fine if the court intends to impose one). In the absence of "findings with regard to the ability to pay, we will search the record to

determine whether it supports the court’s sentencing decision.” *See State v. Vesper*, 2018 WI App 31, ¶28, 382 Wis. 2d 207, 912 N.W.2d 418. We conclude there would be no arguable merit to further proceedings concerning East’s ability to pay the fines because the record demonstrates that he had the ability to pay them. Specifically, East retained counsel and also posted a total of \$11,000 in cash so that he could be released while his first case was pending. Moreover, online court records for these two cases indicate that all of East’s financial obligations related to these cases—totaling \$6078.13—have been satisfied.<sup>4</sup>

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved from further representing Phalon L. East in these appeals. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>4</sup> A short notation in the online record for 2015CF3874 suggests the financial obligations were satisfied from the \$10,000 cash bail on file.