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

2018AP2235-CRNM State of Wisconsin v. Jason L. Baumeister (L.C. # 2016CF458)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Jason Baumeister appeals from an amended judgment[1] convicting him of two counts of repeated sexual assault of the same child contrary to WIS. STAT. § 948.025(1)(d)

[1] We construe the appeal as taken from the amended judgment of conviction dated October 30, 2018.

(2015-16).[2] Baumeister's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18) and ***Anders v. California***, 386 U.S. 738 (1967). Baumeister received a copy of the report and has filed a response. Upon consideration of the report, the response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21 (2017-18).

The circuit court sentenced Baumeister to consecutive forty-year terms (twenty-five years of initial confinement and fifteen of extended supervision for each count). Baumeister received sentence credit.

The no-merit report addresses the following possible appellate issues: (1) whether Baumeister's guilty pleas were knowingly, voluntarily and intelligently entered; and (2) whether the circuit court misused its sentencing discretion. After reviewing the record, we conclude that counsel's no-merit report properly analyzes these issues and correctly determines that these issues lack arguable merit.

Matters Relating to the Guilty Pleas

Baumeister's guilty pleas "waive[d] all nonjurisdictional defects and defenses." *See* ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471 (citation omitted). The colloquy informed Baumeister of the constitutional rights waived by his plea. *See* ***State v. Pegeese***, 2019 WI 60, ¶37, 387 Wis. 2d 119, 928 N.W.2d 590. The court confirmed

[2] The crimes occurred from 2011 to 2015. For ease of reference and unless otherwise noted, we refer to the 2015-16 version of the Wisconsin Statutes.

Baumeister's understanding of necessary other matters relating to his guilty pleas, including the plea questionnaire with the attached jury instructions for the crimes to which Baumeister had agreed to plead guilty. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. No issue with arguable merit arises from the plea colloquy. [3]

In his response, Baumeister complains that his guilty pleas waived various constitutional rights, including his right to a trial. Baumeister is correct. Waiver of constitutional rights is a consequence of a guilty plea, ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437, and the circuit court warned Baumeister of this consequence. We have already held that no

[3] During the plea colloquy, the circuit court did not review the specific elements of the crimes with Baumeister. Nevertheless, we do not deem the plea colloquy defective. During the colloquy, the circuit court confirmed that the elements of the crimes were attached to the plea questionnaire, Baumeister signed the plea questionnaire, he consulted with counsel about the questionnaire, and he reviewed the elements with counsel and understood them. Counsel also confirmed that he discussed the elements with Baumeister, and he understood them. The plea colloquy was adequate. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶37, 40-41, 387 Wis. 2d 119, 928 N.W.2d 590 (similar colloquy regarding the constitutional rights waived by a plea deemed adequate).

Even if the plea colloquy were defective, the record shows that at sentencing, the circuit court engaged in a further colloquy with Baumeister about the elements of the crimes. In light of this record, a motion to withdraw the guilty pleas would lack arguable merit. A reviewing court may look beyond the plea hearing transcript to the totality of the circumstances to evaluate whether a manifest injustice will occur if the plea is not withdrawn. ***State v. Cain***, 2012 WI 68, ¶31, 342 Wis. 2d 1, 816 N.W.2d 177. "The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well [as] the defense counsel's statements ... among other portions of the record." ***Id.*** (citation omitted). Based on the totality of the record created at the plea hearing and at sentencing, we conclude that in light of all of the information provided to Baumeister, he cannot show that it would be manifestly unjust to hold him to his guilty pleas.

We also observe that during the plea colloquy, the circuit court did not discuss the sentencing consequences that could arise from the dismissed and read-in charges. In ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, the court stated that the circuit court should advise the defendant that it may consider a read-in charge when imposing sentence, it may require a defendant to pay restitution on a read-in charge, and the State cannot prosecute a read-in charge in the future. Nevertheless, no issue with arguable merit is present because the circuit court did not consider the dismissed and read-in charges at sentencing, and restitution was not imposed.

issue with arguable merit arises from the entry of Baumeister's guilty pleas. We observe that an otherwise valid plea is not rendered involuntary because it was "induced or motivated by the defendant's desire to get the lesser penalty." ***Rahhal v. State***, 52 Wis. 2d 144, 151, 187 N.W.2d 800 (1971). That a defendant must choose among alternatives is not inherently coercive.

