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October 3, 2018

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

2017AP2011-CRNM State of Wisconsin v. Antwon Dylan Jordan (L.C. # 2015CF5386)

Before Kessler, P.J., Brennan and Brash, 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).

Antwon Dylan Jordan 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 resisting an officer causing a soft tissue injury to the officer, and one count of possession of tetrahydrocannabinols (THC) as a second or subsequent offense. Appellate counsel, Pamela Moorshead, 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] Jordan was advised of his right to file a response, but he 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, two officers on patrol attempted to conduct a field interview of Jordan, but, before the uniformed officer in the marked squad car could speak with him, Jordan fled and ignored commands to stop. When officers caught up to Jordan, he struggled with them while reaching for his waistband. Both officers were injured, one when his hand struck concrete and one when Jordan pulled his index finger and twisted. In a search incident to arrest, police recovered a loaded gun, marijuana, and cocaine on Jordan's person.

Jordan was charged with one count of possession of a firearm by a felon, one count of resisting an officer resulting in a soft tissue injury to the officer, one count of possession of cocaine as a second or subsequent offense, and one count of possession of THC as a second or subsequent offense. Jordan agreed to resolve his case through a plea. In exchange for his guilty pleas to the other three offenses, the cocaine charge would be dismissed and read in. The State also agreed to recommend a global sentence of four years' initial confinement and four years' extended supervision. The circuit court accepted Jordan's pleas and imposed three years' initial confinement and two years' extended supervision for the felon-in-possession count, two years' initial confinement and two years' extended supervision for the resisting count, and twelve

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

months in the House of Correction for the THC count. The three sentences were concurrent to each other but consecutive to any other sentence. Jordan appeals.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Jordan's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging Jordan's pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Jordan 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. Trial counsel included the jury instructions with the form. The form correctly acknowledged the maximum penalties Jordan faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *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. In large part, the circuit court conducted the necessary steps for ensuring a knowing, intelligent, and voluntary plea. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (listing circuit court duties during plea colloquy). We note that the circuit court did not expressly review the individual elements of each offense with Jordan, a step commonly employed to "[e]stablish the defendant's understanding of the nature of the crime with which he is charged[.]" *See* ***id.***; *see also* § 971.08(1)(a). However, the circuit court recited the charges to Jordan and inquired if he understood the charges, and it asked whether he had reviewed the jury instructions

and the elements listed therein. Jordan answered that he had reviewed the instructions and that he understood. The court also confirmed with counsel that she had reviewed the materials, including the instructions and the elements, with Jordan.

The plea questionnaire and waiver of rights form and addendum, the jury instructions, and the court's colloquy appropriately advised Jordan of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.[2]

The other issue counsel raises is whether the circuit court erroneously exercised 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 court should consider primary factors including the gravity of the offense, the character of the offender, and the protection of

[2] Three mandatory DNA surcharges were assessed on the judgment 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 he was not advised at the time of the plea that multiple mandatory DNA surcharges would be imposed. ***Odom*** was voluntarily dismissed before oral argument. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, 916 N.W.2d 643, which holds that a circuit court does not have a duty during a plea colloquy to inform a defendant about mandatory DNA surcharges because the surcharge is not a punishment or a direct consequence of the plea. *See* ***id.***, ¶12. Thus, there is no arguable merit to a claim for plea withdrawal based on the assessment of multiple mandatory DNA surcharges.

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.

The circuit court here explained that probation was not appropriate because Jordan was on probation at the time of this offense and had a prior probation revocation. It explained that although Jordan was likely to be revoked as a result of incurring these charges, a consecutive sentence of some sort would be necessary because this case involved separate decisions that caused a different harm. The court identified proper objectives for each sentence and considered only proper factors, like the seriousness of the offenses and the risk to the community, in light of Jordan's prior record.

The maximum possible sentence Jordan could have received was nineteen and one-half years' imprisonment. The concurrent sentences totaling five years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is 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 sentencing court's discretion.

We note two additional potential issues that we have independently identified and considered that counsel did not address.

