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

May 19th, 2020

To:

Hon. Janet C. Protasiewicz
901 N. 9th St.
Milwaukee, WI 53233-1425

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

Kaitlin A. Lamb
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

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

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

Raymond T. Golden 510710
Kettle Moraine Correctional Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2018AP1761-CRNM State of Wisconsin v. Raymond T. Golden (L.C. # 2017CF99)

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

Summary disposition orders may not be cited in any court o f this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Raymond T. Golden pled guilty to five felonies, each as a second or subsequent offense in violation of the Wisconsin controlled substances act, WIS. STAT. ch. 961 (2015-16).[1] The circuit court imposed an aggregate fifteen-year term of imprisonment, bifurcated as seven years

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of initial confinement and eight years of extended supervision, and ordered Golden to serve the aggregate term consecutively to the sentence he was serving following revocation of his extended supervision for a prior crime involving controlled substances. He appeals.

Appellate counsel, Attorney Brian C. Hagner, filed a no-merit report and a supplemental no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18).[2] Golden filed two responses. Upon our consideration of the no-merit reports, Golden's responses, and a review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal, and accordingly, we summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).

According to the criminal complaint, police received information from a confidential source that Golden was engaged in selling heroin and crack cocaine. On November 15, 2016, police officers searched the confidential source, provided that source with $500 and a recording device, and then conducted surveillance of the source entering and exiting Golden's home. When the confidential source rejoined the officers, they determined that the confidential source left Golden's home with approximately two grams of heroin and approximately seven grams of cocaine. Additionally, the confidential source reported that Golden had a quantity of cocaine and heroin in the basement rafters of his home.

The complaint further alleged that on November 17, 2016, police executed a search warrant at Golden's home. In the basement rafters, police found approximately twenty grams of

[2] Attorney Hagner took new employment in another state after this matter was submitted to the court for disposition. The State Public Defender thereafter appointed Assistant State Public Defender Kaitlin A. Lamb as successor counsel for Golden. She rested on Attorney Hagner's submissions.

heroin, approximately 238 grams of cocaine, and an unspecified amount of marijuana. In the kitchen, police found two firearms and documents reflecting that Golden resided in the home. In the bedroom, police found $2800. The complaint went on to allege that in 2010 Golden had been convicted of the felony offense of possessing a controlled substance with intent to deliver, that he had been convicted in 2014 of the felony offense of possessing a firearm while a felon, and that both convictions remained of record and unreversed. Attached to the complaint were certified copies of Golden's judgments of conviction from the 2010 and 2014 offenses, along with certified copies of judgments reflecting that he had two additional felony drug convictions.

Based on the foregoing allegations, the State charged Golden with seven felonies. He decided to resolve the charges with a plea bargain in which he agreed to plead guilty as charged to the following five crimes, each as a second or subsequent offense:

> ● delivery of three grams or less of heroin, a controlled substance, for which he faced a maximum fine of $25,000, and maximum imprisonment of sixteen years and six months, *see* WIS. STAT. §§ 961.41(1)(d)1., 939.50(3)(f), 961.48(1)(b);
>
> ● delivery of more than five but less than fifteen grams of cocaine, for which he faced a maximum fine of $50,000, and maximum imprisonment of nineteen years, *see* WIS. STAT. §§ 961.41(1)(cm)2., 939.50(3)(e), 961.48(1)(b);
>
> ● possession with intent to deliver more than ten grams but less than fifty grams of heroin, for which he faced a maximum fine of $100,000, and maximum imprisonment of thirty-one years, *see* WIS. STAT. §§ 961.41(1m)(d)3., 939.50(3)(d), 961.48(1)(a);
>
> ● possession with intent to deliver more than forty grams of cocaine, for which he faced a maximum fine of $100,000, and maximum imprisonment of forty-six years, *see* WIS. STAT. §§ 961.41(1m)(cm)4., 939.50(3)(c), 961.48(1)(a); and
>
> ● keeping a drug house, for which he faced a maximum fine of $10,000, and maximum imprisonment of seven years and six months, *see* WIS. STAT. §§ 961.42(1), 939.50(3)(i), 961.48(1)(b).