Baumeister argues that by pleading guilty, he "had to accept the erroneous dates that the crimes were committed thus causing one of the charges to be elevated from a Class C felony to a Class B felony concerning Victim B." Victim B is the subject of Count 6 in the second amended information which alleges repeated sexual assault of a child on or between November 1, 2014 and March 31, 2015, a Class B felony. *See* WIS. STAT. § 948.025(1)(d). On appeal, Baumeister argues that the crimes occurred between July 17, 2016 and October 1, 2016, after Victim B reached thirteen years.[4] Therefore, he should have been exposed to a Class C felony, *see* § 948.025(1)(e), not a Class B felony.

Baumeister's claim is at odds with the record and the positions he took in the circuit court. *See* ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987) (a party cannot take inconsistent positions). During the plea colloquy, Baumeister admitted that the charging document constituted the factual basis for his guilty pleas. In so doing, Baumeister stipulated to the factual basis that Victim B was under the age of thirteen at the time of the offenses, and he waived his right to contest the factual allegations. Furthermore, Baumeister explicitly admitted his guilt at the plea hearing and at sentencing. Baumeister's claim lacks arguable merit.

[4] The victim reached thirteen years on June 9, 2016.

Baumeister protests that he was manipulated into a plea agreement because the prosecutor charged him as a repeat offender. We have already upheld the guilty pleas as knowingly, voluntarily and intelligently entered. Furthermore, the prosecutor had broad discretion with regard to the charging decisions. *See* ***State v. Krueger***, 224 Wis. 2d 59, 67, 588 N.W.2d 921 (1999). This issue lacks arguable merit.

Matters Relating to Sentencing

We conclude that the circuit court engaged in a proper exercise of sentencing discretion after considering various sentencing factors. *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (we review the sentence for a misuse of discretion); ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (sentencing factors discussed). The circuit court found that the offenses were "incredibly severe" and that the public requires protection. The circuit court also considered Baumeister's history of prior offenses, his character and his substance use issues. During allocution, Baumeister explicitly acknowledged committing the offenses to which he pled guilty, he accepted responsibility for his conduct, and he expressed remorse and regret for his conduct and depravity.

As with the length of the sentence, whether sentences shall be served consecutively or concurrently is entrusted to the circuit court's discretion. *See* ***State v. Hamm,*** 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988). The factors that apply to the length of the sentences also apply to whether the sentences will run consecutively. ***Cunningham v. State***, 76 Wis. 2d 277, 284-85, 251 N.W.2d 65 (1977). The circuit court's rationale for fashioning the sentences also supports the circuit court's decision that the two sentences should be served consecutively. We do not see any misuse of discretion or issue with arguable merit.

In his response, Baumeister argues that because he sexually assaulted the victims in the same time frame rather than serially, the charges to which he pled guilty were multiplicitous. Therefore, he should have received concurrent, not consecutive, sentences. We have upheld the consecutive sentences as a proper exercise of circuit court discretion. We further hold that the charges were not multiplicitous because the two counts of repeated sexual assault of the same child were not identical in fact: the counts involved two victims and multiple acts against each victim on multiple occasions. ***State v. Pal***, 2017 WI 44, ¶¶15, 20, 374 Wis. 2d 759, 893 N.W.2d 848. This claim lacks arguable merit.

Baumeister complains that the sentencing judge was too solicitous of the victims at sentencing and exhibited bias against him. At sentencing, the circuit court acknowledged the impact on the victims of the crimes. The effect on the victim is an appropriate consideration at sentencing. ***State v. Owens***, 2006 WI App 75, ¶8, 291 Wis. 2d 229, 713 N.W.2d 187; ***State v. Bokenyi***, 2014 WI 61, ¶64, 355 Wis. 2d 28, 848 N.W.2d 759. The weight of all of the sentencing factors and considerations, including victim impact, Baumeister's character and non-sexual interactions with the victims, and any other matters Baumeister argues would have favored a lighter sentence, was for the sentencing court to decide. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112.[5] We see no arguable merit to a claim of circuit court bias or misuse of discretion at sentencing.

