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**DISTRICT I**

May 4, 2021

*To*:

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

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2020AP408-CRNM State of Wisconsin v. Davoughna Raeshawn Haley (L.C. #2018CF5394)

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).**

Davoughna Raeshawn Haley pled guilty to forgery as a party to a crime. *See* WIS. STAT. § 943.38(2), 939.05 (2017-18).[1] She faced maximum penalties of a $10,000 fine and a six-year term of imprisonment. *See* WIS. STAT. § 939.50(3)(h) (2017-18). The circuit court imposed an

[1] All subsequent references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

evenly bifurcated three-year term of imprisonment but stayed it in favor of three years of probation with the condition that she serve 120 days in the House of Corrections. The circuit court awarded Haley the four days of sentence credit she requested, found her eligible for the challenge incarceration program and the Wisconsin substance abuse program, required her to perform 100 hours of community service, and ordered her to pay the $1,936.91 in restitution to which the parties agreed. Haley appeals.

Appellate counsel, Attorney Jay R. Pucek, filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). In that no-merit report, Attorney Pucek addressed the validity of Haley's guilty plea and the circuit court's exercise of sentencing discretion. At our request, he filed a supplemental no-merit report addressing restitution. Haley did not file a response to either report. Upon consideration of the no-merit reports 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, Haley told her co-actors, Marcus J. Blackmore and Viola R. Smith, that "Haley had a way for them to easily make money." On November 7, 2018, Haley drove the three of them to a credit union branch office and directed Blackmore and Smith to open checking accounts. Haley then signed her name on two purported payroll checks preprinted with the name K & D Transport, a nonexistent company, and she made each check payable to one of the two co-actors. Haley next drove Blackmore and Smith to the Credit Union Service Center in Brown Deer, Wisconsin, where Blackmore and Smith attempted to cash the checks. While Blackmore and Smith were at the bank, the bank manager told an employee to call the police because the manager recalled that earlier in the day the bank had received a

worthless check drawn on the account of the same nonexistent company. When the police arrived, the bank manager told police that the account number on the checks was associated with a Landmark Credit Union account belonging to Haley. Blackmore and Smith each gave a custodial statement inculpating Haley. The State charged Haley with one count of forgery as a party to a crime.

Haley decided to resolve the case with a plea agreement. Pursuant to that agreement, Haley pled guilty as charged, and the State agreed to recommend an imposed and stayed three-year term of imprisonment, a three-year term of probation, forty hours of community service, and restitution. The State also agreed to recommend that Haley serve time in jail as a condition of probation but agreed not to recommend a specific period of incarceration. Haley was free to argue for any alternative disposition that she believed was warranted. The circuit court accepted Haley's guilty plea, and the matter proceeded to sentencing.

We first consider whether Haley could pursue an arguably meritorious challenge to the validity of her guilty plea. We conclude that she could not do so. At the outset of the plea hearing, the circuit court established that Haley had signed a plea questionnaire and waiver of rights form reflecting that she was thirty-one years old and had a high school education, and the circuit court found that she understood the contents of the form and its attachments. *See* ***State v. Pegeese***, 2019 WI 60, ¶37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Haley 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; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The record—including the plea questionnaire and waiver of rights form and its addendum, the attached jury instructions describing the elements of the crime to which Haley pled guilty, and the plea hearing transcript—demonstrates that Haley

entered her guilty plea knowingly, intelligently, and voluntarily. We therefore agree with appellate counsel that further pursuit of this issue would lack arguable merit.

We also agree with appellate counsel that Haley 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 punishment and deterrence were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The circuit court's discussion included the mandatory 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 sentence that the circuit court imposed was well within the limits of the maximum sentence 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. A challenge to the circuit court's exercise of sentencing discretion would therefore lack arguable merit.

Next, we conclude that Haley could not pursue an arguably meritorious challenge to the order that she pay restitution to Landmark Credit Union in the amount of $1,936.91. Trial counsel explained at the sentencing hearing that he and Haley had reviewed the restitution request in conjunction with the discovery and that the defense would agree to the amount that the credit union sought. *See* WIS. STAT. § 973.20(13)(c). Accordingly, Haley did not preserve an appellate challenge to the restitution order, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996), and any consideration of this issue therefore would normally be addressed, if at all, within the rubric of ineffective assistance of counsel, *see* ***State v. Benson***, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484.

