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October 15, 2019

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

2018AP2328-CRNM State of Wisconsin v. Jonathan Luis Rivera (L.C. # 2017CF2216)

Before Brash, P.J., Kessler and Fitzpatrick, 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).

Jonathan Luis Rivera pled guilty to one count of robbery of a financial institution and one count of attempted robbery of a financial institution. He faced maximum penalties of forty years of imprisonment and a $100,000 fine for the robbery conviction, and twenty years of

imprisonment and a $50,000 fine for the attempted robbery conviction. *See* WIS. STAT. §§ 943.87 (2017-18);[1] 939.50(3)(c); 939.32 (1g). For the robbery, the circuit court imposed a thirty-three-year term of imprisonment, bifurcated as eighteen years of initial confinement and fifteen years of extended supervision. For the attempted robbery, the circuit court imposed a seventeen and one-half year term of imprisonment, bifurcated as ten years of initial confinement and seven and one-half years of extended supervision. The circuit court ordered Rivera to serve the sentences concurrently with each other and concurrently with sentences that he was already serving for convictions in Ozaukee County. The circuit court ordered Rivera to pay $1700 in restitution, awarded him the 360 days of sentence credit that he requested, and found him eligible for the challenge incarceration program and the Wisconsin substance abuse program upon completion of thirteen years of his sentences. Rivera appeals.

Rivera's appellate counsel, Attorney Jeremy Newman, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Rivera did not file a response. Based upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

We take the facts from the criminal complaint. It reflects that on May 3, 2017, Rivera entered a Milwaukee County branch of the PNC Bank and presented a note to the teller demanding money. The teller gave Rivera $1700, and he left the bank with the cash. On May 8, 2017, Rivera attempted to rob a Milwaukee County branch of the Associated Bank. He

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

approached a teller and handed her a demand note. The teller refused to comply, and Rivera fled the area in a two-door Saturn vehicle. Shortly thereafter, a bank was robbed in Ozaukee County, and the robber fled in a two-door Saturn vehicle. Following a high speed chase, police arrested the suspected robber, who was subsequently identified as Rivera. The State charged Rivera in Milwaukee County with one count of robbery of a financial institution and one count of attempted robbery of a financial institution.[2]

Rivera decided to resolve the Milwaukee County charges short of trial. Pursuant to a plea agreement, he pled guilty as charged, and the parties jointly recommended an aggregate sentence of eighteen years of initial confinement and fifteen years of extended supervision, to be served concurrently with his identical aggregate sentence in Ozaukee County case No. 2017CF151. The circuit court accepted Rivera's guilty pleas and imposed the aggregate sentence that the parties recommended.

We first consider whether Rivera could pursue an arguably meritorious challenge to the validity of his guilty pleas. We agree with appellate counsel's conclusion that Rivera could not do so. The circuit court conducted a thorough guilty plea colloquy that fully 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); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record—including the plea questionnaire and

[2] The record shows that Rivera was charged and ultimately convicted in Ozaukee County case No. 2017CF151 of robbing a financial institution and second-degree recklessly endangering safety, both as a result of his conduct on May 8, 2017. He received an aggregate sentence of eighteen years of initial confinement and fifteen years of extended supervision. The instant appeal does not encompass the Ozaukee County case.

waiver of rights form and addendum, the attached jury instructions describing the elements of the crimes to which Rivera pled guilty, and the plea hearing transcript—demonstrates that Rivera entered his guilty pleas knowingly, intelligently, and voluntarily.

We also agree with appellate counsel's conclusion 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 identified appropriate sentencing objectives and discussed the sentencing factors that it viewed as relevant to achieving those objectives. *See* ***id.***, ¶¶41-43. The sentences that the circuit court selected were well within the maximum sentences 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. Moreover, the circuit court imposed the aggregate sentence that Rivera requested. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (defendant may not challenge on appeal a sentence that he or she affirmatively approved). Accordingly, we are satisfied that a challenge to the sentences would lack arguable merit.

Appellate counsel does not discuss whether Rivera could pursue an arguably meritorious challenge to the order that he pay restitution of $1700 to PNC Bank. Rivera stipulated to restitution in that amount. *See* WIS. STAT. § 973.20(13)(c); ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126 (a defendant may not challenge or appeal a restitution amount that he or she affirmatively approved). Therefore, a challenge to the order would be frivolous within the meaning of ***Anders***.

Appellate counsel also does not discuss whether Rivera could mount an arguably meritorious challenge to the circuit court's finding that he is eligible for the Wisconsin substance

abuse program and the challenge incarceration program only after he completes thirteen years of his aggregate sentence. We conclude that he could not mount such a challenge.

Both the Wisconsin substance abuse program and the challenge incarceration program are prison treatment programs. A circuit court has discretion at sentencing to determine both a defendant's eligibility for these programs and when the defendant's eligibility may begin. *See* WIS. STAT. § 973.01(3g)-(3m); ***State v. White***, 2004 WI App 237, ¶¶2, 6-10, 277 Wis. 2d 580, 690 N.W.2d 880.[3] 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. If the circuit court finds the defendant eligible for either program, 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, the defendant's remaining initial confinement time is converted to time on extended supervision. *See* §§ 302.045(3m)(b)1.; 302.05(3)(c)2.a.

Here, the circuit court's sentencing remarks included findings and conclusions that Rivera had a history of opioid abuse, that the primary sentencing goals were community protection, deterrence, and rehabilitation, and that, in light of Rivera's substantial criminal record, his rehabilitative needs must be addressed in a confined setting. After discussing the sentencing factors and pronouncing sentence, the circuit court found Rivera eligible for the Wisconsin substance abuse program but imposed a thirteen-year waiting period before his

[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 current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

eligibility would begin, emphasizing that the sentence selected was intended to ensure "a long period of time where there's protection of the community." The circuit court then added that it would "make [Rivera] eligible for [the challenge incarceration program] at the same mark, at thirteen years." The circuit court's decision to delay Rivera's program eligibility for thirteen years thus comports with its sentencing rationale and reflects a reasonable exercise of discretion. A challenge to the decision would lack arguable merit.

We have also considered whether Rivera could pursue an arguably meritorious claim that the circuit court sentenced him on the basis of inaccurate information, specifically an incorrect view of his eligibility for the challenge incarceration program. An inmate is statutorily disqualified from participating in that program if the inmate has attained the age of forty years before his or her participation would begin. *See* WIS. STAT. § 302.045(2)(b). Rivera was thirty-two years old at the time of sentencing and therefore will have passed the age of forty years before he completes thirteen years of his sentence. The record, however, does not support an arguably meritorious claim for resentencing on this basis.

When a defendant contends that the sentencing court relied on inaccurate information, the defendant may pursue a claim for resentencing only upon a showing that the circuit court actually relied on inaccurate information in fashioning the sentence. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. The record is clear that the circuit court did not rely on Rivera's eligibility for the challenge incarceration program when fashioning the sentences here. First, the circuit court told Rivera that "[t]he Department of Corrections makes th[e] determination" of suitability for program participation. Second, the circuit court had already imposed Rivera's sentences and determined his eligibility for the Wisconsin substance abuse program before adding that Rivera would also be eligible for the challenge incarceration

program. Eligibility for the latter program, determined only after the circuit court imposed sentence, did not influence the length or structure of the sentences selected.

Our independent review of the record does not disclose any other potential issues for appeal. 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeremy Newman is relieved of any further representation of Jonathan L. Rivera 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