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DISTRICT I

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December 29, 2020

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

2019AP158-CRNM State of Wisconsin v. Chaze Desouva Biami (L.C. # 2016CF2689)

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).

Chaze Desouva Biami pled guilty to three counts of injury by intoxicated use of a motor vehicle and three counts of second-degree reckless injury, all as a repeat offender. Each conviction carried maximum penalties of eighteen years and six months of imprisonment and a

$25,000 fine. *See* WIS. STAT. §§940.25(1)(a)(2015-16),[1] 940.23(2)(a), 939.50(3)(f), 939.62(1)(c). The circuit court imposed an aggregate thirty-year term of imprisonment, bifurcated as twenty years of initial confinement and ten years of extended supervision, and the circuit court also imposed a consecutive five-year term of probation. The circuit court awarded Biami the 285 days of presentence credit that he requested and ordered him to pay $1759.96 in restitution.

Biami's postconviction and appellate counsel, Attorney Christopher D. Sobic, filed a postconviction motion seeking resentencing on the ground that the circuit court imposed sentence based on inaccurate information, specifically, that the aggregate 111-year term of imprisonment that Biami faced included aggregate maximum component periods of ninety-six years of initial confinement and fifteen years of extended supervision. Biami argued that the aggregate maximum component periods were eighty-one years of initial confinement and thirty years of extended supervision. The circuit court rejected the claim.

Attorney Sobic filed a notice of no-merit appeal and a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18). Biami filed a response. Upon consideration of the no-merit report, Biami's response, and a 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 (2017-18).

We take the facts from the criminal complaint. On June 19, 2016, at approximately 4:25 a.m., Biami was driving a car the wrong way at high speed on Highway I-43 in Milwaukee,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Wisconsin. As he travelled south, he struck the vehicle that K.M. was driving northbound. Milwaukee Fire Department personnel who arrived at the scene of the collision initially determined that K.M. was pulseless and not breathing but they were able to resuscitate her and extricate her from the car using the Jaws of Life. Two children in car seats were also removed from the car, and all three victims were transported to a hospital. K.M. was placed in a medically induced coma and diagnosed with multiple broken ribs, a bruised kidney, a fractured arm, and a broken leg, among other injuries. E.M., five years old, had a shattered pelvis and internal injuries. J. E., four years old, had internal injuries and a broken collar bone.

Biami admitted to police that he had been drinking. A chemical test of his blood revealed an alcohol content of .144 percent. Police also determined that Biami's driver's license was suspended and that he had at least one prior felony conviction.

The State charged Biami with thirteen felonies as a repeat offender: three counts of injury by intoxicated use of a motor vehicle causing great bodily harm; three counts of injury by operating a motor vehicle with a prohibited blood alcohol content causing great bodily harm; three counts of second-degree reckless injury; one count of second-degree recklessly endangering safety; and three counts of knowingly operating a motor vehicle with a suspended driver's license causing great bodily harm. Biami also received three traffic citations: one for operating while intoxicated as a first offense, a second for operating a motor vehicle with a prohibited alcohol content, and a third for driving the wrong way on a divided highway.

Biami decided to resolve the charges against him short of trial. Pursuant to a plea agreement, he pled no-contest as a repeat offender to three counts of injury by intoxicated use of a motor vehicle and three counts of second-degree reckless injury. The State agreed to

recommend an aggregate sentence of twenty years of initial confinement and ten years of extended supervision, and the State moved to dismiss and read-in for sentencing purposes the remaining charges and citations. The circuit court accepted Biami's no-contest pleas, set the convictions for sentencing, and granted the State's motion to dismiss and read in the remaining charges.

At the outset of the sentencing hearing, the parties discussed a letter that Biami had sent to the circuit court a few weeks earlier stating that he wanted to change his no-contest pleas to guilty pleas due to his deep remorse and consciousness of guilt. His trial counsel explained that Biami had written the letter without counsel's knowledge and against counsel's advice. After Biami received advisements on the record from the circuit court, he withdrew his request to change his pleas, and the matters proceeded to sentencing. For the crimes of injuring J.E. and E.M. by intoxicated use of a motor vehicle, the circuit court imposed consecutive fifteen-year terms of imprisonment, each bifurcated as ten years of initial confinement and five years of extended supervision. For each of the three convictions for second-degree reckless injury, the circuit court imposed fifteen-year terms of imprisonment bifurcated as ten years of initial confinement and five years of extended supervision, and the circuit court ordered Biami to serve the three terms concurrently with each other and with the term of imprisonment imposed for the crime of injuring E.M by intoxicated use of a motor vehicle. For the remaining crime of injuring K.M. by intoxicated use of a motor vehicle, the circuit court imposed and stayed a fifteen-year term of imprisonment in favor of five years of probation and ordered Biami to serve that probationary term consecutive to the aggregate thirty-year term of imprisonment imposed for the other five convictions.

We begin by considering an issue that both appellate counsel and Biami discuss in their submissions, namely, whether Biami could pursue an arguably meritorious claim for plea withdrawal on the ground that his no-contest pleas were not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The record shows that Biami signed and filed two plea questionnaire and waiver of rights forms with attachments.[2] The forms reflected that Biami was thirty-seven years old and had completed the eleventh grade. The circuit court established that Biami had reviewed the forms with his trial counsel 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 Biami 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 forms, the attached jury instructions describing the elements of the crimes to which Biami pled no contest, and the plea hearing transcript—demonstrates that Biami entered his no-contest pleas knowingly, intelligently, and voluntarily.

Biami disagrees. He first asserts that he has an arguably meritorious claim that the circuit court failed in its duty to provide him with information about the range of punishments that he faced. *See* ***Pegeese***, 387 Wis. 2d 119, ¶23. In support, he points to the circuit court's statement at sentencing regarding the aggregate periods of initial confinement and extended supervision that constituted the 111-year maximum aggregate term of imprisonment that he faced. There is no arguable merit to this claim. During the plea hearing, the circuit court correctly told Biami

[2] Biami signed one plea questionnaire reflecting his wish to plead no-contest to three counts of injury by intoxicated use of a motor vehicle, and he signed a second plea questionnaire reflecting his wish to plead no-contest to three counts of second-degree reckless injury.

that it could impose eighteen years and six months of imprisonment for each offense. Further, although the circuit court is not required to "parse out and specifically advise the defendant" about the potential periods of confinement and extended supervision, *see* ***State v. Taylor***, 2013 WI 34, ¶42 n.12, 347 Wis. 2d 30, 829 N.W.2d 482, the circuit court also told Biami that it could bifurcate each maximum term of imprisonment as thirteen years and six months of initial confinement and five years of extended supervision. In sum, the circuit court fulfilled its obligation to ensure that when Biami pled no-contest, he understood the range of punishments he faced upon conviction. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Biami next complains that the circuit court did not explain the elements of the crimes to which he was pleading no-contest. The record, however, reflects that Biami acknowledged on his plea questionnaire and waiver of rights forms that he had reviewed the elements of the crimes with his trial counsel, that he understood those elements, and that they were reflected on documents attached to the plea forms. Attached to the forms were jury instructions correctly describing the elements of each crime. The circuit court confirmed on the record that Biami understood his written acknowledgements. The foregoing fully satisfies the circuit court's obligation to ensure that Biami understood the charges against him. *See* ***State v. Brown***, 2006 WI 100, ¶¶49, 56, 293 Wis. 2d 594, 716 N.W.2d 906 (reflecting that the circuit court may establish the defendant's understanding of the charges in numerous ways and setting forth a non-exhaustive list of such ways, including referencing a document signed by the defendant that includes the elements); *see also* ***State v. Hampton***, 2004 WI 107, ¶43, 274 Wis. 2d 379, 683 N.W.2d 14 (explaining that a valid plea does not require the circuit court to use "magic words or

an inflexible script"). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We next consider appellate counsel's conclusion that Biami's no-contest pleas do not raise double jeopardy or multiplicity concerns. We are satisfied that appellate counsel has correctly analyzed these potential claims and demonstrated that further pursuit of such claims would lack arguable merit. Accordingly, additional discussion of these issues is unnecessary.

We next consider whether Biami could 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. "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." *See* ***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. *See* ***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 and deterrence were the primary sentencing goals, and the circuit court discussed the factors that it deemed relevant to those goals.

The circuit court considered the gravity of the offenses, finding that Biami had "turned a five-year-old into a paraplegic" and finding that all of the victims had undergone extensive surgeries, endured long hospital stays, and were experiencing ongoing pain and disability. The circuit court went on to find that Biami had committed "the worst reckless injury case that [the court] ever had" before it. Turning to the need to protect the public, the circuit court recognized that Biami had not previously been convicted of operating a motor vehicle while intoxicated but observed that he nonetheless had a substance abuse problem requiring treatment in a confined setting. As to Biami's character, the circuit court found that Biami had two prior felony convictions and twenty-four prior convictions for operating after either suspension or revocation of his driver's license. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (holding that a substantial criminal record is evidence of character). The circuit court emphasized, however, that Biami had accepted responsibility for his crimes and demonstrated remorse. Therefore, notwithstanding the gravity of the offenses, the circuit court stated that it would not exceed the State's recommendation for an aggregate term of twenty years of initial confinement and ten years of extended supervision.

The circuit court identified the factors that it considered when sentencing Biami. The factors were proper and relevant. Moreover, none of the sentences exceeded the maximum terms of imprisonment allowed by law, and the aggregate penalty imposed was far less than the aggregate 111 years of imprisonment and $150,000 fine that he faced upon conviction. Biami

therefore cannot mount an arguably meritorious claim that his sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

We next conclude that Biami could not pursue an arguably meritorious challenge to the order that he pay restitution of $1,759.96. Biami stipulated to restitution in that amount. *See* WIS. STAT. § 973.20(13)(c). Therefore, a challenge to the order would be frivolous within the meaning of ***Anders***. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

We next conclude that Biami could not pursue an arguably meritorious claim that the circuit court erroneously found him ineligible to participate in the challenge incarceration program and the Wisconsin substance abuse program. A person serving a sentence for any crime specified in WIS. STAT. ch. 940 is statutorily disqualified from participation in either program. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1.

Next, we consider whether Biami could pursue an arguably meritorious challenge to the circuit court's postconviction order denying resentencing. We agree with appellate counsel that a challenge would lack arguable merit.

Biami sought resentencing on the ground that he was denied his due process right to be sentenced on the basis of accurate information. To establish a denial of that right, 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. Our review is *de novo*. *See* ***id.***, ¶9.

Here, Biami contended that the circuit court misunderstood the maximum component parts of the aggregate term of imprisonment that he faced. Biami's allegation turned on the following comments that the circuit court made at the outset of its sentencing remarks:

> if I gave you the maximums on the six charges that you've got, 111 years[,] I think. Eighteen and a half times six is a hundred and eleven years. Fifteen of it's extended supervision. Ninety-six would be initial confinement. Ninety-six and fifteen, that's the maximum I've got in front of me right now."

In rejecting Biami's claim, the circuit court stated in its postconviction order that the 111-year aggregate maximum term of imprisonment comprised eighty-one years of initial confinement and thirty years of extended supervision. The circuit court concluded, however, that Biami failed to show that it had relied on the maximum periods of confinement and supervision when imposing sentence. The circuit court explained that "it was the defendant's cooperation and remorse that guided the court's decision to follow the State's recommendation," and in support, the circuit court pointed to its remarks at sentencing that Biami "had accepted responsibility and shown remorse. More so than most people. And that's why you're not getting more than [the State] asks for."