We also agree with appellate counsel that a challenge to trial counsel's effectiveness with regard to the restitution order would lack arguable merit. A defendant alleging ineffective assistance of counsel 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). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate 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. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Here, Landmark Credit Union requested restitution for the amount lost in incidents involving Haley. The record reflects that none of the losses arose from the crime of conviction. Rather, the State made clear at sentencing that the losses all stemmed from worthless checks linked to Haley and presented for redemption during incidents that preceded the crime of conviction.

When imposing sentence, courts must order restitution for losses suffered by the "victim of a crime considered at sentencing." *See* WIS. STAT. § 973.20(1r). The phrase "crime considered at sentencing" is broadly construed and "encompasses 'all facts and reasonable inferences concerning the defendant's activity *related to* the 'crime' for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge of which the defendant was convicted.'" ***State v. Queever***, 2016 WI App 87, ¶21, 372 Wis. 2d 388, 887 N.W.2d 912 (citations omitted). Relying substantially on ***Queever***, this court held in an unpublished but authored opinion that the evidence presented at a restitution hearing established

a "causal nexus demonstrating that the prior burglaries [committed by the defendant] were 'part of a single course of criminal conduct' related to the ... burglary [of conviction] and subject to restitution." *See* ***State v. Wiskerchen*** (***Wiskerchen I***), No. 2016AP1541-CR, unpublished slip op., ¶13 (WI App Nov. 1, 2017), *aff'd*, 2019 WI 1, 385 Wis. 2d 120, 921 N.W.2d 730 (citing ***Queever***). The supreme court affirmed our decision, albeit on different grounds, approximately four months before Haley's April 3, 2019 sentencing. *See* ***Wiskerchen*** (***Wiskerchen II***), 385 Wis. 2d 120, ¶¶44-47. Thus, at the time of Haley's sentencing, as is the case today, persuasive authority from this court provided that the phrase "crime considered at sentencing" in § 973.20(1r) is broad enough to encompass a series of property crimes where the State has charged the defendant with only a single property crime in the series. *See* ***Wiskerchen I***, No. 2016AP1541-CR, ¶13.[2] Further, our supreme court has reviewed that decision and has neither reversed it nor disapproved our analysis.

Trial counsel "ha[s] no ***Strickland*** responsibility to either seek a change in Wisconsin law or lay a fact-predicate to try to precipitate that change." ***State v. Beauchamp***, 2010 WI App 42, ¶18, 324 Wis. 2d 162, 781 N.W.2d 254. Moreover, an attorney does not perform deficiently by "failing to 'object and argue a point of law' that is 'unclear.'" *See* ***State v. Morales-Pedrosa***, 2016 WI App 38, ¶16, 369 Wis. 2d 75, 879 N.W.2d 772 (citation omitted). In light of the foregoing and ***Wiskerchen I*** and ***II***, trial counsel reasonably advised Haley to agree at sentencing to pay restitution for uncharged offenses that were tied to her because that agreement demonstrated her remorse and thus her good character. *See* ***State v. Kimbrough***, 2001 WI App

[2] Pursuant to WIS. STAT. RULE 809.23(3), an authored but unpublished opinion issued on or after July 1, 2009, may be cited for its persuasive value.

138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752 (explaining that when the record reveals a strategic basis for trial counsel's actions, we will conclude that those actions are objectively reasonable). We therefore agree with appellate counsel's conclusions that Haley could not pursue an arguably meritorious claim that trial counsel performed deficiently in advising her to stipulate to restitution, and that she thus could not pursue an arguably meritorious claim that her trial counsel was ineffective. *See* ***Strickland***, 466 U.S. at 697.

Our independent review of the record does not disclose any other potential issues warranting discussion. We therefore 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 Jay R. Pucek is relieved of any further representation of Davoughna Raeshawn Haley. *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*