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November 1, 2018

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

2018AP979-CRNM State of Wisconsin v. Rafeal L. Glosson (L.C. # 2016CF150)

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).

Rafeal L. Glosson appeals from a judgment of conviction, entered upon his guilty plea, on one count of robbery with the use of force as a party to a crime. Glosson also appeals from an order denying his postconviction motion for sentence modification based on a new factor. Appellate counsel, Nicole M. Masnica, 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] Glosson 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 are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

According to the criminal complaint, victim G.Z. arrived at his home and parked his car when two men approached him from the front of his neighbor's home and demanded his vehicle at gunpoint. The gunman thrust the gun forward, hitting G.Z. in the forehead and causing a laceration that began bleeding. The gunman demanded G.Z.'s keys, which G.Z. surrendered, and ordered G.Z. to the ground. The gunman gave the keys to his accomplice. The accomplice started the car; the gunman began kicking G.Z. in the ribs and took G.Z.'s money, checkbook, jewelry including a watch, and cell phone.

Police later located the stolen vehicle. The person driving it named Glosson as one of the people from whom he bought the car. Police developed a photo array, which was shown to G.Z., and G.Z. identified Glosson as the gunman. Glosson was arrested wearing G.Z.'s watch.

Glosson was charged with one count of armed robbery with the use of force as a party to a crime. The case was ultimately resolved with a plea agreement. In exchange for Glosson's guilty plea, the State agreed to amend the charge in this case to robbery with the use of force as a party to a crime. It also agreed to dismiss and read in a charge of operating a motor vehicle without the owner's consent from Milwaukee County Circuit Court case No. 2015CF2474. At

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

sentencing, the State agreed it would recommend prison but would not specify an amount. The circuit court accepted Glosson's guilty plea to the amended charge and ultimately imposed five years' initial confinement and four years' extended supervision, with no eligibility for either the challenge incarceration or substance abuse programs.

Glosson brought a postconviction motion seeking sentence modification based on a new factor. He asked the circuit court to find him eligible for the two programs because the circuit court had not heard about his significant history of opioid addiction at sentencing. The circuit court denied the motion, noting that even if Glosson's opioid issues were a new factor, that factor did not justify sentence modification. Glosson appeals.

Counsel identifies three potential issues for appeal: whether there is any basis for a challenge to the validity of Glosson's guilty plea, whether the circuit court appropriately exercised its sentencing discretion, and whether the circuit court erred when it denied Glosson's postconviction motion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging Glosson's guilty plea as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Glosson 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 form correctly acknowledged the maximum penalties Glosson 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. The plea was largely compliant with the circuit court's duties for accepting a guilty plea, including the recommended step of explaining the nature of read-in offenses. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (listing circuit court duties at plea colloquy); ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835 (recommending explanation of read-in offenses). However, the circuit court neglected to review the elements of party to a crime liability, and the jury instructions provided by trial counsel also omit the instruction on party to a crime liability. *See* WIS. STAT. § 971.08(1)(a) (during plea colloquy, circuit court must "[a]ddress the defendant personally and determine that the plea is made … with understanding of the nature of the charge").

Despite the failure of the circuit court to review party to a crime liability with Glosson, there is no arguable merit to challenging Glosson's guilty plea. First, the circuit court inquired of trial counsel whether he had reviewed the concept of party to a crime liability with Glosson, and counsel responded that he had. Second, the facts alleged in the complaint, which Glosson personally acknowledged could be used as a factual basis for the plea, establish Glosson's direct liability for the robbery as the principal actor—G.Z. identified him as the gunman who took his keys, money, jewelry, and phone. The circuit court did personally review the elements of robbery with Glosson. Under this particular set of circumstances, when Glosson could be held directly liable for the robbery, it was not necessary for the circuit court to additionally explain party to a crime liability. *See* ***State v. Brown***, 2012 WI App 139, ¶¶12-13, 345 Wis. 2d 333, 824 N.W.2d 916.

We additionally note a related issue that counsel did not address. The record reflects that in case No. 2015CF2474, the case with the read-in charge, a different trial attorney raised an issue regarding Glosson's competency to stand trial. Glosson was examined and the examiner concluded that Glosson was competent but with reservations stemming from Glosson's low I.Q. and "borderline intelligence." Based on this information, trial counsel in this case made a record that he had "taken great care in reviewing this" matter with Glosson, explaining they had discussed the case for about three hours the day before, and had spent about an hour reviewing the plea questionnaire "in great detail." The record before us does not reflect any confusion or other behavior on Glosson's part that would suggest that Glosson did not understand the plea colloquy or that trial counsel, in this case, should have raised competency prior to the plea.

Thus, the plea questionnaire and waiver of rights form and addendum, the jury instructions for robbery, and the circuit court's colloquy adequately advised Glosson of the elements of his offense and the potential penalties he faced, and otherwise sufficiently 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 plea's 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 satisfies us that the circuit court properly exercised its sentencing discretion. It identified proper sentencing objectives, explained why probation was not appropriate, and considered only proper sentencing factors, including mitigating factors.

It appears, from Glosson's reaction at the sentencing hearing, that he felt the sentence was excessive. However, the maximum possible sentence Glosson could have received was fifteen years' imprisonment. The sentence of nine 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 circuit court's sentencing discretion.[2]

Finally, counsel discusses whether there is any arguable merit to a challenge to the circuit court's denial of Glosson's postconviction motion. Glosson asked the circuit court to reconsider its denial of his eligibility for the challenge incarceration and substance abuse programs. Glosson asserted there was a new factor and "presented information that at the time of the incident, he suffered from an addiction to opiates, a fact which the court was not aware of at the time of sentencing."

[2] The circuit court also ordered Glosson to pay restitution; Glosson agreed to the amount.

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 circuit court concluded that even if Glosson's opioid addiction constituted a new factor, sentence modification was not warranted.[3] The circuit court explained that the fact had "absolutely no impact" on its declaration of ineligibility for programs—the crime of conviction had been too violent. The circuit court explained that the sentence imposed was chosen to punish Glosson and for the "sanctity and security of the community." We discern no arguably meritorious challenge to the circuit court's exercise of discretion in concluding that sentence modification was not warranted.

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

Upon the foregoing, therefore,

[3] We note, as did the circuit court, that Glosson told the author of a presentence investigation report only about his marijuana use and specifically denied any other drug issues. Information known to a party at the time of sentencing generally does not constitute a new factor. *See* ***State v. Crockett***, 2001 WI App 235, ¶¶13-14, 248 Wis. 2d 120, 635 N.W.2d 673.

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

IT IS FURTHER ORDERED that Attorney Nicole M. Masnica is relieved of further representation of Glosson 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