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

2018AP946-CRNM State of Wisconsin v. Jervon Strotter (L.C. # 2015CF4773)

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).

Jervon Strotter appeals from a judgment of conviction, entered upon his guilty pleas, on three counts of armed robbery as a party to a crime. He also appeals from an order denying his postconviction motion for sentence modification based on a new factor. 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] Strotter was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Strotter's response, we conclude there are no arguably meritorious issues to be pursued on appeal. We therefore summarily affirm the judgment.

Strotter was charged with five counts of armed robbery as a party to a crime for offenses committed during a robbery spree involving himself and five others on October 27-28, 2015. The alleged ringleader, Tiyon L. Satcher, was charged with six armed robberies in the same complaint: four as a co-actor with Strotter and two as the sole defendant.[2] Strotter's case was ultimately resolved through a plea agreement. In exchange for his guilty pleas to three of the charged armed robberies, the State would dismiss and read in the other two armed robberies listed in the complaint. It also agreed not to charge, but to read in, an additional attempted armed robbery. At sentencing, the State would recommend twelve to fifteen years of initial confinement and five years of extended supervision. The circuit court accepted Strotter's guilty pleas and imposed a sentence of four years of initial confinement and four years of extended supervision on each of the three armed robberies, to be served consecutively, for a total of twelve years of initial confinement and twelve years of extended supervision.

After sentencing, Strotter filed a postconviction motion alleging a new factor. He noted that the presentence investigation report (PSI) stated he had been arrested for carrying a

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

[2] The record in this case does not clearly indicate whether the four other actors were charged, and we note that two of them were juveniles.

concealed weapon, but Strotter denied this to the author and the circuit court, leading the circuit court to comment at sentencing:

> You talk about your reaction to this stuff on page nine to this record. Arrested in February of 2012 for carrying a concealed weapon: I don't recall this offense, it is not me. That's your response. I don't know whether it was or not. [The author] obviously got this from NCIC, which is the national record of any time anybody is arrested.

Postconviction counsel could find no record of the arrest, even from the Milwaukee Police Department, and could not access the NCIC report on which the PSI author relied. Thus, Strotter asserted that he was sentenced on inaccurate information, with the circuit court incorrectly believing he had a prior firearm offense and incorrectly believing Strotter to be a liar, and that this inaccuracy constituted a new factor justifying sentence modification.

The circuit court denied the motion. It concluded that Strotter had not shown an inaccuracy by clear and convincing evidence; the circuit court had known that Strotter disputed the concealed carry violation; and, in any event, the alleged concealed carry incident was "one small component among the plenitude of many aggravating and disturbing factors about Strotter" and it was not highly relevant to the sentence. Strotter appeals.

Counsel identifies three potential issues: whether there is any basis for seeking plea withdrawal, whether the circuit court appropriately exercised its sentencing discretion, and whether the circuit court erred in denying the postconviction motion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis on which to seek to withdraw Strotter's guilty pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12

(1986). Strotter 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. The jury instructions for armed robbery and party to a crime liability were included and initialed by Strotter. The form correctly identified the maximum penalty for a count of armed robbery and the form, along with an addendum, also specified the constitutional rights Strotter was waiving with his pleas. *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. The circuit court largely complied with its duties for accepting guilty pleas, *see* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, as well as with the recommendation to review the nature of read-in offenses, *see* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. We note that while the plea questionnaire listed the maximum penalty for a single armed robbery charge, the circuit court explained to Strotter that he faced an aggregate maximum sentence of 120 years' imprisonment and $300,000 in fines.

The circuit court did not specifically review party to a crime liability with Strotter. *See* WIS. STAT. § 971.08(1)(a) (when accepting a guilty plea, the circuit court must "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge"). In his response to the no-merit report, Strotter alleges he "was aware that [he] was plea[d]ing guilty to the case but was not aware of what was going [on] and didn't not [sic] have full understanding of party to a crime[.]" However, Strotter's conclusory assertion in

his no-merit response that he did not understand party to a crime liability does not give rise to an issue of arguable merit because the record conclusively demonstrates to the contrary.[3]

Although the circuit court did not expressly review what it meant to be a party to a crime with Strotter, it had asked him whether he understood that the State would have to prove that he and the others were "all acting as party to a crime" and that Strotter, "as party to a crime, with intent to steal, took property" from its owners. Strotter acknowledged that he understood this. After confirming this information with Strotter, the circuit court asked trial counsel if he had reviewed the elements of each offense, including "[t]he concept of party to a crime" with Strotter; trial counsel confirmed that he had done so. This is supported by the fact that Strotter initialed the jury instructions that explain party to a crime liability.

Ultimately, the record in this case, including the plea questionnaire form and addendum, the jury instructions, and the court's colloquy, satisfy us that Strotter was appropriately advised of the elements of his offenses, including party to a crime liability, and that the circuit court otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. We discern no issue of arguable merit regarding the plea colloquy.

[3] In the no-merit report, counsel indicates that while the circuit court's failure to review party to a crime liability constitutes a *prima facie* defect in the colloquy, she does not believe that she could bring a meritorious plea withdrawal motion under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because she has concluded that she could not allege Strotter did not understand party to a crime liability. She bases this conclusion on "her entire review of the case and discussion with Mr. Strotter. Counsel believes that she cannot reveal the contents of her discussions with Mr. Strotter unless in the context of a supplementary no-merit report, in reply to a response by him."

