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DISTRICT I

October 24, 2019

To:

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

2019AP375-CRNM State of Wisconsin v. James L. Gill, Sr. (L.C. # 2017CF3486)

Before Kessler, Dugan 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).

James L. Gill, Sr., appeals from an amended judgment, entered upon his guilty pleas, convicting him on one count of manufacture or delivery of three grams or less of heroin and one count of possession with intent to deliver three grams or less of heroin. Appellate counsel, Thomas J. Erickson, 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 Gill 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 appellate counsel's report, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Gill was arrested outside his residence following two controlled drug buys with an undercover police officer. Because Gill was on extended supervision for another case, police searched his apartment after his arrest. Alexis S. Brown and Gill's then nine-month-old son lived in the apartment with him. Police recovered marijuana in the living room, along with six corner cuts of heroin and assorted drug paraphernalia in the kitchen. Gill later gave a statement admitting that the heroin in the kitchen was his, that he had been selling it, and acknowledging his sale to the undercover officer. Gill was charged with two counts of manufacture or delivery of three grams or less of heroin, possession with intent to deliver three grams or less of heroin, and maintaining a drug trafficking place.²

Gill agreed to resolve his case with a plea. In exchange for his guilty pleas to one count of manufacture or delivery and the count of possession with intent as charged, the State agreed to dismiss and read in the other two counts and to make a sentence recommendation of three to four years of initial confinement and three to four years of extended supervision, consecutive to any revocation sentence.

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

² Brown was charged as a co-defendant on the drug trafficking place offense.

The circuit court accepted Gill's pleas and sentenced him to three years of initial confinement and three years of extended supervision on each of the two counts, to be served concurrently with each other but consecutive to his revocation sentence. The circuit court also ordered Gill to pay \$130 in restitution, which was in accord with the plea agreement, to the West Allis Police Department for buy money used in one of the undercover buys.

Gill's appellate attorney filed a no-merit appeal. In an order dated January 14, 2019, we asked for a supplemental report regarding the restitution order. *See State v. Gill*, No. 2018AP1471-CRNM, unpublished order (WI App Jan. 14, 2019). Specifically, we noted that in *State v. Evans*, 181 Wis. 2d 978, 979, 512 N.W.2d 259 (Ct. App. 1994), we had held that there was no authority for ordering buy money to be paid as restitution. Our order also noted that the legislature's response to *Evans* was to make buy money compensable as an item of costs. *See* WIS. STAT. § 973.06(1)(am). Gill voluntarily dismissed that appeal, and we extended the time for him to file a postconviction motion.

Gill filed a postconviction motion to vacate restitution. In response, the State noted that the West Allis Police Department was no longer seeking reimbursement, so the State did not object to setting restitution at \$0. The circuit court granted the motion,³ and an amended judgment of conviction was entered. Gill appeals.

The first potential issue appellate counsel identifies is whether Gill's pleas were "knowing and voluntary." Our review of the record—including the plea questionnaire and

³ The Honorable Janet C. Protasiewicz accepted Gill's pleas and imposed sentence. The Honorable Lindsay A. Grady granted the motion to vacate restitution.

waiver of rights form, addendum, and plea hearing transcript—confirms that the circuit court generally complied with its obligations for ensuring a guilty plea is knowing, intelligent, and voluntary, pursuant to WIS. STAT. § 971.08, *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The circuit court did not expressly review the elements of either offense with Gill. However, it did take other steps to establish his understanding of the nature of the crimes. *See* WIS. STAT. § 971.08(1)(a); *Bangert*, 131 Wis. 2d at 268. The circuit court first noted that trial counsel had provided the jury instructions for the two offenses. It explained that the instructions are “very important because they contain the elements the State would need to provide in order to convict” Gill. Gill acknowledged the circuit court’s statement as correct. The circuit court then asked Gill if he understood the elements, to which he answered, “Yes.” The circuit court next asked Gill if he had ample time to go over the elements with his attorney. Gill again answered, “Yes.” Finally, the circuit court asked Gill if he had any questions about the elements, and he answered, “No.”

Therefore, based on the entirety of the record, we are satisfied that there is no arguable merit to a claim that the circuit court failed to fulfill its obligations during the plea colloquy or that Gill’s pleas were anything other than knowing, intelligent, and voluntary.

The other issue appellate counsel discusses 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 a variety of 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.

Here, the circuit court expressed its concerns over the seriousness of the offense—Gill had a young child around the drugs, which could have been fatal had the child ingested any of the drugs. Gill also admitted having about twenty-five customers, and the circuit court commented that heroin is quite dangerous to those who consume it. The circuit court was also “extraordinarily concerned” about Gill’s character. Although it gave him credit for accepting responsibility through his pleas, it noted that he had committed these offenses while on supervision and his criminal history, which included offenses of fleeing and robbery, was “violent and dangerous.” The circuit court further noted Gill’s apparent “willingness to victimize some of the most vulnerable people in this community.” Thus, it identified punishment and protection of the community as its primary sentencing objectives.

The maximum possible sentence Gill could have received was twenty-five years’ imprisonment. The concurrent sentences totaling six 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 would be no arguable merit to a challenge to the sentencing court’s discretion in setting the sentence length.

In the no-merit report, appellate counsel notes that Gill was interested in appealing the circuit court's denial of his eligibility for the Earned Release Program (ERP). A decision on a defendant's eligibility for the program "is part of the court's exercise of sentencing discretion." See *State v. Owens*, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g). While the circuit court must state whether the defendant is eligible for the program, the statute does not "require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the ERP determination." See *Owens*, 291 Wis. 2d 229, ¶9.

Here, the circuit court's observation that Gill committed the current offenses while on supervision and its identification of punishment and community protection as sentencing objectives are factors that adequately support the determination to deny Gill ERP eligibility. There is no arguable merit to challenging the decision.

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

Upon the foregoing, therefore,

IT IS ORDERED that the amended judgment is summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of further representation of Gill 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