The State agreed to recommend a global disposition of eight years of initial confinement and six years of extended supervision consecutive to any other sentence, and the State agreed to move for dismissal of the two counts of possessing a firearm while a felon.

The circuit court accepted Golden's five guilty pleas, dismissed the two remaining counts, and proceeded immediately to sentencing. The circuit court imposed evenly bifurcated, concurrent four-year terms of imprisonment for delivering heroin and for delivering cocaine. The circuit court further imposed five years of initial confinement and six years of extended supervision for possession with intent to deliver cocaine, an evenly bifurcated ten-year term of imprisonment for possession with intent to deliver heroin, and an evenly bifurcated four-year term of imprisonment for keeping a drug house. The circuit court ordered Golden to serve the latter three sentences concurrently with each other but consecutive to the sentences for delivery of heroin and cocaine, and the circuit court ordered Golden to serve all of the sentences consecutively to the sentence that he was already serving following revocation of his extended supervision for an earlier offense. The circuit court also granted Golden's request to be found eligible to participate in the Wisconsin substance abuse program but delayed the start of his eligibility until after he had served five years of initial confinement.

Appellate counsel and Golden both discuss whether he could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty pleas were not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). We agree with appellate counsel that Golden could not do so. At the outset of the plea and sentencing hearing, the circuit court established that Golden was twenty-nine years old and had completed high school and three years of post-secondary education. The circuit court also established that Golden had signed a guilty plea questionnaire and waiver of rights form, and the

circuit court found that he understood the contents of that document and its attachments. *See* ***State v. Pegeese***, 2019 WI 60, ¶37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Golden that complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08.

Golden suggests that the circuit court did not fulfill its duty to establish a factual basis for his pleas. *See* ***Pegeese***, 387 Wis. 2d 119, ¶23. The pages of the transcript that he points to in support of that allegation show that in response to questioning by the circuit court, Golden said that the criminal complaint was true "for the most part." After he and his trial counsel consulted briefly off the record, trial counsel said that Golden disputed the facts surrounding the dismissed charges that he possessed firearms as a felon. The circuit court next asked Golden if the complaint correctly described the facts surrounding the five charges to which he was pleading guilty, and Golden said, "yes." The circuit court then asked Golden about each of those five offenses individually, and Golden admitted that he committed each one. Additionally, Golden admitted that in Milwaukee County case No. 2010CF1604, he had previously been convicted of a crime involving controlled substances, and his trial counsel confirmed that the conviction had not been reversed. The circuit court thus properly established a factual basis for Golden's guilty pleas. *See* ***State v. Black***, 2001 WI 31, ¶¶11-13, 242 Wis. 2d 126, 624 N.W.2d 363.

Golden further alleges that the transcript excerpt discussed above shows that his guilty pleas were coerced because his trial counsel "intimidated" him and "refused to allow" him to discuss his disagreement with some of the facts surrounding the discovery of the drugs and guns. In fact, the transcript reflects that the circuit court ensured that Golden had the opportunity to present any concerns he had, and Golden made clear that he admitted the facts relevant to each of the five crimes to which he pled guilty. While trial counsel may have discouraged him from

volunteering additional information, a trial attorney acts properly in firmly counseling the defendant regarding how to proceed. *See* ***State v. Rhodes***, 2008 WI App 32, ¶11, 307 Wis. 2d 350, 746 N.W.2d 599 (concluding that an attorney's "'forceful advice'" was not coercive (citation omitted)).

The record reflects that Golden entered his guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 257; ***Pegeese***, 387 Wis. 2d 119, ¶¶23, 37. Further pursuit of this issue would lack arguable merit.

Golden tells us in both of his responses to the no-merit reports that he believes he has arguably meritorious claims that the police violated ***Miranda v. Arizona***, 384 U.S. 436 (1966) and its progeny when obtaining his confession, and that the prosecutor violated ***Brady v. Maryland***, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. Golden, however, knowingly, intelligently, and voluntarily entered guilty pleas, and therefore he gave up his right to mount challenges to his statement and to the actions of the prosecutor. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (guilty plea constitutes a forfeiture of all nonjurisdictional defects including constitutional claims). Further pursuit of these issues would therefore lack arguable merit.

