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110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT I**

January 20, 2021

*To*:

Hon. Jean M. Kies
Circuit Court Judge
901 N. 9th St., Rm. 504
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Rm. 114
Milwaukee, WI 53233

Dustin C. Haskell
Assistant State Public Defender
735 N. Water St., Rm. 912
Milwaukee, WI 53203

Elizabeth A. Longo
Assistant District Attorney
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Justin Covellie Gray
4838 N. 60th. Street
Milwaukee, WI 53218

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

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2019AP2382-CRNM State of Wisconsin v. Justin Covellie Gray (L.C. # 2019CF1075)

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).**

Justin Covellie Gray pled guilty on July 8, 2019, to one felony count of stalking and five misdemeanor counts of unlawful use of a telephone to make threats against another person, all as acts of domestic abuse. For the felony offense, he faced maximum penalties of three and one-half years of imprisonment and a $10,000 fine. *See* WIS. STAT. § 940.32(2) (2017-18);[1] WIS.

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

STAT. § 939.50(3)(i). For each misdemeanor offense, he faced maximum penalties of ninety days in jail and a $1000 fine. *See* WIS. STAT. §§ 947.012(1)(a), 939.51(3)(b). As to each of the six offenses, he also faced a $100 domestic abuse surcharge. *See* WIS. STAT. § 973.055(1). For the felony conviction, the circuit court imposed a maximum term of imprisonment, bifurcated as eighteen months of initial confinement and two years of extended supervision. For each misdemeanor conviction, the circuit court imposed a maximum ninety-day jail sentence and ordered Gray to serve the five ninety-day sentences consecutively; but the circuit court further ordered that he serve the aggregate 450-day misdemeanor sentence concurrently with the felony sentence. The circuit court ordered Gray to pay $300 as restitution and imposed a $100 domestic abuse surcharge for each of the six offenses. Finally, the circuit court awarded Gray the 120 days of presentence credit that he requested and ordered that he receive the credit against the felony sentence and two of the misdemeanor sentences.

After Gray entered prison, the Department of Corrections advised the circuit court that, in the Department's assessment, the circuit court had awarded Gray excess sentence credit against the misdemeanor sentences. The circuit court agreed and entered an order directing entry of an amended judgment of conviction that awarded Gray 120 days of sentence credit against the aggregate misdemeanor sentences. Gray appeals.[2]

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[2] Gray filed a no-merit notice of appeal stating that he appeals from a judgment of conviction. The circuit court, however, entered two judgments of conviction, one in regard to the felony and one in regard to the misdemeanors. We construe the notice of appeal as applicable to both judgments. *See* ***Rhyner v. Sauk Cnty.***, 118 Wis. 2d 324, 325-26, 348 N.W.2d 588 (Ct. App. 1984) (explaining that it is immaterial that a notice of appeal refers to only one judgment when no doubt exists that the appeal is from two judgments).

Appellate counsel, Attorney Dustin C. Haskell, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Gray did not file a response. Upon review 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.

According to the criminal complaint, police spoke to A.T.L. on January 6, 2019, at her home on North 39th Street in Milwaukee, Wisconsin. She reported that Gray, who is the father of her three children, had forced his way into her home by breaking through the door, and that he then seized her by the throat and strangled her. On March 5, 2019, A.T.L. reported that she had been unable to evade Gray as he followed her home from their children's school. Police arrested Gray on March 11, 2019, outside A.T.L.'s home, after responding to her report that he was violating a temporary restraining order. The complaint goes on to describe a series of fifteen recorded telephone messages from Gray to A.T.L. The messages contained threatening and obscene language, including explicit statements that Gray planned to "take [his] Glock 21 and murder [A.T.L.]", to "blow [her] brains out," and to "break [her] motherf[*]ing neck." The State charged Gray with one felony count of strangulation and suffocation, one felony count of stalking, fourteen misdemeanor counts of unlawful use of a telephone, and one forfeiture count of making a telephone call with intent to harass, all as acts of domestic abuse.

Gray entered pleas of not guilty to the charges and demanded a speedy trial. On the day set for trial, however, he decided to resolve the case with a plea agreement. Pursuant to its terms, he pled guilty to the stalking charge and to five misdemeanor counts of unlawful use of a telephone, and the State moved to dismiss and read in the other eleven counts. The State agreed to recommend a maximum term of confinement for the felony conviction and an aggregate

twelve-month jail sentence for the misdemeanor convictions, and the State agreed to recommend that the court stay those sentences in favor of four years of probation. The circuit court accepted Gray's guilty pleas, dismissed and read in the remaining charges, and proceeded immediately to sentencing.

We first consider an issue that appellate counsel does not discuss, namely, whether Gray could raise an arguably meritorious claim that he was not competent to proceed in the circuit court. At Gray's first court appearance, his trial counsel questioned whether Gray was competent in light of his behavior while he waited for the court to call his case. A circuit court commissioner therefore referred Gray for a competency examination. The examining psychiatrist, Dr. John Pankiewicz, filed a report stating that Gray was "able to communicate in a coherent manner" and that he understood the "allegations against him, the seriousness of his charges, general court proceedings, and available pleas." Although Dr. Pankiewicz opined that Gray carried diagnoses of unspecified mood disorder, multi-substance use disorder, and unspecified personality disorder, Dr. Pankiewicz concluded that Gray was competent to proceed. Neither the State nor Gray challenged Dr. Pankiewicz's conclusion, and the circuit court found that Gray was competent.

