OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

April 21, 2020

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Br. 35
901 N. 9th St., Rm. 632
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Pamela Moorshead
Assistant State Public Defender
735 N. Water St., Ste 912
Milwaukee, WI 53202-4116

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Nathaniel Anthony Woods 507588
Felmers O. Chaney Correctional Center
2825 N. 30th St.
Milwaukee, WI 53210

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

2019AP967-CRNM State of Wisconsin v. Nathaniel Anthony Woods
(L.C. # 2017CF5284)

Before Brash, P.J., Dugan and White, 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).

Nathaniel Anthony Woods pled guilty to possession of a firearm by a felon. He faced maximum penalties of a $25,000 fine and ten years of imprisonment. *See* WIS. STAT.

§§ 941.29(1m)(a)(2017-18),[1] 939.50(3)(g). He also faced a mandatory minimum three-year term of initial confinement because he both committed the offense within five years after completing a sentence for a prior felony, and he previously was convicted of a violent felony, namely, possession of a firearm by a felon. *See* § 941.29(4m). The circuit court imposed a five-year term of imprisonment bifurcated as three years of initial confinement and two years of extended supervision. The circuit court found Woods ineligible for the challenge incarceration program and the Wisconsin substance abuse program and awarded him one day of sentence credit.

Woods, by Attorney Pamela Moorshead, moved for sentence modification on the ground that the circuit court erroneously concluded that his mandatory minimum sentence disqualified him from participating in the challenge incarceration program and the Wisconsin substance abuse program. The circuit court agreed that Woods was statutorily qualified for participation but found that he was nonetheless ineligible for the programs and denied relief. Woods appeals.

Attorney Moorshead filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Woods has not filed a response. Based upon our independent review of the record and the no-merit report, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police officers conducted a traffic stop on November 12, 2017, after observing a car drive over a curb and onto the grass in the 3300 block of North 4th Street in the city of Milwaukee, Wisconsin. The driver, subsequently identified as Woods, bent down toward the floorboard of the vehicle, then got out of the car with an object in

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

his mouth. Testing revealed that the object contained .46 grams of tetrahydrocannabinols (THC). A search of the car uncovered a firearm. The complaint went on to allege that in Milwaukee County Circuit Court case No. 2006CF4028, Woods previously was convicted of possessing with intent to deliver cocaine and further alleged that on June 30, 2014, he was convicted of possessing a firearm while a felon and completed his sentence in that case within the previous five years. The State charged Woods with one count of possessing THC as a second or subsequent offense and one count of possessing a firearm as a felon.

Woods decided to resolve the charges short of trial. Pursuant to a plea agreement, he pled guilty to possession of a firearm by a felon, and the State moved to dismiss the remaining count. The State also agreed to recommend the mandatory minimum three-year term of initial confinement.

In the no-merit report, appellate counsel first examines whether Woods could pursue an arguably meritorious challenge to his guilty plea. We are satisfied that appellate counsel properly analyzed this issue. The circuit court conducted a 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); ***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 instruction signed by Woods and describing the elements of the crime, and the plea hearing transcript—demonstrates that Woods entered his guilty plea knowingly, intelligently, and voluntarily. Therefore, pursuit of this issue would lack arguable merit.

We also agree with appellate counsel that Woods could not mount an arguably meritorious challenge to the circuit court's exercise of 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, deterrence, and punishment were the primary sentencing objectives, and the circuit court explained the factors that it considered when fashioning the sentence. *See* ***id.***, ¶¶40-43. The factors selected were proper and relevant. The sentence that the circuit court imposed did not exceed either the mandatory minimum term of initial confinement or the term of imprisonment 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. Further discussion of this issue is unwarranted.

Finally, we have considered whether Woods could pursue an arguably meritorious challenge to the order denying his postconviction motion. We conclude that he could not do so.

Woods alleged in his postconviction motion that a new factor warranted sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. Specifically, Woods claimed that the circuit court erred at sentencing in concluding that his mandatory minimum term of initial confinement constituted a bar to his participation in the challenge incarceration program and the Wisconsin substance abuse program when in fact he was statutorily qualified for admission to those programs. *See* ***id.***, ¶40 (citation omitted) (defining "new factor" as "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").

The challenge incarceration program and the Wisconsin substance abuse program are prison 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).[2] If the circuit court finds the defendant eligible, the Department of Corrections may 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* §§ 302.045(3m)(b)1., 302.05(3)(c)2.a.

Here, the circuit court agreed in postconviction proceedings that at sentencing it misconstrued its obligation to impose a mandatory minimum term of initial confinement as also precluding a finding of eligibility for the challenge incarceration program and the Wisconsin substance abuse program. The circuit court determined, however, that while its reinterpretation of the law constituted a new factor, that new factor did not warrant sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶37 (explaining that when a new factor is present, the circuit court determines whether the new factor justifies sentence modification). The circuit court found that if Woods were eligible for programs leading to early release, "it would unduly depreciate the seriousness of his conduct." Further, the circuit court found that the period of confinement imposed "is necessary in this case to punish [Woods's] flagrant disregard of the law, to deter him from reoffending[,] and to protect a community which is fed up with guns getting into the hands of people, like [Woods], who are not allowed to possess them." In short, the circuit court

[2] 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).

concluded that eligibility for the programs was inconsistent with the sentencing goals. That is not an erroneous exercise of discretion. *See* ***State v. Owens***, 2006 WI App 75, ¶11, 291 Wis. 2d 229, 713 N.W.2d 187. Because the circuit court properly exercised its discretion in resolving Woods's motion for sentence modification, an appellate challenge to that decision would lack arguable merit.

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 Pamela Moorshead is relieved of any further representation of Nathaniel Anthony Woods. *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