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

2019AP1630-CRNM State of Wisconsin v. Emmanuel J. Hoskins (L.C. # 2015CF3129)

Before Dugan, Donald 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).

Emmanuel J. Hoskins pled guilty to second-degree sexual assault. He faced maximum penalties of a \$100,000 fine, forty years of imprisonment, or both. *See* WIS. STAT. §§ 940.225(2)(a) (2013-14),¹ 939.50(3)(c). The circuit court imposed a twenty-five-year term of

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

imprisonment bifurcated as fifteen years of initial confinement and ten years of extended supervision. The circuit court set restitution at zero and awarded Hoskins the 548 days of sentence credit that he requested.

Hoskins, by Assistant State Public Defender Nicole N. Masnika, moved for postconviction relief. He alleged that he was sentenced on the basis of inaccurate information about his 2009 misdemeanor conviction for engaging in sexual intercourse with a child age sixteen or older. Relatedly, he alleged that additional information about the circumstances of that offense constituted a new factor and that his trial counsel was ineffective for failing to ensure that the circuit court received the information at sentencing. The circuit court denied the motion without a hearing. Hoskins appeals.

Attorney Masnika filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).² Hoskins did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders*, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. See WIS. STAT. RULE 809.21 (2017-18).

According to the criminal complaint, C.T.B. was walking alone in the 2600 block of North 35th Street in Milwaukee, Wisconsin, at approximately midnight on November 29, 2013. A man driving a car swore at her and ordered her to get into his car. C.T.B. complied. The man drove into an alley, demanded that she remove her pants, and engaged in mouth-to-vagina sexual

² Attorney Masnika left her position with the State Public Defender's Office after she filed the no-merit report in this matter. The State Public Defender subsequently appointed Assistant State Public Defender Christopher D. Sobic as successor counsel for Hoskins.

intercourse with her. Next, he grabbed her head and forced her to have penis-to-mouth sexual intercourse. The man then drove a few blocks, stopped the car, punched her in the face, and squeezed her throat. After ordering C.T.B. to lie down, the man forced his penis into her vagina and then into her anus. He told her that he would cut her throat, take her up north, and kill her. C.T.B. struggled to sit up, but the man strangled her until she lost consciousness. When she regained consciousness, he again began driving the car. C.T.B. reached across the man, opened the driver's side door, and rolled out of the vehicle. The man held on to her, dragging her body along the road as the car moved forward. Eventually, the man released C.T.B., and she fell into the street.

On November 30, 2013, C.T.B. went to the hospital, where medical personnel collected swabs from her body, including swabs from her vagina and anus. The swabs were sent to the Wisconsin State Crime Laboratory for DNA analysis.

On December 25, 2014, C.T.B. called the police and reported that the man who had raped her was at a bus stop at 275 West Wisconsin Avenue. Police arrested the man, who was subsequently identified as Hoskins, and collected buccal swabs from him. Those swabs were also sent to the Wisconsin State Crime Laboratory. A DNA analyst compared the DNA profile developed from C.T.B.'s anal and vaginal swabs with the DNA profile developed from Hoskins's buccal swabs. The analyst concluded that the profiles matched. The State charged Hoskins with five felonies: one count each of kidnapping, strangulation and suffocation, and false imprisonment; and two counts of second-degree sexual assault.

Hoskins pled not guilty, and the matter was set for jury trial. On the first day of trial, however, he elected to resolve the case with a plea agreement. Pursuant to its terms, he agreed to

plead guilty to one count of second-degree sexual assault, and the State agreed to move for dismissal of the remaining four counts. The parties also agreed that both sides were free to argue for whatever sentence each thought appropriate. The circuit court accepted Hoskins's guilty plea and dismissed the remaining charges against him. The matter thereafter proceeded to sentencing.

