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October 20, 2020

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

2019AP1679-CRNM State of Wisconsin v. Velma D. Harris (L.C. # 2018CF2886)

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).

Velma D. Harris pled no contest to the charge of failure to act to prevent sexual assault of a child. She faced maximum penalties of a $25,000 fine and twelve years and six months of imprisonment. *See* WIS. STAT. §§ 948.02(3) (2017-18),[1] 939.50(3)(f). The circuit court imposed an evenly bifurcated seven-year term of imprisonment, granted her the 149 days of sentence

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

credit she requested, set restitution at zero, and found her ineligible for the challenge incarceration program and the Wisconsin substance abuse program. Harris appeals.

Appellate counsel, Attorney Michael S. Holzman, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Harris filed a response. We have considered the no-merit report and Harris's response, and we have conducted an independent review of the record as mandated by ***Anders***. We conclude that no arguably meritorious issues exist for an appeal, and therefore we summarily affirm. *See* WIS. STAT. RULE 809.21.

The criminal complaint reflects that in June 2018, medical personnel located a foreign object lodged in the vagina of Harris's eleven-year-old daughter, Amy.[2] According to Amy, her mother's boyfriend, David Smith, inserted the object in September 2017, immediately after he had penis-to-vagina intercourse with her. In an interview with police, Amy said that Smith had penis-to-vagina intercourse with her on six occasions and additionally forced her to have mouth-to-penis and mouth-to-vagina contact with him. She said that she told Harris about the sexual

[2] To protect the privacy of the victim, we refer to her as Amy, a pseudonym. *See* WIS. CONST. art. I, § 9m; WIS. STAT. RULE 809.86.

abuse in September 2017 but Harris did not believe Amy, and Smith continued to live with her family. The State charged Harris with violating WIS. STAT. § 948.02(3).[3]

Harris decided to resolve the charge pursuant to a plea agreement. In October 2018, the circuit court accepted her no-contest plea to the charge, and the matter proceeded to sentencing.

We first consider whether Harris could pursue an arguably meritorious challenge to her no-contest plea on the ground that the circuit court did not fulfill the statutory and court-mandated duties required of it during a plea colloquy. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. We conclude that she could not do so.

At the start of the plea proceeding, the State described the terms of the parties' plea agreement. Harris would enter a plea other than not guilty to the charge in this case, and the State would recommend that the circuit court impose and stay an evenly bifurcated six-year term of imprisonment in favor of a three-year term of probation. The State would further move to dismiss and read in a misdemeanor theft case that had been pending against Harris since 2012. The circuit court reiterated these terms, and Harris confirmed that she understood them. She

[3] WISCONSIN STAT. § 948.02(3) provides:

> FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

assured the circuit court that she had not been threatened or promised anything outside of the plea agreement to induce her to enter her no-contest plea.

The circuit court described to Harris the maximum penalties that she faced upon conviction. Harris said she understood. The circuit court explained that it could impose the maximum statutory penalties if it chose to do so and that it was not bound by the terms of the plea agreement or by any sentencing recommendations. Harris again said she understood.

The record contains a plea questionnaire and waiver of rights form and an addendum. Harris confirmed that she signed both the plea questionnaire and the addendum after reading them and reviewing them with her trial counsel. The questionnaire reflected that Harris understood the charge she faced, the rights she waived by pleading no contest, and the penalties that the circuit court could impose. The addendum reflected Harris's acknowledgment that, by pleading no contest, she would give up her rights to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of the evidence against her.

The circuit court asked Harris whether the plea questionnaire correctly reflected that she was thirty years old, had an eleventh-grade education, was not under the influence of drugs or alcohol, and was not receiving treatment for a mental illness. Harris confirmed that the information was correct.

The circuit court told Harris that by proceeding with her no-contest plea, she would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed some of those rights on the record. Harris said she understood. Although the circuit court did not discuss every right, a check mark appears next to each right on the questionnaire, reflecting her understanding. A formalistic recitation of the rights is not required. *See* ***State v. Pegeese***, 2019

WI 60, ¶41, 387 Wis. 2d 119, 928 N.W.2d 590. Similarly, although the circuit court did not warn Harris in conformity with WIS. STAT. § 971.08(1)(c) about the risks of deportation and other potential immigration consequences that accompanied her no-contest plea, the warning appeared on the plea questionnaire. Because Harris had actual knowledge of the information that the circuit court should have provided, the omission does not provide a basis to challenge the plea.[4] *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶38, 378 Wis. 2d 504, 904 N.W.2d 773.