Golden also suggests that his trial counsel was ineffective in failing to seek suppression of his statement to police and in failing to challenge the prosecutor's actions in regard to alleged ***Brady*** evidence. When claims are forfeited, we may in some cases address those claims under the rubric of ineffective assistance of counsel. *See* ***State v. Benson***, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484. We have therefore considered whether Golden could raise

arguably meritorious claims that his trial counsel was ineffective for failing either to allege that his statement was coerced or to challenge the prosecutor's actions.

To prevail on a claim of ineffective assistance of counsel, a defendant must make a two-prong showing that trial counsel's performance was deficient and the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court may address either prong first, and if the defendant fails to satisfy one prong, the court need not address the other. *See* ***id.*** at 697. To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. In the context of a guilty plea, a defendant must demonstrate prejudice by showing that, but for trial counsel's errors, the defendant would not have pled guilty but would have insisted on a trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

Upon reviewing the record, we conclude, first, that Golden could not make an arguably meritorious showing of prejudice arising out of trial counsel's failure to seek suppression of his statement. Suppression simply would not have weakened the State's case in regard to the five drug-related charges to which Golden pled guilty and therefore a suppression motion, even if successful, would not have led him to insist on a trial. Police had gathered evidence of drug transactions through surveillance and a confidential source, and police had found a substantial quantity of heroin and cocaine when they searched Golden's home. Accordingly, the State had overwhelming evidence of the five drug-related charges absent any statement from Golden and could have presented a strong case at a trial on those charges without such a statement.

Accordingly, no reasonable probability exists that a suppression motion, even if successful, would have affected Golden's strategy or the ultimate outcome of the proceedings.

As to the claim that trial counsel was ineffective for failing to allege a ***Brady*** violation, Golden does not demonstrate that the State violated its obligations under ***Brady***. The Supreme Court held in ***Brady*** that "a defendant has a constitutional right to evidence favorable to the accused and that a defendant's due process right is violated when favorable evidence is suppressed by the State ... and when prejudice has ensued." *See* ***State v. Harris***, 2008 WI 15, ¶61, 307 Wis. 2d 555, 745 N.W.2d 397. Here, Golden complains that "on January 25, 2017"—the day on which he waived his right to a preliminary examination—the State did not produce telephone records or the audio and video footage recorded during the search of his home. ***Brady***, however, does not require the State to produce exculpatory evidence on the day of the preliminary examination. Indeed, "***Brady*** does not require pretrial disclosure of exculpatory evidence." *See* ***Harris***, 307 Wis. 2d 555, ¶63. ***Brady*** requires only that the State produce exculpatory evidence in time for the defendant to use it effectively. *See* ***Harris***, 307 Wis. 2d 555, ¶63. Golden does not describe any exculpatory evidence that the State failed to produce in time for the defense to use it. Golden therefore does not show that his trial counsel performed deficiently in regard to pursuit of alleged ***Brady*** evidence. [3]

Golden also alleges that his trial counsel was ineffective for failing to consult with him for "a period of approximately six months," and he objects to trial counsel's strategic decisions,

[3] We have considered Golden's assertion that the State never produced telephone records that Golden claims are referenced in a police report, but Golden specifically adds that he knows such telephone records do not exist. Golden cannot show that his trial counsel was ineffective for failing to insist on production of nonexistent records. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16 (stating that an attorney is not ineffective for failing to pursue a meritless motion).

particularly the decision not to seek suppression of his confession and the decision regarding which attorney from counsel's firm should appear at the plea and sentencing hearing.[4] Nothing in the record or in Golden's submission, however, shows either that the period of allegedly limited contact had an impact on the litigation or that different strategic choices would have ultimately led Golden to reject a plea agreement and insist on a trial. Golden therefore cannot pursue an arguably meritorious claim that he was prejudiced by the deficiencies that he alleges. *See* ***Strickland***, 466 U.S. at 687. In sum, the record does not support an arguably meritorious claim that Golden's trial counsel was ineffective. *See* ***id.*** at 697.

