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August 14, 2019

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

2018AP2090-CRNM State of Wisconsin v. Lamarr Taylor (L.C. # 2015CF4714)

Before Kessler, Brennan 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).

Lamarr Taylor pled guilty to first-degree reckless injury while armed with a dangerous weapon. He faced maximum penalties of a $100,000 fine and thirty years of imprisonment. *See*

WIS. STAT. §§ 940.23(1)(a) (2017-18),[1] 939.50(3)(d), 939.63(1)(b). The circuit court imposed a twelve-year term of imprisonment bifurcated as eight years of initial confinement and four years of extended supervision. The circuit court declared Taylor eligible for the challenge incarceration program (CIP) and the Wisconsin substance abuse program (WSAP) after serving five years of his sentence and awarded him 366 days of sentence credit.

Taylor, by Assistant State Public Defender Erin K. Deeley, moved for postconviction relief. He alleged, first, that his statutory disqualification from participation in CIP and WSAP constituted a new factor warranting sentence modification and, second, that he was entitled to an additional day of sentence credit. The circuit court denied sentence modification but awarded Taylor the sentence credit he requested. Taylor appeals.

Attorney Deeley filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Taylor submitted a response, asserting that meritorious grounds exist to pursue a claim for sentence modification.[2] Based upon our independent review of the record, the no-merit report, and Taylor's response, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The record shows that on October 23, 2015, Taylor approached P.B. in the yard of an apartment complex in Milwaukee County, Wisconsin, and demanded that P.B. repay money he

[1] Taylor committed his crime while the 2015-16 version of the Wisconsin Statutes was in effect. The portions of the 2015-16 statutes relevant to this appeal are unchanged in the current, 2017-18 version, and therefore all subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Attorney Deeley left her position with the State Public Defender's Office after this matter was submitted to the court for disposition. The State Public Defender subsequently appointed Assistant State Public Defender Kaitlin A. Lamb as successor counsel for Taylor.

owed to Taylor. Within moments, Taylor produced a gun and shot P.B. in the neck. Taylor then fled the scene. P.B. survived but sustained serious injuries. The State charged Taylor with attempted first-degree intentional homicide while armed. Taylor demanded a jury trial.

After a jury was selected, Taylor decided to accept the State's offer to resolve the charge against him with a plea agreement. He pled guilty to a reduced charge of first-degree reckless injury while armed, and the State agreed to recommend a prison sentence without specifying a recommended term of imprisonment.

We first consider whether Taylor could pursue an arguably meritorious claim that he lacked competency to proceed. "[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. A circuit court commissioner referred Taylor for a competency examination after trial counsel expressed concerns about Taylor's competency at the outset of his preliminary examination. The examining psychiatrist subsequently filed a report with the circuit court stating that Taylor "does not lack substantial mental capacity to understand court proceedings or to assist in his defense."

The matter proceeded to a competency hearing. The examining psychiatrist testified that Taylor "was able to communicate in a[n] organized and coherent manner," that he "was fully aware of the charge and the specific allegations," and that his nervousness and depression "did not impair his ability to either communicate or to discuss relevant issues regarding his legal circumstances." Taylor did not present any contrary evidence. The circuit court found that Taylor was competent to proceed.

This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the evidence presented at the hearing and the standard of review, any further proceedings in regard to Taylor's competency would lack arguable merit.

We next consider whether Taylor could pursue an arguably meritorious challenge to the validity of his guilty plea. The circuit court conducted a guilty plea colloquy that complied with the circuit court's obligations when accepting a plea other than not guilty. *See* WIS. STAT. § 971.08, ***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 crime to which Taylor pled guilty; and the plea hearing transcript—demonstrates that Taylor entered his guilty plea knowingly, intelligently, and voluntarily.

