OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
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

May 4, 2021

To:

Hon. Mark A. Sanders
Safety Building, Rm. 620
821 W. State St.
Milwaukee, WI 53233-1427

John D. Flynn
Assistant District Attorney
District Attorney's Office
821 W. State. St. - Ste. 405
Milwaukee, WI 53233

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

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

Dustin C. Haskell
Wisconsin State Public Defender's Office
Suite 912
735 N. Water Street
Milwaukee, WI 53212

Donnell Lashon Weaver 242620
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2018AP2226-CRNM State of Wisconsin v. Donnell Lashon Weaver
(L.C. # 2016CF3062)

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).

Donnell Lashon Weaver appeals from a judgment, entered on his guilty pleas, convicting him of second-degree reckless homicide, second-degree recklessly endangering safety, and possession of a firearm by a felon. Weaver's appellate counsel filed a no-merit report, Weaver

filed a response to the report, and appellate counsel filed a supplemental report.[1] *See* ***Anders v. California***, 386 U.S. 738 (1967); WIS. STAT. RULE 809.32 (2019-20).[2] Upon this court's independent review of the record, as mandated by ***Anders***, counsel's reports, and Weaver's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment.

On July 2, 2016, Milwaukee police were dispatched to a shooting at a residence on North 3rd Street. The responding officer found the homicide victim, Marquelle Miller, on the ground in a pool of blood in front of the porch. Another victim, A.M., was on the porch, distraught, with his hands covered in blood. A.M. told police that he and Miller were standing outside the house and talking when A.M. observed Weaver approaching. Weaver waved Miller over to speak with him. Weaver asked Miller, "What happened the other day?" Miller responded that he did not know what Weaver was talking about. Weaver then produced a handgun and attempted to hit Miller in the head with it. Weaver dropped the gun as he swung, and Miller and A.M. attempted to flee. Weaver picked up the gun up and began firing. Miller was shot three times in the chest and back; A.M. was shot in the wrist. A.M. identified Weaver in a photo array, stating that he was "300% sure" Weaver's photo depicted the shooter.

Weaver gave a statement to police in which he acknowledged an encounter with the victims. He claimed the victims had been involved in a prior house shooting of one of Weaver's loved ones. Weaver claimed the victims were "calling him 'out of his name' and threatening

[1] The no-merit report and supplement were filed by Attorney Leon W. Todd, III, who has been replaced by Attorney Dustin C. Haskell as Weaver's appellate counsel.

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

him." Weaver believed the two men had firearms, even though he told police he never saw a gun, so he pulled out his own gun and shot towards the men four or five times. Weaver told police that he did not know if he actually shot the victims and that he walked off and threw the gun in a sewer before driving home.

Weaver was charged with first-degree reckless homicide with a dangerous weapon, first-degree recklessly endangering safety, possession of a firearm by a felon, and misdemeanor bail jumping. Weaver agreed to resolve his case through a plea agreement. In exchange for guilty pleas, the State would amend the first two charges to second-degree offenses, remove the dangerous weapon enhancer on the homicide, and dismiss and read in the bail jumping charge. The State would recommend "substantial prison" while Weaver would be free to argue a specific sentence length. The circuit court accepted Weaver's guilty pleas and later sentenced him to concurrent and consecutive sentences totaling nineteen years of initial confinement and ten years of extended supervision. Weaver appeals.

The first potential issue discussed in the no-merit report is whether Weaver should be allowed to withdraw his pleas, either because they were not knowing, intelligent, and voluntary, or because a factual basis for the pleas was lacking. Our review of the record—including the plea questionnaire and waiver of rights form, addendum, jury instructions initialed by Weaver, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. These obligations include discerning a sufficient factual basis for the pleas. *See* ***Brown***, 293 Wis. 2d 594, ¶35; § 971.08(1)(b). The no-merit report properly analyzes this issue, and we agree with the conclusion that there is no arguable merit to a claim for plea withdrawal.

The other issue discussed in the no-merit report is whether this court should remand the case for resentencing because the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of additional factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors when setting the imprisonment terms. The aggregate twenty-nine-year sentence imposed is well within the forty-five-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The no-merit report observes that the judgment of conviction indicates that Weaver is ineligible for the substance abuse program and challenge incarceration program, even though the circuit court at sentencing neglected to specifically address Weaver's eligibility for those early release programs. When imposing a bifurcated sentence, "the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to

participate in" the substance abuse and challenge incarceration programs. *See* WIS. STAT. § 973.01(3g)-(3m).[3] Nevertheless, the no-merit report concludes that there is no arguably meritorious issue to pursue relating to the circuit court's omission of this sentencing component, and we agree.

Weaver is statutorily ineligible for the challenge incarceration program because he was over age forty at the time of sentencing. *See* WIS. STAT. § 302.045(2)(b). He is also statutorily ineligible for the substance abuse program while serving his reckless homicide sentence, because inmates incarcerated for a crime specified in WIS. STAT. ch. 940 are specifically excluded from program eligibility. *See* WIS. STAT. §§ 302.05(3)(a)1., 940.06(1). As a practical matter, this ineligibility also extends to Weaver's felon-in-possession sentence because that sentence runs concurrently with the reckless homicide sentence.

There is no statutory bar to Weaver's eligibility for the substance abuse program during the term of his sentence for recklessly endangering safety. However, while a circuit court is supposed to state whether the defendant is eligible or ineligible for the program, the statute does not require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the determination. *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187; *see also* ***State v. Tobatto***, 2016 WI App 28, ¶17, 368 Wis. 2d 300, 878 N.W.2d 701 (holding that the court of appeals may search the record to determine if it supports circuit court's discretionary decision).

[3] WISCONSIN STAT. § 973.01(3g) refers to the "earned release program" under WIS. STAT. § 302.05(3), which is the prior name for the substance abuse program. *See* 2011 Wis. Act 38, § 19.

Here, the circuit court's sentencing comments reflect its emphasis on the needs of the public, in terms of both protection and deterrence, over any rehabilitative concerns for Weaver. The circuit court specifically noted that its sentence would keep Weaver confined until he turned sixty-one years old, but that calculation is only valid if the circuit court planned for Weaver to serve the entire sentence imposed. Accordingly, the record reflects that the circuit court did not intend for Weaver to be eligible for either program and, based on the foregoing, that there is no arguable merit in challenging any aspect of the circuit court's exercise of sentencing discretion.[4]

In his response to the no-merit report, Weaver identifies three ways in which he believes he received ineffective assistance from trial counsel. "There are two elements that underlie every claim of ineffective assistance of counsel[.]" ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. "[F]irst, the person making the claim must demonstrate that his or her counsel's performance was deficient[.]" ***Id.*** To demonstrate deficient performance, the person must show that counsel's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Second, the person "must demonstrate that this deficient performance was prejudicial." ***Mayo***, 301 Wis. 2d 641, ¶60. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***McDougle***, 347 Wis. 2d 302, ¶13 (citation omitted). We need not address both elements if the defendant cannot make a sufficient showing as to one or the other. ***Mayo***, 301 Wis. 2d 641, ¶61.

[4] The no-merit report and supplemental report also indicate that counsel conferred with Weaver at least twice and that, even if there were an arguably meritorious issue relating to program eligibility, Weaver did not want counsel to pursue the issue.

Weaver first claims that "[t]rial counsel was ineffective for failure to file a motion to suppress" a statement Weaver gave to the police on July 6, 2016. Weaver says that he takes 60mg of OxyContin daily for back pain, so his state of mind was "clearly" impaired and the police, once told of his medication, should have stopped the interview "until at least 12 hours when the drug … is no longer [a]ffecting" him. However, the police report from July 6 reflects not only that Weaver told police about his OxyContin use, but also that he told them "that he felt emotionally and physically okay to speak with [them] and stated that he could understand and comprehend what was being discussed and could clearly articulate his side of events." Moreover, it is not clear what part of Weaver's statement from July 6 he would seek to suppress or why; in that interview, Weaver explained his presence in the area and told police that he was "not involved" with the shooting, and the interview ended when Weaver asked to return to his cell. Weaver did not make any inculpatory statements until the following day. Accordingly, the record does not reveal any basis upon which the circuit court would have granted a motion to suppress Weaver's July 6 statement, so trial counsel was not ineffective for failing to pursue such a motion. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Weaver next claims that trial counsel "was ineffective for failure to provide … certain missing reports from the discovery." He asserts that to "not be able to review those missing reports deprived [him of] the opportunity to make a rational and partial decision whether [to try] the case to a jury or plea[d] to the charges[.]" While the transcript of a status conference confirms that a few reports had yet to be turned over to defense counsel at that time, the plea hearing transcript suggests that those reports were eventually received—both Weaver and his trial attorney confirmed that they had discussed "everything that was in the police reports." Further, Weaver has not identified or described any information that was in, or potentially in, the

missing reports that would have caused him to go to trial instead of entering guilty pleas.[5] Thus, even if counsel performed deficiently in failing to provide Weaver with copies of the police reports, the record does not support any claim of prejudice from that failure.

Finally, Weaver contends that trial counsel was ineffective for failing to raise a self-defense claim. However, by entering his guilty pleas, Weaver waived the right to raise such a defense. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (valid guilty plea waives all nonjurisdictional defects and defenses). Weaver acknowledged as much when he signed the addendum to the plea questionnaire.

Further, nothing in the record supports a valid claim of self-defense. "A person is privileged to … *intentionally* use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person."[6] WIS. STAT. § 939.48(1) (emphasis added). While Weaver in his no-merit response says that both victims "appeared to have a gun" when they approached him, their mere possession of firearms was not an "an unlawful interference" with Weaver.[7] Thus,

[5] The supplemental no-merit report explains that counsel "consulted with Mr. Weaver about the specific police reports that he claims his trial attorneys did not provide" and that counsel "reviewed those reports." Based on that review and counsel's discussions with Weaver, counsel has concluded that there was no arguably meritorious basis for claiming any prejudice from this alleged failure.

[6] Also, "[t]he privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a [third] person[.]" WIS. STAT. § 939.48(3). However, "if the unintended infliction of harm amounts to the crime of first-degree or [second]-degree reckless homicide … [or] first-degree or [second]-degree reckless injury … the actor is liable for whichever one of those crimes is committed." ***Id.***

[7] Weaver also told police that he did not see either victim with a gun, although he believed both victims were known to carry a gun.

trial counsel was not ineffective for failing to pursue an unsupported affirmative defense. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of further representation of Weaver 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