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October 5, 2018

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

2016AP2143-CRNM State of Wisconsin v. Antwon M. Brown (L.C. # 2014CF671)

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).

Antwon M. Brown appeals a judgment of conviction entered upon his no-contest pleas to three felonies: (1) first-degree recklessly endangering safety; (2) possessing with intent to deliver three grams or less of heroin, a controlled substance; and (3) possessing with intent to deliver one gram or less of cocaine, a controlled substance. *See* WIS. STAT. §§ 941.30(1) (2013-

14),[1] 961.41(1m)(d)1., 961.41(1m)(cm)1g. He also appeals a judgment of conviction entered upon his no-contest plea to the misdemeanor offense of battery by use of a dangerous weapon. *See* WIS. STAT. § 940.19(1), 939.63(1)(a).

Appellate counsel, Attorney Gregory P. Seibold, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16). Brown did not file a response. Based upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm.[2] *See* WIS. STAT. RULE 809.21 (2015-16).

According to the criminal complaint filed in Fond du Lac County case No. 2014CF671, S.T. called 911 on December 23, 2014, and said she needed help "right now." When police arrived at S.T.'s home in Fond du Lac, Wisconsin, she reported that her former boyfriend, Brown, had threatened to harm her if he determined that she had stolen any of his cocaine and heroin. He then held her at knifepoint while hitting her in the face and stealing jewelry from her purse. Brown next hit her with a knife, puncturing her skin, then forced her into the bathtub and threatened to kill her. Officers at the scene located a pill bottle on the porch of S.T.'s home. The bottle contained two baggies, each with a substance inside that chemical testing subsequently determined to be heroin. The bottle also contained five rocks subsequently determined to be

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The notice of appeal in this case makes explicit reference only to the judgment convicting Brown of felonies and does not reference the judgment convicting Brown of a misdemeanor. The no-merit report, however, discusses the potential merits of a challenge to all of Brown's convictions. We are satisfied that the notice of appeal is sufficient to permit review of both judgments. *See* ***Rhyner v. Sauk Cty.***, 118 Wis. 2d 324, 326, 348 N.W.2d 588 (Ct. App. 1984) (notice of appeal is sufficient if we are able to determine what is appealed).

cocaine. The State charged Brown with seven crimes: armed robbery, first-degree recklessly endangering safety by use of a dangerous weapon, false imprisonment by use of a dangerous weapon, possessing with intent to deliver heroin, possessing with intent to deliver cocaine, battery by use of a dangerous weapon, and disorderly conduct by use of a dangerous weapon.

Brown disputed the charges for some time, but in due course he decided to resolve the charges with a plea bargain. On October 12, 2015, Brown entered no-contest pleas to first-degree recklessly endangering safety, possessing with intent to deliver three grams or less of heroin, possessing with intent to deliver one gram or less of cocaine, and battery by use of a dangerous weapon. The remaining charges were dismissed and read in for sentencing purposes. The parties' plea bargain included a joint recommendation for a ten-year term of initial confinement that would encompass the charges in both this case and in Fond du Lac County case No. 2015CF333, in which Brown pled no contest to possessing with intent to deliver heroin as a party to a crime.[3]

The circuit court sentenced Brown in December 2015. For the crime of first-degree recklessly endangering safety, the circuit court imposed a seven-year term of imprisonment, bifurcated as four years of initial confinement and three years of extended supervision. For possessing with intent to deliver three grams or less of heroin, the circuit court imposed an

[3] When Brown entered his no-contest pleas in Fond du Lac County case No. 2014CF671, he also resolved the charges pending against him in Fond du Lac County case No. 2015CF333. The judgment of conviction in the latter case is not before this court, and we discuss case No. 2015CF333 only to the extent that the proceedings are intertwined with the resolution of case No. 2014CF671, which underlies this appeal.

evenly bifurcated four-year term of imprisonment. For possessing with intent to deliver one gram or less of cocaine, the circuit court imposed an evenly bifurcated two-year term of imprisonment. The circuit court ordered Brown to serve the three felony sentences consecutively to each other and to any other previously-imposed sentence. The circuit court also imposed a concurrent, nine-month sentence for battery by use of a dangerous weapon.[4]

In the no-merit report, appellate counsel first discusses whether Brown entered his no-contest pleas knowingly, intelligently, and voluntarily. Upon our independent review of the record, we are satisfied that appellate counsel properly analyzes why pursuit of plea withdrawal in this case would lack arguable merit. Additional discussion of that issue is not warranted.

[4] The sentencing hearing in Fond du Lac County case No. 2014CF671 also encompassed Brown's sentencing in Fond du Lac County case No. 2015CF333. The judgment of conviction in case No. 2014CF671 reflects a $250 DNA surcharge, and electronic docket entries in 2015CF333 reflect that the circuit court imposed a $250 DNA surcharge in that matter as well. In light of those surcharges, we delayed resolution of this appeal 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 plea that he or she faced multiple mandatory DNA surcharges. The supreme court subsequently granted voluntary dismissal of ***Odom*** before oral argument. We then delayed resolution of this appeal pending a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, 916 N.W.2d 643. ***Freiboth*** holds that "plea hearing courts do not have a duty to inform defendants about the mandatory DNA surcharge." *See* ***id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of multiple mandatory DNA surcharges.

We add that while this appeal was pending, the supreme court determined, pursuant to WIS. STAT. § 973.046, that courts sentencing defendants after January 1, 2014, are required to impose a $250 DNA surcharge for each felony conviction and a $200 DNA surcharge for each misdemeanor conviction. *See* ***State v. Williams***, 2018 WI 59, ¶26, 381 Wis. 2d 661, 912 N.W.2d 373. Further, the supreme court determined that the surcharges cannot be waived. *See* ***State v. Cox***, 2018 WI 67, ¶1, 382 Wis. 2d 338, 913 N.W.2d 780. The judgments of conviction underlying this appeal, however, reflect only a single $250 DNA surcharge, notwithstanding Brown's four criminal convictions. The failure to impose multiple DNA surcharges in this case benefits Brown and therefore does not give rise to an arguably meritorious claim for postconviction or appellate relief. *Cf.* WIS. STAT. RULE 809.10(4) (2015-16) (appeal brings before this court rulings adverse to the appellant). Accordingly, we do not further discuss the absence of multiple surcharges in this case.

Appellate counsel also considers whether Brown could pursue an arguably meritorious challenge to his sentences. Although we agree with appellate counsel's conclusion that a sentencing challenge would lack arguable merit, some additional discussion of the issue is warranted.

Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record reflects an appropriate exercise of sentencing discretion in this case. The circuit court identified protection of the public as the primary sentencing objective, and the

circuit court discussed the factors relevant to that goal. The circuit court determined that the drug crimes and the crimes of violence were all serious offenses. In reaching that conclusion, the circuit court particularly emphasized that Brown terrorized S.T. and that heroin is an "insidious substance" that blights the community with "death, heartache [and] loss." The circuit court considered Brown's character, acknowledging his efforts to obtain treatment for substance abuse and his participation in counselling to address his violent tendencies. The circuit court also observed that Brown was bright and articulate, and the circuit court praised him for obtaining a high school equivalency degree while incarcerated. The circuit court expressed concern, however, that Brown did not maintain steady employment when he had thirteen children to support, and the circuit court observed that he appeared "not capable of sticking to ... any specific responsible approach to life and his responsibilities." The circuit court addressed the need to protect the public, noting that the presentence investigation report reflected prior allegations that Brown was violent towards a romantic partner, and the circuit court reiterated its concern about the dangers heroin poses to the community.

The circuit court identified the factors that it considered in choosing sentences in this matter. The factors are proper and relevant. Moreover, the sentences are not unduly harsh. A sentence is unduly harsh "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

Here, Brown faced twelve years and six months of imprisonment and a $25,000 fine for each of his convictions for first-degree recklessly endangering safety and for possessing with intent to deliver three grams or less of heroin. *See* WIS. STAT. §§ 941.30(1), 961.41(1m)(d)1.,

939.50(3)(f). He faced ten years of imprisonment and a $25,000 fine upon his conviction for possessing with intent to deliver one gram or less of cocaine. *See* WIS. STAT. §§ 961.41(1m)(cm)1g., 939.50(3)(g). Finally, he faced a fifteen-month term of imprisonment and a $10,000 fine upon conviction for battery by use of a dangerous weapon. *See* WIS. STAT. §§ 940.19(1), 939.63(1)(a), 939.51(3)(a). The sentences that the circuit court imposed were far less than the law allowed. "[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted). Accordingly, the sentences here are not unduly harsh or excessive. We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Last, we observe that the circuit court declared Brown eligible for the Wisconsin substance abuse program but did not declare him eligible for the challenge incarceration program. Both prison programs offer substance abuse treatment, and an inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.05(1)(am), 302.05(3)(c)2., 302.045(1), 302.045(3m)(b). A circuit court normally exercises its sentencing discretion when determining a defendant's eligibility for these programs. *See* WIS. STAT. § 973.01(3g)-(3m).[5] A defendant is statutorily disqualified, however, from participating in the challenge incarceration program if the

[5] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

defendant has attained the age of forty years before his or her participation would begin. *See* § 302.045(2)(b). The record is uncontroverted that Brown was forty-four years old on the date of sentencing. Accordingly, any challenge to the circuit court's order denying him eligibility for the challenge incarceration program would be frivolous within the meaning of ***Anders***.[6]

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2015-16).

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that appellate counsel, Attorney Gregory P. Seibold, is relieved of any further representation of Antwon M. Brown on appeal. *See* WIS. STAT. RULE 809.32(3) (2015-16).

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

Sheila T. Reiff
Clerk of Court of Appeals

[6] We need not consider whether Brown is statutorily disqualified from participating in the Wisconsin substance abuse program pursuant to his conviction for battery under WIS. STAT. § 940.19(1). *See* WIS. STAT. § 302.05(3)(a)1.(excluding inmates from participating in the program if they are incarcerated in connection with a crime specified in WIS. STAT. ch. 940). Regardless of Brown's statutory qualification for the program, the circuit court's eligibility determination does not adversely affect him and therefore does not give rise to an arguably meritorious claim for postconviction or appellate relief. *Cf.* WIS. STAT. RULE 809.10(4) (2015-16).