We also conclude that the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that protection of the public and deterrence were the primary sentencing objectives, and the circuit court discussed the sentencing factors that it viewed as relevant to achieving those objectives. *See* ***id.***, ¶¶40-43. The sentence that the circuit court selected was well within the maximum sentence allowed by law and cannot be considered unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Taylor asserts in his response to the no-merit report that his sentence was adversely affected by the prosecutor's sentencing remarks referencing gun violence in Milwaukee County and the number of homicides that had occurred in the county as of the date of sentencing. We

see no meritorious basis in the record for further proceedings in this regard. The circuit court twice explained during the sentencing proceedings that it did not hold Taylor responsible for anyone's actions other than his own.

The no-merit report and Taylor's response both include a discussion of the postconviction order determining that Taylor's statutory disqualification from participation in CIP and WSAP was not a new factor warranting sentence modification. 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." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a new factor exists is a question of law for our *de novo* review. *See* ***id.***, ¶¶33, 36. Whether to modify a sentence based on a new factor rests in the circuit court's discretion. *See* ***id.***, ¶37. We agree with Attorney Deeley's conclusion that further proceedings regarding this issue would lack arguable merit.

Both CIP and WSAP are prison treatment programs. A circuit court normally exercises its sentencing discretion when determining a defendant's eligibility for these programs. *See* WIS. STAT. § 973.01(3g)-(3m).[3] If the circuit court finds the defendant eligible, the Department of Corrections has discretion to permit the defendant to participate. *See* WIS. STAT. §§ 302.045(2)(cm), 302.05(3)(a)2. Upon successful completion of either program, an inmate's remaining initial confinement time is converted to time on extended supervision. *See*

[3] 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).

§§ 302.045(3m)(b)1., 302.05(3)(c)2.a. A defendant is statutorily disqualified from participation in either program, however, if the defendant is serving a sentence for a crime described in WIS. STAT. ch. 940. *See* §§ 302.045(2)(c), 302.05(3)(a)1. In this case, the circuit court declared Taylor eligible to participate in both CIP and WSAP after serving five years of initial confinement, but his conviction under WIS. STAT. § 940.23 disqualifies him from participation.

Taylor asserts that the circuit court "intended for [him] to be release[d from confinement] after five years with completion of programming," and his statutory disqualification from CIP and WSAP is therefore a new factor that gives rise to an arguably meritorious claim for sentencing relief. In postconviction proceedings, however, the circuit court concluded that Taylor's statutory disqualification from CIP and WSAP did not warrant sentence modification because his potential participation in the programs was "not highly relevant at all to the sentence imposed." The circuit court explained that the sentence was not predicated on Taylor's acceptance into either CIP or WSAP "or on any expectation that the Department of Corrections would permit [Taylor] these programs." *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994)(stating that the circuit court has an additional opportunity to explain the sentence when resolving a postconviction motion). Upon our independent review, we conclude that the record supports the circuit court's determination. The circuit court pronounced the length and structure of Taylor's sentence before deciding his eligibility for the programs. Moreover, the circuit court expressly advised Taylor when declaring his eligibility that admission into the programs rested in the discretion of the Department of Corrections. The circuit court's authorization for Taylor to participate in CIP and WSAP if the Department of Corrections approved of his participation was thus not highly relevant to the sentence imposed, and his statutory disqualification therefore was not a new factor within the meaning of ***Harbor***.

Relatedly, we conclude that Taylor could not pursue an arguably meritorious claim for relief on the ground that the circuit court sentenced him on the basis of incorrect information about his eligibility for CIP and WSAP. When a prisoner contends that the sentencing court relied on inaccurate information, the prisoner may pursue a claim for resentencing only upon a showing that the circuit court actually relied on the inaccurate information in fashioning the sentence. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Although "the circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance," *see* ***State v. Travis***, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491, the record here supports the circuit court's determination that program eligibility was not relevant to the sentencing decision. The eligibility finding, made after the circuit court imposed sentence, did not influence the length or structure of the sentence selected.

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 judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved of any further representation of Lamarr Taylor 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