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October 18, 2018

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

2017AP1850-CRNM State of Wisconsin v. Lavell Clifton Stokes (L.C. # 2014CF2033)

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).

Lavell Clifton Stokes pled guilty to possessing a firearm while a felon and possessing with intent to deliver heroin in an amount of more than ten grams but less than fifty grams. *See*

WIS. STAT. §§ 941.29(2) (2013-14),[1] 961.41(1m)(d)3. (2013-14). The circuit court imposed consecutive, evenly bifurcated sentences of five years and ten years respectively.[2]

Stokes's postconviction and appellate counsel, Attorney Kathleen A. Lindgren, filed a postconviction motion seeking sentence modification. The circuit court denied the motion.[3] Stokes filed a notice of appeal, and Attorney Lindgren filed a no-merit report on his behalf pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Stokes 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. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police executed a no-knock search warrant at Stokes's home in Milwaukee, Wisconsin, on April 30, 2014. During the search, officers found a pistol, a revolver, twenty-three packages containing a total of 10.08 grams of heroin, and a bag containing 9.82 grams of marijuana. The complaint further alleged that Stokes previously was

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

[2] The circuit court also imposed two mandatory DNA surcharges. In light of those 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 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 held these appeals pending a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. In ***Freiboth***, we concluded 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 mandatory DNA surcharges. We, therefore, lift the hold imposed in this matter and proceed to resolve the appeal.

[3] The Honorable Jonathan D. Watts presided over Stokes's plea and sentencing and entered the judgment of conviction. The Honorable T. Christopher Dee presided over the postconviction proceedings and entered the order denying postconviction relief.

convicted of a felony in Milwaukee County case No. 2013CF4312, and that the conviction remained of record and unreversed. The State charged Stokes with one count of possessing a firearm while a felon and one count of possessing with intent to deliver heroin in an amount of more than ten grams but less than fifty grams.

In due course, the State filed an amended information that charged Stokes with five crimes: the two offenses charged at the outset of the case along with one count of possessing tetrahydrocannabinols as a second or subsequent offense, one count of maintaining a drug trafficking place, and an additional count of possessing a firearm while a felon. Soon thereafter, Stokes decided to resolve the case short of trial. Pursuant to a plea bargain, Stokes pled guilty in June 2015 to one count each of possessing a firearm while a felon and possessing with intent to deliver heroin in an amount of more than ten grams but less than fifty grams. The remaining charges were dismissed and read in for sentencing purposes. The matter proceeded to sentencing the following month, and the State, as agreed, recommended "substantial prison" consecutive to any other sentence.

In the no-merit report, appellate counsel first considers the potential issue of whether Stokes entered his guilty pleas knowingly, intelligently, and voluntarily. Our independent review of the record satisfies us that appellate counsel correctly analyzed this issue and that pursuit of a claim for plea withdrawal would lack arguable merit. Further discussion of this issue is not warranted.

A defendant who enters a valid guilty plea normally forfeits all nonjurisdictional defects and defenses to the criminal charge. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d

62, 716 N.W.2d 886. We are satisfied that no arguably meritorious basis exists to pursue issues arising prior to the guilty pleas in this case.

We also agree with appellate counsel that Stokes could not challenge his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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. We will affirm a sentence imposed by the circuit court if the record shows that the circuit court "engaged in a process of reasoning based on legally relevant factors." ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695 (citation omitted).

The record reflects a proper exercise of sentencing discretion here. The circuit court indicated that punishment and protection of the community were the primary sentencing goals, and the circuit court considered proper factors in fashioning sentences to meet those goals. The circuit court described the "combination" of the two offenses here as "very serious," emphasizing that Stokes was using a firearm to protect a dangerous drug-dealing operation. The circuit court discussed the need to protect the community, stating that Milwaukee County was "setting a record for ... heroin deaths." In considering Stokes's character, the circuit court recognized that Stokes had accepted responsibility for his crimes, and the circuit court explicitly

acknowledged that, in a letter written to the court, Stokes displayed "positive personal characteristics," including honesty and integrity.

The circuit court also considered a variety of other factors. *See* ***Odom***, 294 Wis. 2d 844, ¶7 (listing factors that the circuit court may consider in addition to the primary sentencing factors). The circuit court observed that Stokes's "demeanor in court is good," and the circuit court praised Stokes for obtaining a high school diploma. *See* ***id.*** The circuit court also took into account, however, that he had three prior criminal convictions and that he committed his most recent offenses while on probation for an attempted burglary. *See* ***id.***

The circuit court considered but rejected a probationary disposition. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). The circuit court determined that probation was inappropriate because it would unduly depreciate the gravity of the offenses and because Stokes's criminal history indicated that he required correctional treatment in a confined setting.

The circuit court told Stokes that, in light of the relevant sentencing factors, the offenses warranted a lengthier aggregate sentence than the three to five years of initial confinement that he proposed. The circuit court explained that the appropriate aggregate sentence necessary to protect the community and adequately punish Stokes was seven and a half years each of initial confinement and extended supervision.

The circuit court declined to find Stokes eligible for either the challenge incarceration program (CIP) or the Wisconsin substance abuse program (WSAP). 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. §§ 302.045(1), (3m)(b); 302.05(1)(am), (3)(c)2. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m).[4] In this case, the circuit court denied Stokes eligibility for either program because participation "would reduce by too great an amount the amount of punishment that [the circuit court] determined is appropriate."

The circuit court discussed the factors it considered in fashioning Stokes's sentences. 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). Stokes faced maximum penalties of twenty-five years of imprisonment and a $100,000 fine for possessing with intent to deliver heroin in an amount more than ten grams but less than fifty grams, and he faced maximum penalties of ten years of imprisonment and a $25,000 fine for possessing a firearm while a felon. *See* WIS. STAT. §§ 961.41(1m)(d)3. (2013-14), 939.50(3)(d) (2013-14), 941.29(2)(2013-14), 939.50(3)(g) (2013-14). The sentences that the circuit court imposed were far below the statutory maximums allowed by law. Accordingly, we cannot conclude that the

[4] 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 current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

sentences were unduly harsh or unconscionable. *See* ***Grindemann***, 255 Wis. 2d 632, ¶31. A challenge to the sentences would be frivolous within the meaning of ***Anders***.

In the no-merit report, appellate counsel does not examine the circuit court's order denying Stokes's claims for postconviction relief. A brief discussion of those claims is warranted here.

Stokes first moved for reconsideration of his eligibility to participate in CIP and WSAP. The circuit court correctly denied the motion. As we have seen, the sentencing court properly exercised its discretion in determining his program ineligibility in the first instance. Stokes, therefore, was required to present a new factor that would warrant modification of the eligibility determination. *See* ***State v. Harbor***, 2011 WI 28, ¶¶36-38, 333 Wis. 2d 53, 797 N.W.2d 828 (circuit court may modify a sentence upon a showing of a new factor). A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***id.***, ¶33.

Stokes speculated in his postconviction motion that the sentencing court may have denied him eligibility for CIP and WSAP because the sentencing court did not know it had the power to declare him eligible for the programs "after serving a certain amount of his sentence." *Cf.* ***State v. White***, 2004 WI App 237, ¶¶2, 6-10, 277 Wis. 2d 580, 690 N.W.2d 880 (explaining that the circuit court has discretion to determine when eligibility for the programs may begin). The record does not support Stokes's speculative claim. To the contrary, we presume that judges

know the law. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302. Moreover, as the circuit court observed in its postconviction order, the record of the sentencing proceeding makes "crystal clear" that the sentencing court wanted Stokes "to serve the full amount of confinement time as punishment for his actions in this case." Further pursuit of this issue would lack arguable merit.

Stokes also moved to vacate one of the two mandatory DNA surcharges imposed in this case under WIS. STAT. § 973.046(1r), asserting that a second surcharge constituted a violation of the *ex post facto* clauses of the United States and Wisconsin Constitutions. *See* U.S. CONST. art. I, §10, cl. 1, WIS. CONST. art. 1 §12. Stokes could not pursue an arguably meritorious challenge to the circuit court's order denying his motion. The *ex post facto* clauses prohibit a law that "makes more burdensome the punishment for a crime after its commission." *See* ***State v. Williams***, 2018 WI 59, ¶21, 381 Wis. 2d 661, 912 N.W.2d 373 (citation and brackets omitted). As the circuit court explained, § 973.046(1r) mandating a DNA surcharge for each conviction was in effect when Stokes committed his crimes. Moreover, while this appeal was pending, the supreme court determined that § 973.046(1r) does not run afoul of the *ex post facto* clauses. *See* ***Williams***, 381 Wis. 2d 661, ¶¶16, 43. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

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.

IT IS ORDERED that the hold previously imposed in this matter is lifted.

IT IS FURTHER ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kathleen A. Lindgren is relieved of any further representation of Lavell C. Stokes on appeal. *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