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

2019AP1923-CRNM State of Wisconsin v. Larry T. Hayward (L.C. #2017CF5743)

Before Brash, P.J., Dugan 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).

Larry T. Hayward appeals a judgment of conviction entered upon his guilty pleas to four crimes: one count of delivery of cocaine and two counts of possession with intent to deliver cocaine, all as a party to a crime and as a second or subsequent offense relating to controlled substances; and one count of possessing a firearm as a felon. He also appeals a postconviction order denying sentence modification. Appellate counsel, Attorney Jorge R. Fragoso, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32

(2017-18).[1] Hayward 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. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, an undercover Waukesha County detective working with federal law enforcement officers purchased marijuana from M.W., who then said that he could also supply "as much cocaine as [the buyer] wanted." On October 16, 2017, the undercover detective arranged to purchase cocaine from M.W. Later that day, M.W. met with the detective in a parking lot at South 84th Street, in Milwaukee County, and delivered 59.4 grams of cocaine in exchange for $2900. Additional officers conducting surveillance observed that M.W. got into and out of the passenger side of a black Buick before completing the delivery. The officers determined that Hayward was the registered owner of the Buick and identified him as its driver.

On October 23, 2017, at the same South 84th Street location, M.W. delivered 29.5 grams of cocaine to the undercover detective in exchange for $1600, and on November 2, 2017, at another Milwaukee County location, M.W. delivered 31 grams of cocaine to the detective in exchange for $1450. On both of those occasions, officers conducting surveillance observed M.W. get into and out of the passenger side of Hayward's Buick before completing the drug transaction, and on both occasions officers determined that Hayward was in the driver's seat of the Buick.

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

On November 7, 2017, the undercover detective again arranged to purchase cocaine from M.W. Officers conducting surveillance that day observed M.W. get into and out of Hayward's Buick. M.W. then walked to a prearranged meeting place, where officers arrested him. Officers also arrested Hayward, who was sitting alone in the driver's seat of his Buick on West Scott Street in Milwaukee. A search of the Buick uncovered 27 grams of cocaine.

M.W. gave a statement to police after his arrest. He admitted selling cocaine and identified Hayward as the source of the drugs. Police obtained and executed a search warrant for Hayward's Milwaukee home that same day. In the home, police found a loaded firearm, a baggie containing 7.3 grams of cocaine, and $6000 in cash.

The State charged Hayward with three counts of delivery of cocaine and two counts of possession with intent to deliver cocaine, all as a second or subsequent offense and as a party to a crime. The State also charged him with one count of possessing a firearm as a felon. Shortly after filing the complaint, the State filed certified judgments reflecting that Hayward had both a prior misdemeanor conviction for possessing cocaine and a prior felony conviction for possessing cocaine.

Hayward decided to resolve the charges against him with a plea agreement. Pursuant to its terms, he agreed to plead guilty as charged to one count of delivery of cocaine, both counts of possession with intent to deliver cocaine, and possession of a firearm as a felon. The State agreed to recommend a global disposition of fifteen years of initial confinement and eight years of extended supervision and to move to dismiss the remaining charges and read them in for

sentencing purposes.[2] The circuit court accepted Hayward's pleas and dismissed the remaining charges.

At sentencing, Hayward faced maximum penalties as follows:

> ● for the Class C felony of delivery of more than forty grams of cocaine as a second or subsequent offence and as a party to a crime, a forty-six year term of imprisonment and a $100,000 fine, *see* WIS. STAT. §§ 961.41(1)(cm)4., 939.05, 939.50(3)(c), 961.48(1)(a);
>
> ● for the Class D felony of possession with intent to deliver more than fifteen but less than forty grams of cocaine as a second or subsequent offense and as a party to a crime, a thirty-one-year term of imprisonment and a $100,000 fine, *see* WIS. STAT. §§ 961.41(1m)(cm)3., 939.05, 939.50(3)(d), 961.48(1)(a);
>
> ● for the Class E felony of possession with intent to deliver more than five but less than fifteen grams of cocaine as a second or subsequent offense and as a party to a crime, a nineteen-year term of imprisonment and a $50,000 fine, *see* WIS. STAT. §§ 961.41(1m)(cm)2., 939.05, 939.50(3)(e), 961.48(1)(b); and
>
> ● for the Class G felony of possessing a firearm as a felon, a ten-year term of imprisonment and a $25,000 fine, *see* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g).

The circuit court imposed an aggregate term of seventeen years of imprisonment bifurcated as nine years of initial confinement and eight years of extended supervision. Specifically, the circuit court imposed four years of initial confinement and three years of extended supervision for the Class C felony, a consecutive sentence of three years of initial confinement and two years of extended supervision for the Class D felony, a concurrent sentence of three years of initial confinement and two years of extended supervision for the Class E

[2] At the plea hearing, the State also advised that it would seek reimbursement of the buy money used in the undercover cocaine purchases. At sentencing, however, the State expressly abandoned any request for reimbursement of the buy money.

felony, and a consecutive sentence of two years of initial confinement and three years of extended supervision for the Class G felony. The circuit court awarded Hayward the nine days of presentence incarceration credit that he requested and found him eligible for the challenge incarceration program and the Wisconsin substance abuse program after he completed five years of initial confinement.[3]

We first consider whether Hayward 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). The circuit court established at the plea hearing that Hayward was thirty-eight years old and had a high school equivalency degree. The circuit court also established that Hayward had signed a guilty plea questionnaire and waiver of rights form and addendum and that he understood their contents. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Hayward 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. The record—including the plea questionnaire and waiver of rights form and addendum, the attached documents describing the elements of the crimes to which Hayward pled guilty, and the plea hearing transcript—demonstrates that Hayward entered his guilty pleas knowingly, intelligently, and voluntarily. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

[3] Both the challenge incarceration program and the Wisconsin substance abuse program are prison programs offering substance abuse treatment. *See* WIS. STAT. §§ 302.045(1), 302.05(1)(am). When an inmate successfully completes either program, his or her remaining initial confinement time is converted to extended supervision time. *See* §§ 302.045(3m)(b), 302.05(3)(c)2.

We also conclude that Hayward could not pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that deterrence and protection of the community were the primary sentencing goals, and the circuit court discussed the sentencing factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The sentences that the circuit court selected were well within the limits of the maximum sentences allowed by law and cannot be considered unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Last, we have considered whether Hayward could pursue an arguably meritorious challenge to the circuit court's order rejecting his claim that a new factor warranted sentence modification. 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). Whether a fact or set of facts constitutes a new factor is a question of law for our *de novo* review. *See* ***id.***, ¶33.

To demonstrate the existence of a new factor here, Hayward, by counsel, alleged in postconviction proceedings that the Department of Corrections has a policy prohibiting an inmate from entering the Wisconsin substance abuse program unless the inmate is within three years of his or her release date. Hayward further alleged that he would thus be unable to participate in that program until he has served six of his nine years of initial confinement. Hayward argued that this thwarts the circuit court's intention that he enter the program after

serving five years of initial confinement and therefore warrants a one-year reduction in the length of his aggregate term of initial confinement.[4]

The circuit court correctly concluded that Hayward did not demonstrate the existence of a new factor. A circuit court exercises its discretion in determining whether to find a defendant eligible for the challenge incarceration program and the Wisconsin substance abuse program. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; *see also* WIS. STAT. §§ 973.01(3g)-(3m).[5] After the circuit court makes its eligibility finding, however, the Department of Corrections decides whether to place the inmate in the programs. *See* ***State v. Schladweiler***, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114, *overruled on other grounds by* ***Harbor***, 333 Wis. 2d 53, ¶¶47, 52, & n.11. The sentencing transcript here reflects that the circuit court was aware of the Department of Corrections' authority to determine an inmate's suitability for participation. The circuit court explained: "you have to serve five years of initial confinement and then it's up to the Department of Corrections if they want to put you in those programs. You could substantially reduce your sentence but it's not up to me. It's up to them." Thus, the circuit court recognized that, notwithstanding its eligibility finding, prison policies might delay or bar Hayward's participation. Accordingly, the circuit court did not "unknowingly overlook" the possibility that Hayward would not enter the Wisconsin substance

[4] Hayward alleged in a postconviction motion filed *pro se* shortly after his sentencing that he was unable to participate in the challenge incarceration program, and he further alleged that this constituted a new factor warranting sentence modification. The circuit court declined to address the motion because Hayward had counsel. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996). Attorney Fragoso did not renew the claim in the postconviction motion that he filed on Hayward's behalf.

[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 current version of the Wisconsin Statutes. .*See* WIS. STAT. §§ 302.05; 973.01(3g).

abuse program after completing five years of initial confinement. Further pursuit of this issue would lack arguable merit.

We observe that the foregoing analysis is equally applicable to a claim that Hayward's disqualification from participation in the challenge incarceration program constitutes a new factor. An inmate is excluded from participation in that program if the inmate has reached the age of forty before entering the program. *See* WIS. STAT. § 302.045(2)(b). Although Hayward will pass the age of forty before he completes five years of initial confinement and becomes eligible to participate, the circuit court's sentencing remarks reflect that the circuit court made eligibility findings knowing that he might never be placed in the program. His disqualification is therefore not a new factor. 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.

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

IT IS FURTHER ORDERED that Attorney Jorge R. Fragoso is relieved of any further representation of Larry T. Hayward. *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