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August 22, 2019

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

2018AP294-CRNM State of Wisconsin v. Willie J. Malone, Jr. (L.C. # 2015CF5310)

Before Brash, P.J., 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).

Willie J. Malone, Jr., appeals from a judgment, entered upon his guilty plea, convicting him on three counts of delivering between three and ten grams of heroin, one count as a party to a crime, and one count of possession with intent to deliver between three and ten grams of heroin as a party to a crime, all as second or subsequent offenses. Malone also appeals from an order that denied his motion for sentence modification based on a new factor. Appellate counsel, Jorge R. Fragoso, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738

(1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Malone 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 Malone's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

After a drug trafficking investigation that lasted more than a year and a half, police executed seven search warrants on locations believed to be linked to Malone and heroin trafficking. Malone was arrested and charged with seven offenses: three counts of manufacture or delivery of between three and ten grams of heroin, one as a party to a crime; one count of manufacture or delivery of less than three grams of heroin; one count of possession with intent to deliver between three and ten grams of heroin as a party to a crime; and two counts of keeping a drug house, one as a party to a crime. All seven offenses were charged as a second or subsequent offense. The manufacture/delivery charges were based on purchases made by a confidential informant. Malone also gave a statement to police in which he admitted dealing drugs and gave details about his operation.

Malone agreed to resolve his charges through a plea agreement. In exchange for his guilty pleas to the three counts of delivering between three and ten grams of heroin plus the possession with intent to deliver charge, the State would move to dismiss and read in the other three offenses. The State would also recommend prison without specifying an amount.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

The circuit court engaged Malone in a colloquy and accepted his guilty pleas.[2] Later, the circuit court sentenced Malone to four years of initial confinement and five years of extended supervision on each count, to be served consecutively.[3] The circuit court ruled Malone ineligible for the challenge incarceration program but made him eligible for the substance abuse program after serving the eight years of initial confinement for counts one and two.

Malone moved for sentence modification on new factor grounds. Malone had been sentenced on July 15, 2016, but under a Department of Corrections policy memo effective August 1, 2017, an inmate will not be enrolled in the substance abuse program until he or she has three years or less remaining on the term of initial confinement. Thus, Malone argued that while he would be eligible for the substance abuse program after eight years, the new policy meant that he would have to serve thirteen years before the Department would consider him for participation. The circuit court explained that it required Malone to first serve eight years of confinement because any earlier program eligibility date would undermine the sentencing objectives. The eligibility date was not an expression of intent that Malone start the program after eight years, nor was the total sentence predicated on any expectation that Malone would be in the program after eight years. Thus, the circuit court denied the motion. Malone appeals.

The first potential issue appellate counsel discusses is whether Malone should be allowed to withdraw his pleas as not knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights form and addendum, attached jury

[2] The Honorable Daniel L. Konkol conducted the colloquy and accepted Malone's pleas.

[3] The Honorable Ellen R. Brostrom imposed sentence and reviewed the postconviction motion.

instructions for delivery of a controlled substance and possession with intent to deliver a controlled substance, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although the jury instructions for party to a crime liability were not attached to the plea questionnaire, the circuit court expressly reviewed the elements for such liability with Malone during the colloquy. Accordingly, there is no arguable merit to a claim that Malone's pleas were anything other than knowing, intelligent, and voluntary.

The second issue appellate counsel discusses is whether this court should remand the matters for resentencing because 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 circuit 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 several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of 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* ***id.*** We will affirm a circuit court's exercise of discretion if the conclusion was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See* ***id.***, ¶8.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. Additionally, the thirty-six-year sentence imposed is well within the seventy-six-year 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). Accordingly, there would be no arguable merit to a challenge to the court's sentencing discretion.

The final issue appellate counsel addresses is whether the circuit court improperly denied Malone's postconviction motion for sentence modification based on a new factor. A new factor is a fact or set of facts that is "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." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36.

For purposes of our review, we will assume without deciding that the Department's policy on inmate eligibility for the substance abuse program is a new factor. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37. Our review of the record and the no-merit report satisfies us that the circuit court properly exercised its discretion in denying the postconviction motion because it explained why sentence modification was unwarranted. Thus, there is no arguable merit to challenging the circuit court's denial of the new factor sentence modification motion.

Malone's response to the no-merit report—which invokes the rights to effective assistance of counsel and to be sentenced on accurate information—focuses on his belief that "the amount of drugs I was said to have had was wrong," and he criticizes trial and appellate counsel for not determining whether the drugs were weighed with or without their packaging. Malone asserts, "I know the weight of the drugs to be wrong but cannot, being incarcerated, prove this to be so without the assistance of an attorney."

Malone is correct when he notes that the weight of the drugs is an element of his offenses. *See* ***State v. Warbelton***, 2009 WI 6, ¶20, 315 Wis. 2d 253, 759 N.W.2d 557 ("Generally, a fact must be submitted to a jury and proven beyond a reasonable doubt if it increases the potential penalty for a crime beyond the penalty which could otherwise be imposed."); *see also* WIS. STAT. § 961.41(1)(d)1.-4., (1m)(d)1.-4. (2015-16) (listing increasing penalties for delivery and possession with intent based on weight of controlled substance). However, Malone's guilty pleas necessarily established his factual guilt of the offenses as charged and he waived the right to make the State prove the amounts beyond a reasonable doubt. *See* ***State v. Kelty***, 2006 WI 101, ¶41, 294 Wis. 2d 62, 716 N.W.2d 886. Additionally, a valid guilty plea generally waives nonjurisdictional defenses. *See* ***id.***, ¶18. During the plea colloquy, Malone acknowledged that he would not be able to raise any defenses, and he acknowledged that the facts, including the drug weights, as stated in the criminal complaint were true and correct.

Further, Malone's assertion is conclusory. While he claims that he knows the weight of the drugs to be wrong, he does not tell us how he comes by his certainty, nor does he tell us what he thinks the proper weight should be. Because the time for Malone to challenge the sufficiency of the State's proof was before the entry of his pleas or at a trial, and because Malone waived the right to make such a challenge when he entered his pleas, Malone's conclusory allegation that

the weight of the drugs was incorrect is insufficient to persuade us that there is an arguably meritorious issue to pursue.

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 Jorge R. Fragoso is relieved of further representation of Malone 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