Jordan was charged with one count of resisting an officer causing a soft tissue injury. The charging section of the criminal complaint does not identify the injured officer, and the narrative section indicates that two officers were injured in some fashion. It appears that Jordan was directly responsible for injuring only one of them, by grabbing and twisting the officer's

index finger. The other officer was injured during the struggle when his hand struck concrete. However, the State referenced the fact that two officers were injured at both the plea and sentencing hearings. We therefore have examined whether there is any arguable merit to a claim that the charge was duplicitous.

"Duplicity is the joining in a single count of two or more separate offenses." ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983). However, "acts which alone constitute separately chargeable offenses, 'when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense' without violating the rule against duplicity." ***Id.*** at 587 (citations omitted). The State has the discretion in determining how to issue the charge, subject to the reasons that duplicity is prohibited. *See* ***id.*** at 588.

Some of the concerns about duplicity, such as guaranteeing jury unanimity, are not present here. *See* ***id.*** at 586-87. The most applicable ones—notice to defendant, protection against double jeopardy, and ensuring appropriate sentencing—are satisfied. *See* ***id.*** And, in any event, Jordan waived any duplicity challenge with his plea. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (valid guilty plea waives all nonjurisdictional defects and defenses). Accordingly, there is no arguable merit to a duplicity challenge to the resisting causing injury charge.

We also observe that Jordan had filed a *pro se* motion to suppress evidence based on a "nonconsensual investigatory stop" that he claimed lacked probable cause or legal grounds. The circuit court declined to address the motion because Jordan was represented by counsel. Trial counsel evidently did not see a need to pursue the motion, although had there been a ruling on

the motion, Jordan would have been able to challenge a denial on appeal, notwithstanding his guilty pleas. *See* WIS. STAT. § 971.31(10). We have therefore considered whether there is any arguable merit to claiming ineffective assistance of trial counsel for failing to pursue a suppression motion.

The criminal complaint does not explain the reason for the attempted stop. However, an officer testified at the preliminary hearing that there had been a burglary a few minutes earlier only a few blocks away from where they encountered Jordan. An Xbox had been stolen, and Jordan was carrying a box.[3] Additionally, when the State responded to Jordan's *pro se* motion, it noted that he had attempted to cross the street mid-block in front of the police car—*i.e.*, jaywalking—causing the squad to have to brake unexpectedly, which is a violation of WIS. STAT. § 346.24(2).

Whether a stop and seizure is constitutional is a question of law we review *de novo*. *See* ***State v. Pugh***, 2013 WI App 12, ¶8, 345 Wis. 2d 832, 826 N.W.2d 418. "'[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.'" ***Id.***, ¶9 (quoting ***Terry v. Ohio***, 392 U.S. 1, 22 (1968)). "Thus, 'police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause.'" ***Pugh***, 345 Wis. 2d 832, ¶9 (quoting ***United States v. Sokolow***, 490 U.S. 1, 7 (1989) (internal quotation marks omitted).

[3] Ultimately, Jordan was not linked to the burglary and another person was arrested and charged.

In light of the recent burglary, Jordan's proximity, and the fact that he was carrying a box, officers had a sufficient reasonable suspicion supported by articulable facts to justify a ***Terry*** investigative stop. Even without the possible link to a burglary, officers could have stopped him to discuss the jaywalking, despite the fact that jaywalking is only a forfeiture offense. *See* WIS. STAT. § 346.30(1)(a) (forfeiture amounts for offense); *see also* ***State v. Griffin***, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994). Once Jordan fled from police following their lawful attempt to stop him, they had additional justification for an investigatory stop. *See* ***State v. Anderson***, 155 Wis. 2d 77, 82, 88, 454 N.W.2d 763 (1990). Any motion to suppress based on an invalid stop would clearly have been denied, and an attorney is not ineffective for failing to pursue a meritless argument. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Thus, there is no arguable merit to a claim that trial counsel was ineffective for not pursuing a suppression motion.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of further representation of Jordan 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