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February 9, 2021

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

2020AP1461-CRNM State of Wisconsin v. Tommy Lee Davis (L.C. # 2018CF5674)

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).

Tommy Lee Davis appeals judgments of conviction entered upon his guilty pleas to one felony count of bail jumping and one misdemeanor count of criminal damage to property, both as acts of domestic abuse. Appellate counsel, Attorney Vicki Zick, filed a no-merit report pursuant

to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Davis 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, and therefore we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police met with T.C.M. on November 26, 2018, at her home in the 1200 block of South 19th Street, in Milwaukee. She told the officers that Davis, her former boyfriend and the father of her three children, had forced his way into her home and demanded the keys to her car. When she refused to give him the keys, he left the home, approached her car, and shattered its front windshield, rear window, and driver's side taillight. Police determined that Davis was out of custody following his release on bond in Washington County Circuit Court case No. 2018CF217, where he faced a felony charge, and in Milwaukee County Circuit Court case No. 2018CM1714, where he faced multiple misdemeanor charges. A condition of his bond in both cases was that he not commit any new offenses. Based on Davis's conduct on November 26, 2018, the State charged him with felony bail jumping, misdemeanor bail jumping, criminal damage to property, and disorderly conduct, all as acts of domestic abuse.

Davis decided to resolve the four charges with a plea agreement that also resolved the misdemeanor charges in Milwaukee County Circuit Court case No. 2018CM1714. Pursuant to the plea agreement, he pled guilty to felony bail jumping and to misdemeanor criminal damage to property in the instant case and one count of misdemeanor battery in case No. 2018CM1714.[2] The

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

[2] Davis filed a second notice of no-merit appeal to challenge his judgment of conviction in Milwaukee County Circuit Court case No. 2018CM1714. Davis did not move to consolidate his two no-merit appeals, and they have proceeded separately in this court.

State agreed to dismiss and read in the remaining charges in both Milwaukee County cases and agreed not to charge Davis with any additional crimes arising out of telephone calls he made to T.C.M. while in custody awaiting resolution of the Milwaukee County charges. The agreement did not include any sentence concessions; Davis and the State were each free to recommend any sentence that the party deemed appropriate.

At sentencing, Davis faced maximum penalties of a $10,000 fine and a six-year term of imprisonment for the felony offense of bail jumping; and he faced maximum penalties of a $10,000 fine and nine months in jail for the misdemeanor offense of criminal damage to property. *See* WIS. STAT. §§ 946.49(1)(b), 943.01(1), 939.50(3)(h), 939.51(3)(a). For the felony conviction, the circuit court imposed a forty-two-month term of imprisonment bifurcated as eighteen months of initial confinement and twenty-four months of extended supervision. For the misdemeanor conviction, the circuit court imposed a concurrent nine-month jail sentence. The circuit court additionally set restitution at zero, granted Davis ninety-eight days of presentence credit against his sentences, and, pursuant to WIS. STAT. § 973.055(1), imposed a $100 domestic abuse surcharge for each offense.

We first consider whether Davis 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 Davis was thirty years old and had completed the eleventh grade. The circuit court also established that Davis had signed a guilty plea questionnaire and waiver of rights form and an addendum after reviewing them with his trial counsel, and Davis assured the circuit court that everything in the form and addendum was true and correct. *See* ***State v. Pegeese***, 2019 WI 60, ¶37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a thorough

colloquy with Davis that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08. Upon review of the totality of the record—including the plea questionnaire and waiver of rights form and addendum, the attached jury instructions describing the elements of the crimes to which Davis pled guilty, and the plea hearing transcript—we conclude that Davis entered his guilty pleas knowingly, intelligently, and voluntarily. Further pursuit of this issue would lack arguable merit.

We also conclude that Davis 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 public protection and deterrence 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. Neither of the sentences exceeded the maximum penalties allowed by law, and the aggregate penalty imposed was significantly less than the aggregate penalties that Davis faced upon conviction. Davis 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 Davis 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. §] 943.01 [or WIS. STAT. §] ... 946.49 ... 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.

Sec. 973.055(1)(a). During the sentencing hearing, Davis admitted that he and T.C.M. had three children together, and the circuit court therefore found that T.C.M. was the mother of his children. Accordingly, a challenge to the domestic abuse surcharges would be frivolous within the meaning of ***Anders***.

Finally, we have considered whether Davis could 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. Successful completion of either prison program permits an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m).[3] In this case, the circuit court explained that it would impose only a short prison term but that the confinement ordered was necessary to address the violence involved in the incident and to emphasize the importance of "following what the [c]ourt orders." The eligibility decision was thus consistent with the sentencing rationale. Further pursuit of this issue would lack arguable merit.

[3] 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).

Our independent review of the record does not disclose any other potential issues for appeal. 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 Vicki Zick is relieved of any further representation of Tommy Lee Davis in this matter. *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