We first consider whether Hoskins could pursue an arguably meritorious challenge to the validity of his guilty plea. We conclude that he could not do so. At the outset of the plea hearing, the circuit court established that Hoskins was forty-one years old, had a high school equivalency degree, and had some post-secondary education. The circuit court also established that Hoskins had signed a 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 Hoskins 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; *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The record—including the plea questionnaire and waiver of rights form and its addendum, the attached jury instruction describing the elements of the crime to which Hoskins pled guilty, and the plea hearing transcript—demonstrates that Hoskins

entered his guilty plea knowingly, intelligently, and voluntarily. Further pursuit of this issue would lack arguable merit.³

We next conclude that no arguably meritorious basis exists for further pursuit of the issues Hoskins raised prior to his guilty plea. Although Hoskins filed procedural motions in anticipation of a trial in this case, a defendant who enters a valid guilty plea normally forfeits all nonjurisdictional defects and defenses to the criminal charge. *See State v. Kelty*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. Accordingly, further pursuit of the issues that Hoskins raised in pretrial proceedings would be frivolous within the meaning of *Anders*.

We next consider whether Hoskins could pursue an arguably meritorious challenge to his sentence. 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

³ In the no-merit report, appellate counsel considers the merits of seeking plea withdrawal in light of certain remarks that Hoskins made at sentencing. In that proceeding, Hoskins told the circuit court near the outset of his allocution that he had sexual intercourse with C.T.B., but “the raping, beating, and choking, the dragging down the street, that never happened.” Later in his remarks, Hoskins said several times that his sexual intercourse with C.T.B. “wasn’t by threat” and “wasn’t by force.” The circuit court then reminded Hoskins that he had pled guilty to second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(a), and thus had admitted sexual intercourse with the victim “by use or threat of force or violence.” *See* WIS JI—CRIMINAL 1208. The circuit court then briefly recessed the proceedings to permit Hoskins to consult with his trial counsel. When the proceedings resumed, Hoskins advised the circuit court that, although he denied the allegations that C.T.B. jumped out of his car and was injured as a result, he admitted that he had sexual intercourse with her by use or threat of force or violence. We agree with appellate counsel that the foregoing does not suggest an arguably meritorious basis for Hoskins to challenge his guilty plea. *Cf. State v. Rhodes*, 2008 WI App 32, ¶¶7, 13, 307 Wis. 2d 350, 746 N.W.2d 599 (holding that an assertion of innocence alone is insufficient to support a claim for plea withdrawal before sentence is imposed).

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.” *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 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 a wide range of 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. *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, public protection, Hoskins’s rehabilitation, and deterrence to others were the primary sentencing goals, *see Gallion*, 270 Wis. 2d 535, ¶40, and the circuit court discussed the factors that it viewed as relevant to achieving those goals.

The circuit court described sexual assault as a serious crime and found that the offense was aggravated here because the victim was only seventeen years old. The circuit court explained that “even the most street-wise seventeen year-old is vulnerable to this kind of sexual assault by full-grown, adult men.”

In considering Hoskins’s character, the circuit court began by finding that Hoskins had a substantial criminal record spanning two decades. *See State v. Fisher*. 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (stating that a significant criminal record is indicative of

character). The circuit court went on to catalog his crimes, which the State had listed earlier and Hoskins had not denied. In the 1990s and “early 2000’s,” he was convicted of two counts of operating a motor vehicle without the owner’s consent, possession of a controlled substance with intent to deliver that substance, forgery, and robbery. More recently, Hoskins had been convicted of escape, battery, sex with a child sixteen years of age or older, and retail theft. The circuit court found that his criminal record was “not good,” and the circuit court indicated that it had heightened concerns about his convictions because for “some of these offenses ... [Hoskins] ha[d] been placed on supervision ... and that supervision was revoked.”

The circuit court credited Hoskins with accepting responsibility for his crime in this case and for relieving C.T.B. from the obligation to testify. The circuit court also found that Hoskins had a better education than many criminal defendants, and the circuit court acknowledged that he had a work history and no substance abuse problems. The circuit court took into account, however, that Hoskins had five children and found that his criminal convictions would expose his children to the consequences of his crimes and “impose a terrible burden [on] them.... [W]hen you have kids and you commit serious crimes, it does not speak well for your character.”

Turning to the need to protect the community, the circuit court found that:

the public, and particularly teenagers in the ballpark of seventeen, need protection. This would be the second offense where you had sex with somebody who was in that age range.... It was a misdemeanor conviction earlier for sex with a child over the age of sixteen. Now there’s this one. That’s not good.... The public also needs protection generally from people who pr[e]y on ... strangers.”