We agree that the totality of the circuit court's sentencing remarks do not permit an arguably meritorious claim that the circuit court relied on the potential maximum periods of initial confinement and extended supervision when sentencing Biami. Rather, the circuit court explained that, in light of Biami's cooperation and remorse, the aggregate term of imprisonment imposed would not approach the potential maximum. Accordingly, the aggregate maximum component parts of the sentence did not play any role in the design of the sentences that Biami ultimately received. Moreover, the circuit court's statement about Biami's aggregate sentence was not inaccurate. Information is inaccurate within the meaning of ***Tiepelman*** when the

information is "materially untrue." *See* ***id.***, 291 Wis. 2d 179, ¶10. The circuit court's description of Biami's possible periods of initial confinement and extended supervision was not materially untrue because "a defendant's initial term of confinement may be increased during the confinement phase or the extended supervision phase." *See* ***Taylor***, 347 Wis. 2d 30, ¶42 n.12, (citing WIS. STAT. §§ 302.113(3)(a), 302.113(9)(am)).[3] Accordingly, the circuit court was not categorically wrong in describing the component periods of the maximum aggregate term of imprisonment that Biami faced. A challenge to the postconviction order denying resentencing based on the circuit court's description of those periods would therefore lack arguable merit.

Finally, Biami asserts in his response to the no-merit report that he can pursue an arguably meritorious claim for plea withdrawal based on the alleged ineffective assistance of his trial counsel. A defendant who claims that counsel was ineffective 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). Further, a defendant who seeks plea withdrawal based on the alleged ineffective assistance of counsel cannot prevail without a hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), but the defendant is entitled to a hearing only if the defendant alleges facts that, if true, would entitle the defendant to relief, *see* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). If, however,

[3] Pursuant to WIS. STAT. § 302.113(3)(a): "If an inmate subject to this section violates any regulation of the prison or refuses or neglects to perform required or assigned duties, the department may extend the term of confinement in prison portion of the inmate's bifurcated sentence." Pursuant to WIS. STAT. § 302.113 (9)(am), a person's extended supervision may be revoked for violating the rules of supervision and the person ordered to return to confinement for a time not exceeding the remaining time on the bifurcated sentence.

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 309-10 (citation omitted).

Biami first alleges that his trial counsel was ineffective because "Biami pled guilty without ever being informed that he faced a maximum of 81 years in [prison]."[4] As we have explained, however, Biami's maximum time in prison could exceed eighty-one years. *See* WIS. STAT. § 302.113(3)(a). Moreover, to the extent that Biami implies that his trial counsel failed to tell him the maximum punishment that he faced, the record conclusively shows that he was not prejudiced by the alleged failure. The record demonstrates that the circuit court did not accept Biami's no-contest pleas until Biami confirmed on the record that he understood the maximum sentence that he faced for each of his six convictions. The information that the circuit court provided at the plea hearing overrides any omission on trial counsel's part. *See* ***Bentley***, 201 Wis. 2d at 319.

Second, Biami alleges that his trial counsel was ineffective for failing to advise him regarding "the complete definition of criminally reckless conduct." The record conclusively shows that trial counsel's performance was not deficient. Biami filed WIS JI—CRIMINAL 1252, the pattern jury instruction for second-degree reckless injury, as an attachment to his signed plea questionnaire and waiver of rights forms. The forms reflect that Biami reviewed the applicable jury instructions with his trial counsel, and Biami confirmed during the plea hearing that the information on the forms was true and correct. WISCONSIN JI—CRIMINAL 1252 defines

[4] We observe that Biami did not plead guilty.

criminally reckless conduct. Accordingly, a claim that trial counsel was ineffective for failing to advise Biami about the definition of criminally reckless conduct is refuted by the record and 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 (2017-18).

IT IS ORDERED that the judgments of conviction and the 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 Chaze Desouva Biami. *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