We next consider whether Golden could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to

[4] Golden retained private trial counsel to represent him in this matter.

protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider many other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

We agree with appellate counsel's conclusion that the record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that punishment and protection of the community were the primary sentencing goals, and the circuit court discussed the factors it deemed relevant to those goals. The circuit court found that Golden was involved in "large scale drug dealing" and that opioid trafficking "is one of the most serious problems affecting th[e] community." The circuit court considered Golden's character, recognizing that Golden had taken responsibility for his crimes but also taking into account that he had multiple prior felony convictions involving controlled substances. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (reflecting that a significant criminal record is indicative of character). In considering the need to protect the public, the circuit court found that it must "stem the tide" of drugs that Golden had delivered and intended to deliver into the community.

The circuit court properly considered whether the sentencing goals could be met by placing Golden on probation. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (stating that the circuit court should consider probation as the first sentencing alternative). The circuit court concluded, however, that probation would unduly depreciate the gravity of the offenses and that Golden must serve a term of confinement in prison. The circuit court therefore imposed an aggregate term of seven years of initial confinement and eight years of extended supervision.

The circuit court identified the factors that it considered when sentencing Golden. The factors were proper and relevant. Moreover, none of the sentences exceeded the maximum terms of imprisonment allowed by law, and the aggregate fifteen-year term of imprisonment imposed was far less than the aggregate 120 years of imprisonment and $285,000 fine that Golden faced upon conviction. Golden therefore cannot mount an arguably meritorious claim that his sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

We also agree with appellate counsel that Golden could not mount an arguably meritorious claim that he wrongly faced enhanced penalties for committing his crimes as second or subsequent offenses. The State alleged in the criminal complaint that Golden previously had been convicted of offenses related to controlled substances, *see* WIS. STAT. § 961.48(1)-(2m)(a), (3), and supported those allegations by attaching certified copies of judgments of conviction to the complaint. Golden admitted during the plea colloquy that he had an applicable prior conviction. Golden therefore properly faced an enhanced sentence for each crime. *See* ***id.***; *see also* ***State v. Coolidge***, 173 Wis. 2d 783, 792-93, 496 N.W.2d 701 (Ct. App. 1993), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Regardless, Golden did not receive an enhanced sentence for any of the five convictions here, and the allegations that his crimes were second or subsequent offenses therefore do not support an arguably meritorious claim for relief. *See* ***State v. Farr***, 119 Wis. 2d 651, 662-63, 350 N.W.2d 640 (1984).

Finally, we conclude that Golden could not mount an arguably meritorious challenge to the circuit court's decisions denying him eligibility for the challenge incarceration program and

delaying his eligibility for the Wisconsin substance abuse program until after he serves five years of initial confinement. Both the challenge incarceration program and the Wisconsin substance abuse program are prison treatment programs, and an inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. A circuit court exercises its sentencing discretion when determining both a defendant's eligibility for these programs and the date that the defendant's eligibility may begin. *See* WIS. STAT. § 973.01(3g)-(3m);[5] ***State v. White***, 2004 WI App 237, ¶¶2, 6-10, 277 Wis. 2d 580, 690 N.W.2d 880. 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.

Here, Golden did not seek eligibility to participate in the challenge incarceration program, explaining that he was unable to meet that program's physical demands. Golden cannot pursue an arguably meritorious challenge to a sentencing decision that he requested. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). As to the decision delaying the start of Golden's eligibility for the Wisconsin substance abuse program, the totality of the circuit court's sentencing remarks reflect that the circuit court intended that Golden have a chance to benefit from the opportunities that the program offered but nonetheless spend

[5] 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).

sufficient time in prison to satisfy the sentencing goals. Further pursuit of this issue 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 (2017-18).

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved of any further representation of Raymond T. Golden on appeal. *See* WIS. STAT. RULE 809.32(3) (2017-18).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals