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

2016AP1255-CRNM State of Wisconsin v. Terrance G. Thompson (L.C. # 2014CF1890)

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).

Terrance G. Thompson pled guilty on August 20, 2014, to possessing with intent to deliver heroin in an amount of more than ten grams but less than fifty grams. He also pled guilty on that date to possessing a firearm while a felon. He faced maximum penalties of twenty-five years of imprisonment and a $100,000 fine for the former offense and ten years of imprisonment

and a $25,000 fine for the latter. *See* WIS. STAT. §§ 961.41(1m)(d)3. (2013-14),[1] 941.29(2)(a) (2013-14), 939.50(3)(d), (g) (2013-14). For the drug offense, the circuit court imposed a ten-year term of imprisonment bifurcated as six years of initial confinement and four years of extended supervision. For the firearms offense, the circuit court imposed a consecutive evenly bifurcated four-year term of imprisonment. The circuit court awarded Thompson the fourteen days of sentence credit he requested and ordered that he would be eligible to participate in the Wisconsin substance abuse program after serving a total of seven years of initial confinement. He appeals.[2]

Appellate counsel, Attorney Patrick Flanagan, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Thompson filed a response. Based upon our review of the record, the no-merit report, and the response, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged in a criminal complaint that police executed a search warrant at Thompson's home in Milwaukee, Wisconsin, on May 2, 2014, and found three packages

[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 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 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 a motion to voluntarily dismiss ***Odom*** before oral argument. We then held this appeal pending a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. In ***Freiboth***, we determined 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.

containing heroin in an aggregate amount of 25.75 grams; two packages containing cocaine in an aggregate amount of 9.05 grams; and a loaded semi-automatic pistol. The State further alleged that Thompson previously was convicted of a felony on July 24, 2002, in Milwaukee County circuit court and that the conviction is of record and unreversed. The State charged Thompson with one count of possessing with intent to deliver more than ten grams but less than fifty grams of heroin and one count of possessing a firearm while a felon.

Thompson decided to resolve the charges against him with a plea bargain. Pursuant to its terms, Thompson agreed to plead guilty as charged, and the State agreed to recommend an aggregate fifteen-year term of imprisonment bifurcated as ten years of initial confinement and five years of extended supervision. The circuit court accepted Thompson's guilty pleas in August 2014, and after some delay the matter proceeded to sentencing on April 21, 2015.

Appellate counsel first discusses whether Thompson could pursue an arguably meritorious challenge to the validity of his guilty pleas. The circuit court conducted a thorough plea colloquy that fully complied with the circuit court's obligations when accepting a guilty plea. *See* WIS. STAT. § 971.08 (2013-14), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record—including the plea questionnaire and waiver of rights form and addendum; the attached jury instructions describing the elements of the crimes to which Thompson pled guilty; and the plea hearing transcript—demonstrates that Thompson entered his guilty pleas knowingly, intelligently, and voluntarily. We add that Thompson does not suggest in his response to the no-merit report that he takes issue with the validity of his guilty pleas. Accordingly, we agree with appellate counsel's assessment that a challenge to Thompson's pleas would lack arguable merit. Further discussion of this issue is not warranted.

We next consider whether Thompson could pursue an arguably meritorious challenge to 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. ***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.

We agree with appellate counsel's conclusion that the record here reflects an appropriate exercise of sentencing discretion.[3] The circuit court indicated that punishment, deterrence, and

[3] At the request of Thompson's trial counsel, the circuit court sealed a portion of the sentencing transcript. We have reviewed both the sealed and the unsealed portions.

rehabilitation were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals.

The circuit court described Thompson's offenses as serious, stating that "there's absolutely no other way to look at it." The circuit court found that the crimes were aggravated because Thompson possessed a large amount of heroin, which the court described as a "very dangerous drug," and because he kept drugs and a loaded gun in a home where children were present.

The circuit court considered the need to protect the public. The circuit court found that heroin has "affected [the] community in so many negative ways," and the circuit court emphasized the many risks that Thompson courted by possessing both drugs and a gun.

The circuit court considered Thompson's character at length. The circuit court acknowledged that Thompson was thirty-six years old, that he had endured a difficult childhood, and that he nonetheless successfully obtained a high school education. The circuit court recognized that Thompson had struggled to find steady employment, and the circuit court praised him for securing employment while the case against him was pending. Further, the circuit court acknowledged Thompson's efforts to perform community service during the pendency of the case and took those efforts into consideration. The circuit court also found, however, that Thompson had seven prior convictions for drug offenses as well as prior convictions for bail jumping, resisting an officer, and possessing a firearm while a felon. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (significant criminal record is indicative of character). In the circuit court's view, Thompson's positive characteristics and prosocial actions were insufficient to outweigh his history of repeatedly violating the law.

In response to the no-merit report, Thompson complains that his sentences are unfair. He states that he "demonstrated a great show of character throughout this whole process," emphasizing that he "maintained full time employment during the pendency of the case," "showed up on time to every court date, and was [courteous] and respectful." The record shows that the circuit court took into account a wide variety of relevant sentencing considerations and acknowledged numerous mitigating factors. The circuit court's decision to weigh those factors differently than Thompson would have preferred is not an erroneous exercise of sentencing discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("[O]ur inquiry is whether discretion was exercised, not whether it could have been exercised differently.").

Further, the sentences imposed 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, the penalties imposed are far less than the law allows. "[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." ***Id.*** (citation omitted). Accordingly, Thompson's sentences are not unduly harsh or excessive. We conclude that a challenge to the circuit court's exercise of discretion in selecting the length of Thompson's sentences would lack arguable merit.

We next consider the circuit court's resolution of Thompson's request to be found eligible to participate in the challenge incarceration program and the Wisconsin substance abuse

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. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. A circuit court has discretion to determine both a defendant's eligibility for these programs and when the defendant's eligibility may begin. *See* ***State v. White***, 2004 WI App 237, ¶¶2, 6-10, 277 Wis. 2d 580, 690 N.W.2d 880; WIS. STAT. § 973.01(3g)-(3m).[4] 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.

In this case, the circuit court emphasized that Thompson's actions necessitated confinement in prison and that "society has a right to be protected from people who violate the law." The circuit court therefore determined that Thompson would be eligible for the Wisconsin substance abuse program only after serving a total of seven years of initial confinement.[5] 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).

[5] At sentencing, the circuit court discussed with the parties that an inmate is statutorily disqualified from participating in the challenge incarceration program if the inmate has reached the age of forty before participation would begin. *See* WIS. STAT. § 302.045(2)(b). The Wisconsin substance abuse program, by contrast, has no age limit for participants. *See* WIS. STAT. § 302.05(3)(a). Following discussion of the age limit imposed by § 302.045(2)(b), the circuit court found Thompson ineligible for both the challenge incarceration program and the Wisconsin substance abuse program throughout his first seven years of initial confinement and stated that Thompson would thereafter be eligible for "that program." While the oral pronouncement was ambiguous, the judgment of conviction clarifies that the program for which Thompson is eligible after seven years is the Wisconsin substance abuse program. We observe that Thompson will have passed the age of forty and will therefore be statutorily disqualified from participating in the challenge incarceration program at the end of his seven-year waiting period. Accordingly, we defer to the circuit court's clarification in the judgment of conviction explaining that the ambiguous finding of eligibility for "that program" was a finding of eligibility for the Wisconsin substance abuse program. *See* ***Thorp v. Town of Lebanon***, 225 Wis. 2d 672, 683, 593 N.W.2d 878 (Wis. Ct. App. 1999), *aff'd*., 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59 ("We defer to a [circuit] court's interpretation of its own ambiguous order as long as it is a reasonable interpretation.").

circuit court's decision reflects a reasonable exercise of discretion, and a challenge to that decision would therefore lack arguable merit.

Thompson nonetheless suggests that he can pursue an arguably meritorious postconviction motion to be found eligible for the Wisconsin substance abuse program sooner than seven years into his aggregate term of initial confinement. As we have explained, however, the record shows that the circuit court appropriately exercised its discretion in establishing his program eligibility. Thompson would therefore be required to present a new factor that would warrant modification of the eligibility determination. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (circuit court may not modify a sentence merely upon second thought but may do so upon a showing of a new factor). Nothing in the record or in Thompson's submission suggests that such a new factor currently exists. Accordingly, pursuit of a postconviction motion at this time would lack arguable merit.

Finally, Thompson suggests that he can raise an arguably meritorious claim that his trial counsel was ineffective. A defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Thompson's allegation of prejudicially deficient performance by trial counsel is grounded on a claim that the circuit court judge assigned to this case was biased against Thompson, and therefore trial counsel should have filed a request for substitution of judge at the outset of the proceeding. He asserts that a transcript from a prior criminal case where the judge presided would show "how [Thompson] upset [the] judge" during that earlier case. There is no arguable merit to this claim.

A claim of ineffective assistance of counsel for failing to seek substitution of the assigned circuit court judge cannot succeed unless the record of the proceeding under review demonstrates that the assigned judge was partial or fundamentally unfair. *See* ***State v. Damaske***, 212 Wis. 2d 169, 200-01, 567 N.W.2d 905 (Ct. App. 1997). As the supreme court has explained, the assessment of the prejudice prong of the ***Strickland*** analysis "should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.... [E]vidence about the actual process of decision, *if not part of the record of the proceeding under review* ... should not be considered in the prejudice determination." *See* ***Damaske***, 212 Wis. 2d at 201 (emphasis added) (citing ***Strickland***, 466 U.S at 695). Thus, Thompson's contention that he requires a transcript from another proceeding to prove the judge's purported bias in this case refutes rather than supports his claim.[6] *See* ***id.*** Moreover, we have carefully examined the record in this case, and nothing in it reflects partiality on the part of the

[6] We add that the parties discussed Thompson's prior criminal case during the plea colloquy in this matter because the State relied upon Thompson's conviction in that earlier case to prove his status as a felon. Upon reviewing the docket entries in that case, the circuit court observed that it had accepted Thompson's earlier plea and expressed surprise, asking, "[w]ere you before me in 2002?" The record thus indicates that the circuit court had no independent recollection of interacting with Thompson in connection with an earlier criminal prosecution.

assigned judge. Accordingly, a challenge to trial counsel's effectiveness based on failure to seek judicial substitution would lack arguable merit.

Our independent review of the record does not disclose any other potential issues warranting discussion.[7] 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patrick Flanagan is relieved of any further representation of Terrance G. Thompson 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

[7] Our review of the record reveals that record item R.45 is a transcript of a hearing held in a Milwaukee County criminal case involving a defendant other than Thompson. Upon remittitur, the circuit court shall oversee removal of R.45 from the instant record and shall direct the clerk of circuit court to refile the item as appropriate. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (courts may correct clerical errors at any time).