Baumeister contends that the presentence investigation report contained inaccurate information, the circuit court relied upon inaccurate information at sentencing, and his trial

[5] For this reason, we decline to parse the circuit court's remarks at sentencing, as Baumeister would have us do.

counsel was ineffective in this regard. The record shows that at sentencing, trial counsel offered corrections to the presentence investigation report, and Baumeister also had the opportunity to do so. The circuit court accepted corrections to the presentence investigation report, but rejected Baumeister's challenges to statements made by a parent of the victims. Baumeister does not identify the alleged errors in the presentence investigation report, and he does not specify which inaccurate information was allegedly relied upon by the circuit court at sentencing. Baumeister has not shown that this claim has arguable merit for appeal. [6]

Baumeister complains that the presentence investigation report depicted him as a person who did not support his family. This topic was addressed during the sentencing hearing. No issue with arguable merit is present.

Baumeister argues that trial counsel did not highlight the positive aspects of his character and personal history at sentencing. The sentencing record does not support Baumeister's claim. Counsel spoke about Baumeister's character, education and volunteerism and described him as a good person who had done bad things.

Baumeister complains that his trial counsel told him that the circuit court "could not use [a 1995 conviction for second-degree sexual assault of a child] at sentencing. Baumeister also argues that his trial counsel told him not to worry about uncharged offenses at sentencing.[7] At sentencing, the circuit court deemed the prior conviction part of "an undesirable behavior pattern." Even if trial

[6] For this reason, we also reject Baumeister's related ineffective assistance of trial counsel claim.

[7] Baumeister does not specify which aspects of the sentencing hearing support his claim that the circuit court considered uncharged offenses, and references to uncharged offenses are not apparent from the sentencing hearing transcript. Regardless, a circuit court does not err if it considers uncharged offenses. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

counsel made these statements, Baumeister would not be able to show prejudice arising from them.[8] Regardless of counsel's perspective, the circuit court had authority to consider the prior conviction and uncharged offenses as part of evaluating Baumeister's character and history of offenses. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23; ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990) (uncharged offenses can be considered in the context of a defendant's character). This claim lacks arguable merit because Baumeister cannot establish that he was prejudiced by counsel's statements. *See* ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (defendant has the burden of proof on prejudice).

Baumeister argues that his trial counsel was ineffective for failing to present a defense sentencing memorandum. Baumeister does not state what information a defense sentencing memorandum would have revealed. *Cf.* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994), *cert. denied*, 514 U.S. 1030 (1995) (an allegation that counsel failed to investigate "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the" case (citation omitted)). Baumeister also alludes to a "report" that contained the following statements he contends were positive for him: he did not identify emotionally with children, and he did not appear to have sexual urges toward children. Given that Baumeister pled guilty to two counts of repeated sexual assault of the same child, we see no arguable merit to a claim that the sentence would have been different if the circuit court

[8] To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's allegedly deficient representation was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Prejudice is a question of law decided by this court. ***Id.*** To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885 (citation omitted).

had this allegedly positive information before it. *See* ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885 (prejudice must be shown).

Baumeister complains that trial counsel did not counter allegedly erroneous statements made by the victim. Given the breadth of the circuit court's discretion at sentencing and the record of Baumeister's guilt (his guilty pleas, specific admissions of guilt and expressions of remorse), this claim lacks arguable merit.

Baumeister seeks resentencing. Neither Baumeister's response nor this record supports a resentencing claim.

Matters Relating to Ineffective Assistance of Trial Counsel

Baumeister makes a general challenge to the assistance rendered by his trial counsel. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether an ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing. *See* ***State v. Allen***, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal").

Baumeister states that counsel was appointed in the case in April 2017, but he did not meet with counsel until September 2017, shortly before he pled guilty on September 14, 2017.

Baumeister asserts that counsel did not communicate with him, and that he and counsel did not review evidence in the case before the plea hearing. However, the record shows that during the plea colloquy, Baumeister affirmed that he had enough time to consult with counsel and did not need more time to do so. Baumeister's claim of inadequate interactions is at odds with the record and the positions he took in the circuit court and therefore lacks merit. *See* ***Michels***, 141 Wis. 2d at 98.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any arguably meritorious issue for appeal.[9] Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the amended judgment of conviction and relieve Attorney Susan Alesia of further representation of Baumeister in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the amended judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Susan Alesia is relieved of further representation of Jason Baumeister in this matter.

[9] Issues raised in Baumeister's response but not specifically addressed in this opinion are meritless variations on an issue actually addressed by the court. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (appellate court is not required to address issues that lack sufficient merit to warrant individual attention).

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

Sheila T. Reiff
Clerk of Court of Appeals