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July 7, 2020

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

2019AP1476-CRNM State of Wisconsin v. Nicole Dominique Hughes
(L.C. # 2017CF5906)

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

Nicole Dominique Hughes appeals from a judgment, entered upon her guilty pleas, convicting her on one count of child neglect resulting in great bodily harm and one count of physical abuse of a child by intentionally causing bodily harm, both as a habitual offender. Hughes

also appeals from an order denying her postconviction motion for sentence modification. Appellate counsel, Carl W. Chesshir, 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] Hughes was advised of her right to file a response, and she has responded. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's report, and Hughes's response, we conclude that there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment and order.

In December 2017, the Department of Children and Families called the Milwaukee Police Department to lodge a child abuse and neglect complaint. Social worker Alyssa Jones told the responding officer that she had received a complaint of malnutrition, so on November 30, 2017, she and her partner picked up five children from Hughes's home: five-year-old A.J.P., three-year-old C.W.,[2] two-year-old M.W., one-year-old D.W., and one-month-old Z.W. A.J.P., C.W., and M.W. were already in protective custody as a result of a prior Department investigation and Hughes's November 2016 conviction for child neglect resulting in bodily harm, but the children had begun a trial reunification with Hughes in August 2017.

Upon their removal from Hughes's home, the children were taken to Children's Hospital of Wisconsin and examined. Doctors reported injuries to all the children that were "highly concerning" for inflicted trauma and physical abuse. A.J.P. was observed to have multiple injuries including patterned bruising on her abdomen, bruising on her chest, and a scar over her left eye,

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

[2] Four of the children have the first and last initials of Z.W.; for three of these children, we have substituted their middle initial for their first initial so that each child has a distinct identifier.

which was possibly consistent with her report that Hughes had kicked her in the eye. C.W. was observed to have multiple injuries including scars on his lip and ear and multiple contusions, one of which was consistent with a "looped cord" injury. C.W. was also missing a tooth and, when asked what happened to it, he said Hughes had punched him. M.W. had "numerous scars and wounds over her face and ears" as well as bruising beneath both eyes. The bruising was "consistent" with A.J.P.'s report that Hughes had punched M.W. in the face for crying. One-year-old D.W. had healing factures of the right radius and ulna, the bones in the forearm. One-month-old Z.W. had a healing fracture of her left humerus, the bone in the upper arm. The criminal complaint explained, as to both children, that "[l]ong bone fractures usually result from high force events that are outside the range of forces used in the normal care, play, activity, or handling of a non-cruising child." There was also concern for failure to thrive as to the two youngest children and "nutritional neglect" of D.W.

Hughes was charged with two counts of child neglect causing great bodily harm as a habitual offender for her treatment of D.W. and Z.W. and three counts of physical abuse of a child by intentionally causing bodily harm as a habitual offender for her treatment of M.W., A.J.P., and C.W.

Hughes eventually agreed to resolve her case through a plea agreement. In exchange for her guilty pleas to one of the child neglect charges and one of the physical abuse charges, the State would dismiss and read in the other three offenses. In addition, the State would recommend eight to ten years of initial confinement and the defense would be free to argue for the appropriate sentence.

The circuit court conducted a colloquy, accepted Hughes's pleas, and sentenced her to twelve years' imprisonment for the child neglect and ten years' imprisonment for the physical abuse, to be served consecutive to each other and to any other sentence.[3] However, the circuit court had improperly applied the habitual offender penalty enhancer to the terms of extended supervision, prompting the State to ask for a correction. The circuit court revised the sentences by commuting the terms of extended supervision to the statutorily authorized maximums. Thus, Hughes's ultimate sentence was six years of initial confinement and five years of extended supervision for the neglect, plus five years of initial confinement and three years of extended supervision for the abuse, for a total of nineteen years' imprisonment.