"[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychiatrist's report and the standard of review, any further proceedings in regard to Gray's competence would lack arguable merit.

We next consider whether Gray 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). At the outset of the plea hearing, the circuit court established that Gray was thirty-seven years old, that he understood the English language, and that he had a high school equivalency degree. The circuit court also established that Gray had signed a guilty plea questionnaire and waiver of rights form and addendum after reviewing them with his trial counsel, and Gray assured the circuit court that everything in those documents was true and correct. *See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (providing that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The circuit court then conducted a colloquy with Gray that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***State v. Pegeese***, 2019 WI 60, ¶23, 387 Wis. 2d 119, 928 N.W.2d 590; *see also* WIS. STAT. § 971.08. The record—including the plea questionnaire and waiver of rights form and addendum, the attached jury instructions that Gray initialed and that describe the elements of the crimes to which he pled guilty, and the plea hearing transcript—demonstrates that Gray entered his guilty pleas knowingly, intelligently, and voluntarily. *See* § 971.08; *see also* ***Bangert***, 131 Wis. 2d at 266-72. Accordingly, the record does not reflect any basis for an arguably meritorious challenge to the validity of his pleas.

We next conclude that Gray could not pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its 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." ***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 offenses, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

Here, the circuit court identified deterrence as the primary sentencing goal, and the circuit court discussed appropriate factors that it viewed as relevant to achieving that goal. The circuit court considered the gravity of the offenses, finding that Gray's conduct was frightening and reprehensible and that the offenses were aggravated by their frequency. In assessing Gray's character, the circuit court acknowledged that Gray had accepted responsibility for his crimes, but the circuit court also considered that he had a significant criminal history that dated back to 1998. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (recognizing that a criminal record spanning decades is evidence of character). The circuit court discussed the need to protect the public, noting that Gray had threatened to harm not only A.T.L. but also members of her family, and the circuit court took into account that he had exposed his children to his threatening conduct.

The circuit court considered the probationary disposition that the parties recommended. *See* ***Gallion***, 270 Wis. 2d 535, ¶25. The circuit court concluded, however, that probation would unduly depreciate the gravity of Gray's crimes and that the sentencing objective could be met only by a prison term.

The circuit court identified the factors it considered in fashioning an appropriate disposition. The factors were proper and relevant. *See* ***id.***, ¶¶41-43 & n.11. Moreover, the aggregate three years and six months of imprisonment that the circuit court imposed was significantly less than the aggregate of nearly five years of imprisonment and $15,000 in fines that Gray faced upon conviction of the six offenses here. Gray 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 be frivolous within the meaning of ***Anders***.

We also conclude that Gray could not pursue an arguably meritorious claim that the circuit court erred by finding him ineligible to participate in the challenge incarceration program and the Wisconsin substance abuse program. A person is statutorily disqualified from participating in either program if the person is serving a sentence for any crime specified in WIS. STAT. ch. 940, or is serving a sentence that is not bifurcated. *See* WIS. STAT. §§ 302.045(2)(c)-(cm), 302.05(3)(a)1.-2. Pursuit of this issue would therefore be frivolous within the meaning of ***Anders***.

We next conclude that Gray could not pursue an arguably meritorious challenge to the domestic abuse surcharges that the circuit court imposed. As relevant here, the domestic abuse surcharge under WIS. STAT. § 973.055 is implicated if the circuit court:

> convicts the [defendant] of a violation of a crime specified in ... [WIS. STAT. §] 940.32 [or WIS. STAT. §] ... 947.012 ... and ... [t]he court finds that the conduct constituting the violation ... involved an act by the adult [defendant] against ... an adult with whom the adult [defendant] has created a child[.]

*See* § 973.055(1)(a). During the plea and sentencing hearing, Gray, by counsel, admitted that he had three children with A.T.L., and the circuit court therefore found that A.T.L. was the mother of his children. Accordingly, a challenge to the domestic abuse surcharges would be frivolous within the meaning of ***Anders***.

Next, we conclude that Gray could not pursue an arguably meritorious challenge to the order that he pay restitution in the amount of $300. Gray stipulated to restitution in that amount. *See* WIS. STAT. § 973.20(13)(c). A challenge to the order would therefore 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.

Finally, we agree with appellate counsel that Gray could not mount an arguably meritorious challenge to the postconviction order amending the judgment of conviction in the misdemeanor matters to award him 120 days of sentence credit against the aggregate 450-day misdemeanor sentence rather than against two of those sentences. The circuit court ordered Gray to serve his felony sentence concurrently with his misdemeanor sentences, so he was entitled to a total of 120 days of sentence credit against each concurrent term, *see* ***State v. Ward***, 153 Wis. 2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989), but the circuit court ordered Gray to serve the five

misdemeanor sentences consecutively, so the credit must be applied "on a day-for-day basis against the total days imposed in the consecutive sentences," *see* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). Further pursuit of this issue would lack arguable merit.[3]

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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of any further representation of Justin Covellie Gray. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*

[3] Appellate counsel states that the amended judgment of conviction that the circuit court entered in regard to the misdemeanor matters did not conform to the postconviction order because the amended judgment failed to award Gray any sentence credit against the misdemeanor sentences. Appellate counsel goes on to discuss why, in counsel's view, this scrivener's error in the amended judgment does not provide a basis for an appeal. Our review of the record reveals, however, that the circuit court directed entry of a seconded amended judgment of conviction in regard to the misdemeanor counts that correctly reflects the 120 days of sentence credit awarded in the postconviction order.