A circuit court must "establish that a defendant understands every element of the charge[] to which he [or she] pleads." *See* ***Brown***, 293 Wis. 2d 594, ¶58. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offense[] on the record, or ask defense counsel to summarize the elements of the offense[], or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." ***Id.***, ¶56. These methods are not exhaustive. ***Id.***, ¶49. Here, the circuit court summarized the elements at the outset of the plea hearing. Although the circuit court stumbled over its words in describing one of the elements, in context the circuit court's summary was clear. In addition, the circuit court established on the record that Harris reviewed all of the elements with trial counsel and that she had reviewed, initialed, and filed a copy of WIS. STAT. § 948.02(3), which further insured that she understood the elements of the offense.

[4] We observe that, before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Harris could make such a showing. At sentencing, her trial counsel advised that Harris was "originally from St. Louis."

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Here, trial counsel and the State stipulated that the facts in the criminal complaint were true. The circuit court properly found a factual basis for Harris's no-contest plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Harris entered her no-contest plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (reflecting that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

Harris asserts in her response to the no-merit report that she has grounds to withdraw her no-contest plea because her trial counsel was ineffective. A defendant who alleges ineffective assistance of counsel must make a two-prong showing that counsel performed deficiently and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To prove 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.

Here, Harris suggests that trial counsel performed deficiently by failing to tell her that the circuit court might not impose the penalty that the parties negotiated as part of the plea

agreement. She states: "counsel should make it readily known that the honorable judge can decide to go against the agreement made during plea bargaining. Ms. Harris contends that she was not aware of this fact until after she plead[ed] no contest." Harris's signed plea questionnaire, however, memorialized her understanding that "the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty." Moreover, the circuit court advised Harris on the record during the plea colloquy that, although the State was making a sentencing recommendation, "[the circuit court is] not a party to that recommendation. You might get probation, you might go to prison, you might get jail, sentencing is up to [the circuit court]." The circuit court reiterated its warning about the effect of the plea agreement multiple times, each time eliciting Harris's confirmation that she understood. During the last of these warnings, the circuit court emphasized: "there's no promise, whatsoever, on God's earth that you're going to get probation; you might, you might not; do you understand?" Harris responded: "[y]es, [y]our [h]onor." The record therefore shows that Harris in fact understood when she entered her no-contest plea that the circuit court was not required to follow the terms of the plea agreement. The information provided at the plea hearing overrides any erroneous assertion that Harris's trial counsel may have made or any misunderstanding that Harris may have had. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996). Further pursuit of this issue would lack arguable merit.

We also conclude that Harris could not pursue an arguably meritorious challenge to her sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***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 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.

Here, the circuit court identified protection of the public, punishment, and deterrence as the primary sentencing goals, and the circuit court discussed appropriate factors that it viewed as relevant to achieving those goals. The circuit court considered the gravity of the offense, finding that Amy was "traumatized" and "went through hell," and while the circuit court recognized that Smith was the primary source of the trauma, the circuit court found that Harris "stood by" when she was capable of taking protective action. The circuit court viewed Harris's character as largely mitigating, acknowledging that she had only a limited criminal record and that she had accepted responsibility for her crime by pleading no-contest and relieving Amy of the burden of testifying against her mother. Addressing the need to protect the public, the circuit court observed that Harris had exposed not only Amy but also a second daughter to Smith's abuse.

The circuit court considered the probationary disposition that the parties recommended. *See* ***Gallion***, 270 Wis. 2d 535, ¶27. The circuit court concluded, however, that probation would unduly depreciate the gravity of Harris's crime and that the sentencing goals could be met only by a prison term.

Harris contends in her response to the no-merit report that the sentence was unduly harsh. In determining whether a sentence is unduly harsh, we review the circuit court's sentence for an erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449. Here, Harris asserts that the sentence was unduly harsh because she believed that she would receive probation. We cannot agree that Harris has stated an arguably meritorious basis for challenging her sentence. Although the circuit court sentenced her differently than she had hoped, that is not an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206.

Moreover, a sentence is unduly harsh only if its length is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***State v. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 698 N.W.2d 823 (citation omitted). The sentence imposed here was well within the limits of the maximum sentence allowed by law. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct.App.1983).

We are satisfied that the circuit court considered proper factors and fashioned a reasonable sentence in this case. Further pursuit of this issue would lack arguable merit.

Last, we have considered whether Harris could pursue an arguably meritorious claim that the circuit court erred by finding her ineligible to participate in the challenge incarceration program and the Wisconsin substance abuse program. We conclude that she could not do so. A person convicted under WIS. STAT. § 948.02 is statutorily disqualified from participation in either program. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1.

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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of any further representation of Velma D. Harris. *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