At the close of the sentencing hearing, the circuit court clerk asked whether Hughes was eligible for the challenge incarceration and substance abuse programs. The circuit court responded, "No, she is not eligible." Believing the circuit court may have meant she was ineligible under the statutes, even though Hughes satisfied statutory criteria, and because there was no further explanation of the ineligibility determination, Hughes filed a postconviction motion for sentence modification, seeking reconsideration of her program eligibility. The postconviction court concluded that the circuit court's "finding of ineligibility for the early release programs is entirely consistent with its intent to punish and deter the defendant" and denied the motion. Hughes appeals.

Appellate counsel addresses three issues in the no-merit report. The first of these is whether the circuit court properly accepted Hughes's guilty pleas. Our review of the record—including the

[3] The Honorable Mary M. Kuhnmuench accepted Hughes's plea and imposed sentence; we refer to her as the circuit court. The Honorable Jean M. Kies reviewed and denied Hughes's postconviction motion; we refer to her as the postconviction court.

plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, 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.

In particular, we note that the circuit court asked Hughes if she was pleading guilty because she was guilty, and Hughes initially responded, "No, ma'am." The circuit court then paused the proceedings so that Hughes could confer with counsel. When proceedings resumed, trial counsel told the circuit court that Hughes was ready to admit guilt. The circuit court explained to Hughes that it did not take guilty pleas from innocent people and reminded Hughes that if she wanted to go to trial, she had the constitutional right to do so. It further explained that if Hughes had "made peace with the reasons" for entering guilty pleas, it would certainly accept them. The circuit court also informed Hughes that if she wanted additional time to consider her options, her attorney could so request on her behalf. Hughes told the circuit court that she was ready to proceed and that she was pleading guilty because she was guilty, and the circuit court completed the plea colloquy.

Thus, we are satisfied that there is no arguable merit to a claim that Hughes's pleas were anything other than knowing, intelligent, and voluntary, and we agree with appellate counsel's conclusion that there is no arguable merit to a claim that the circuit court failed to properly accept Hughes's pleas.

The second issue appellate counsel addresses 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 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* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. While the original sentences imposed had excessive terms of extended supervision, the circuit court corrected that error when it commuted the supervision terms to their statutorily authorized maximums. *See* WIS. STAT. § 973.13. The resulting consecutive sentences totaling nineteen years' imprisonment are well within the twenty-eight and one-half-year range[4] 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). Thus, we agree with appellate counsel's conclusion that there would be no arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion.

The final issue appellate counsel addresses is whether the postconviction court erred by denying Hughes's request to be made eligible for the challenge incarceration and substance abuse programs, both of which are early release programs. Subject to a few exceptions inapplicable to this appeal, a circuit court imposing a bifurcated sentence "shall, as part of the exercise of its

[4] Had Hughes gone to trial on all the charges, her exposure was sixty-seven years of imprisonment.

sentencing discretion, decide whether the person being sentenced is eligible or ineligible" to participate in the challenge incarceration and substance abuse programs. *See* WIS. STAT. § 973.01(3m); *see also* WIS. STAT. §§ 902.05, 973.01(3g). While the circuit court must state whether the defendant is eligible or ineligible for these programs, completely separate findings on the reasons for the eligibility decision are not required so long as the overall sentencing rationale also justifies the eligibility determination. *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. Whether to grant a motion for sentence modification is committed to the circuit court's discretion. *See* ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895.

The postconviction court here reviewed the circuit court's sentencing comments and denied Hughes's motion, explaining:

> Although rehabilitation was a sentencing consideration in this case, it is clear from the court's sentencing decision that the primary purpose of the sentence was to punish the defendant for what she did to her children and for her selfish attempts to hide her conduct at their expense. The court observed that the defendant had many opportunities to seek help for her children, but instead, she accused them of lying and making up stories despite the damning forensic evidence of abuse. The court's finding of ineligibility for the early release programs is entirely consistent with its intent to punish and deter the defendant for the incredibly serious harm she inflicted upon her children and to protect the most vulnerable members of our community. This court finds that the tenor and totality of [the] sentencing comments justify the eligibility determination [the circuit court] made in this case, and therefore, the court denies the motion for sentence modification.