The circuit court concluded:

[b]ecause of the aggravated nature of the offense, because of the negative aspects of your character and considering the positive aspects as well, your education, the fact that you do have children, the fact you have some employment history, the fact that your convictions are distant in time but still present and continuing, [and] considering that the public needs protection for the reasons that I have outlined, it will be my sentence in connection with this matter that you serve an initial term of confinement in Wisconsin State Prison of fifteen years. It will be followed by a term of ten years of extended supervision.

The circuit court identified the factors it considered in fashioning the sentence imposed. The factors are proper and relevant. A challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

We next consider whether Hoskins could mount an arguably meritorious claim that the circuit court erroneously denied his postconviction motion. We conclude that he could not do so.

In postconviction proceedings, Hoskins contended that he was entitled to resentencing because he was sentenced on the basis of inaccurate information about his 2009 misdemeanor conviction for having sex with a child sixteen years of age or older. Specifically, he argued that the circuit court did not know when it imposed sentence that the victim of the earlier crime had misled Hoskins about her age, that the crime came to light because Hoskins impregnated the victim, that she spoke in his defense at sentencing, and that, following his conviction, the victim maintained an intimate relationship with him that continued for five years and produced three children.

To establish a denial of the due process right to be sentenced on the basis of accurate information, the defendant must show both that the disputed information was inaccurate and that the sentencing court actually relied on the inaccurate information. *See State v. Tiepelman*, 2006 WI 66, ¶¶9, 26, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied the due

process right to be sentenced on the basis of accurate information is a constitutional issue that we review *de novo*. See *id.*, ¶9. Here, as the circuit court explained in its postconviction order, Hoskins failed to show that the circuit court relied on any inaccurate information. Instead, he showed only that the circuit court sentenced him in light of information that he now views as incomplete. That showing does not satisfy *Tiepelman*. Further pursuit of this claim would therefore lack arguable merit.

Hoskins alternatively contended that he was entitled to sentence modification because, he said, the circumstances underlying his 2009 conviction for sex with a child sixteen years of age or older constituted a new factor. A new factor is “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.” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Before a circuit court may modify a sentence based on a new factor, the defendant must show both that a new factor exists and that the new factor warrants sentence modification. See *id.*, ¶38. Whether a new factor exists is a question of law for our *de novo* review, see *id.*, ¶¶33, 36, but whether to modify a sentence based on a new factor rests in the circuit court’s discretion, see *id.*, ¶37.

Here, the circuit court concluded that, assuming the information Hoskins offered about his 2009 conviction constituted a new factor, it did not warrant sentence modification. The circuit court explained: “the details of the 2009 conviction do not mitigate the gravity of the defendant’s crime in this case, the impact on the victim or the need for punishment, deterrence, and community protection. The court imposed the minimum amount of confinement time needed to accomplish its sentencing goals.” Because the circuit court properly exercised its

discretion in denying Hoskins's claim for sentence modification, further pursuit of this issue would lack arguable merit. See *State v. Prineas*, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (“[O]ur inquiry is whether discretion was exercised, not whether it could have been exercised differently.”).

Finally, Hoskins contended in postconviction proceedings that his trial counsel was ineffective for failing to ensure that the sentencing court knew about the circumstances surrounding his 2009 conviction for having sex with a child sixteen years of age or older. To prove that counsel was ineffective, the defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the analysis are questions of law for our *de novo* review. See *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). Here, the circuit court found during the postconviction proceedings that information about the 2009 conviction “did not mitigate the aggravated nature of the sexual assault in this case,” and “would not have resulted in a lesser prison sentence.” Accordingly, Hoskins cannot demonstrate that he suffered prejudice from any alleged deficiency in his trial counsel's failure to provide additional information about the circumstances of the 2009 conviction. See *State v. Giebel*, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (concluding that defendant did not prove prejudice where the circuit court found it would have imposed the same sentence “even if trial counsel had performed at sentencing in the manner suggested by [the defendant]”).

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 and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Christopher D. Sobic is relieved of any further representation of Emmanuel J. Hoskins 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