Despite Strotter's response to the no-merit report claiming he did not understand party to a crime liability, counsel did not file a supplemental no-merit report.

Also in the no-merit response, Strotter notes that his trial attorney did not sign the bottom of the plea questionnaire. Strotter notes that the certification at the bottom of the questionnaire is counsel's confirmation that counsel discussed the document and any attachments with the defendant; counsel believes the defendant understands it and the plea agreement; the defendant is making the plea freely, voluntarily, and intelligently; and counsel saw the defendant sign and date the questionnaire. Strotter claims that without counsel's signature, "the plea would not be [valid] and the sentencing would not have happen[ed] which itself is evidence that a manifest injustice has occurred which warrants withdrawal of the plea."

We observe that although trial counsel did not sign the plea questionnaire form, he did sign the addendum attached to it. At the start of the plea hearing, Strotter acknowledged that he had signed the plea documents. Additionally, trial counsel orally confirmed at the plea hearing that he had reviewed the plea questionnaire with Strotter, as well as the elements of the offenses, the concept of read-ins, the maximum penalties, potential defenses, and mitigating circumstances. Trial counsel also confirmed his satisfaction that Strotter was entering the plea knowingly, intelligently, and voluntarily. We discern no issue of arguable merit from trial counsel's failure to sign the plea questionnaire form in this case and, ultimately, no arguable merit to a challenge to the pleas' validity.

The second 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 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.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors when setting the sentence length. It explained that probation was not appropriate, stating, "[I]f I didn't send you to prison I couldn't face these people that you did this to. It would unduly depreciate the seriousness of the offenses that you did." We observe that the circuit court had earlier noted that Strotter's correctional history showed his adjustment to community supervision was poor. The circuit court also imposed restitution as part of the sentence; Strotter agreed to the amount.

We observe that defense counsel asked the circuit court to impose a sentence less than that received by the supposed ringleader, Satcher, who had received a twenty-two and one-half-year sentence. The circuit court noted it was mindful of the sentence it had given to Satcher, but stated that Strotter was "the guy with the worst record."

The maximum possible sentence Strotter could have received was 120 years' imprisonment. The consecutive sentences totaling twenty-four years' imprisonment are 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 are 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 is no arguable merit to a challenge to the sentencing court's discretion.

The final issue counsel discusses is whether the circuit court erred in denying Strotter's postconviction motion. The motion claimed an inaccuracy in the PSI was a new factor under ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656.

A new factor is a fact, or a 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citing ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law." ***Harbor***, 333 Wis. 2d 53, ¶33 (citation omitted). "The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court[.]" ***Id.***

The PSI inaccuracy—that Strotter had been arrested for carrying a concealed weapon, which postconviction counsel could not confirm—is not a new factor because it existed and was known to the parties at the time of sentencing. *See* ***State v. Crockett***, 2001 WI App 235, ¶¶13-14, 248 Wis. 2d 120, 635 N.W.2d 673. In ***Norton***, by contrast, the inaccuracy that was deemed a new factor—the fact that Norton's probation was revoked despite the sentencing court relying on a representation that it would not be—did not exist until his probation was actually revoked subsequent to the sentencing hearing. *See* ***id.***, 248 Wis. 2d 162, ¶14. Additionally, we know the parties in this case all knew about the supposed inaccuracy in Strotter's PSI at the time of sentencing because the circuit court expressly commented on Strotter's denial of the offense.

However, "a criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912

(1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

In denying Strotter's postconviction motion, the circuit court explained:

> [E]ven assuming that this information was inaccurate, the court acknowledged on the record that the defendant disputed the CCW arrest, and significantly, the court did not express an opinion one way or the other about the accuracy of that record…. The CCW arrest was just one small component among the plenitude of many aggravating and disturbing factors about the defendant the court was presented with at sentencing, and even though this information was relevant to the extent that an offender's prior record is relevant at any sentencing hearing, it was not *highly* relevant to the court's overall sentencing decision. The court's sentencing decision would have been no different without it.
>
> Apart from the CCW arrest, the defendant was less than forthcoming about his other criminal contacts….
>
> Irrespective of the CCW arrest, the court was authorized to consider the defendant's other criminal contacts in evaluating his character and rehabilitative needs. Those contacts in conjunction with the defendant's alarming conduct in this case, his past failures on supervision, his display of violence while at Mendota Mental Health Institute, his young age, his delinquent school behavior, his poor academic achievement and his lack of any expression of remorse, at least before he talked to the presentence writer, said everything about the need for a significant period of incarceration in order to punish the defendant, to deter him and others from committing crimes of this nature, to promote his sorely needed rehabilitation and to protect the community. Given the weight of all of the negative information about the defendant that the court considered in fashioning its sentence in this case, a modification of the sentence is not justified based upon the unverified CCW arrest information in the PSI.

Thus, the record reflects both that the circuit court did not actually rely on any inaccuracy to craft the sentence it imposed and that, even if it were a new factor, the circuit court did not believe the supposed inaccuracy justified sentence modification. Whether we apply the new factor standard or the inaccurate information standard, there is no arguable merit to challenging the circuit court's denial of Strotter's postconviction 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 and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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