We discern no erroneous exercise of discretion in this decision. Accordingly, there is no arguable merit to a challenge to the circuit court's initial denial of program eligibility or to the postconviction court's denial of the motion for sentence modification.

Hughes raises several issues in her two-page response. At the outset, she seeks to withdraw the no-merit report so that she can "file a new motion of ineffective counsel and representation" by her trial attorney. However, the response does not indicate what about counsel's representation Hughes believes was ineffective, and we see no arguably meritorious basis for such a claim in the record before us. To the extent that Hughes may be claiming that trial counsel was ineffective relative to the other issues in her response, those issues lack arguable merit and, thus, her trial attorney was not ineffective for failing to pursue them. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

Hughes first seeks a "removal of my no-contact order," which prevents her from contacting her children, so she "can have the proof that DMCPS (children's court) needs to start my supervised visits." At sentencing, trial counsel noted that there were ongoing proceedings in children's court, and counsel's understanding was that it was "recommended that [Hughes] begin having supervised visits with her children[.]" Trial counsel noted that the existing no-contact order in this case had prevented any visitation and requested, as part of the conditions attached to Hughes's sentence, "that there not be a blanket no contact [order]" but, instead, "maybe some sort of order that she can have contact under the rules and guidelines set up by children's court…. I hope that we can start having her work towards reunification and being able to comply with the requirements out at children's court[.]" The circuit court rejected this request, explaining that to "let [Hughes] have contact with her children in some fashion would unduly diminish the seriousness of these horrible crimes in such a way that [she] would not have a full understanding or appreciation of the wrong that she has done here. That's not even in the realm of what I believe is the appropriate sentence in this case."

"When a court imposes a sentence on an individual … the court may prohibit the individual from contacting victims … during any part of the individual's sentence or period of probation if the court determines that the prohibition would be in the interest of public protection." WIS. STAT. § 973.049(2). In view of the entirety of the record, we discern no arguably meritorious claim that the circuit court erroneously exercised its discretion when ordering Hughes to have no contact with her children.

Hughes next writes that she "would like to be able to do some rehabilitation, programs and even file for my 75% time cut if possible." Aside from the circuit court's obligation to determine initial eligibility for the challenge incarceration and substance abuse programs, the availability of and enrollment in programs in the correctional facilities are within the purview of the Department of Corrections, not the courts. *See* WIS. ADMIN. CODE § DOC 302.14; *see also* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) ("Once a prison term is selected … the [circuit] court may not order specific treatment. Control over the care of prisoners is vested by statute in the Department of [Corrections].").

It is not clear what "75% time cut" Hughes refers to; she may be referring to the possibility of sentence adjustment, in which case, her understanding of that process is incomplete. An inmate serving a sentence for Class F through I felonies "may petition the sentencing court to adjust the sentence if the inmate has served at least [seventy-five percent] of the term of confinement in prison portion of the sentence." *See* WIS. STAT. § 973.195(1g), (1r)(a). A successful petition for sentence adjustment under § 973.195 results in conversion of any remaining initial confinement time to extended supervision time, not a reduction in the overall sentence. *See* § 973.195(1r)(g)1. There is nothing in the record to suggest that Hughes is ineligible to petition for sentence adjustment in accordance with the statute.

Finally, Hughes would "greatly appreciate the consideration of [her] sentence modification and eligibility for E.R.P. or … other program[m]ing available[.]" Hughes's eligibility for the earned release and substance abuse programs has already been discussed; because the circuit and postconviction courts appropriately exercised their discretion with respect to her eligibility, there is no basis for us to disturb their decisions, and the availability of and enrollment in programs in the correctional facilities are otherwise within the purview of the Department of Corrections. Accordingly, we discern no arguably meritorious issues within Hughes's response.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of further representation of Hughes 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