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

September 21, 2021

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

David Malkus
Assistant State Public Defender
Electronic Notice

Dianne K. Carter 675887
Supervised Living Facility
P.O. Box 10
Winnebago, WI 54985

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

2020AP1408-CRNM State of Wisconsin v. Dianne K. Carter (L.C. # 2019CF1775)

Before Brash, P.J., Donald 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).

Attorney David Malkus, appointed counsel for Dianne Carter, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Carter's plea and or sentencing, or the circuit court order denying Carter's postconviction motion for sentence modification. Carter was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as

the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Carter was charged with four counts of trafficking of a child and one count of physical abuse of a child. Pursuant to a plea agreement, Carter pled guilty to one amended charge of soliciting a child for prostitution; the remaining charges were dismissed and read in for sentencing purposes. The State recommended a prison sentence without any recommendation as to the length of the sentence. The court sentenced Carter to three years of initial confinement and four years of extended supervision, and also made her eligible for the Challenge Incarceration Program (CIP). Carter moved for sentence modification on the ground that she was statutorily ineligible for CIP. The court denied the motion.

The no-merit report addresses whether there would be arguable merit to a challenge to Carter's plea. A post sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Carter signed, satisfied the court's mandatory duties to personally address Carter and determine information such as Carter's understanding of the nature of the charge and the range of punishments she faced, the constitutional rights she waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Carter's plea would lack arguable merit. A valid guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

The no-merit report also addresses whether there would be arguable merit to a challenge to Carter's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the severity of the offense, Carter's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Carter faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (citation omitted)). We discern no other basis to challenge the sentence imposed by the circuit court.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision denying Carter's postconviction motion for sentence modification. We agree with counsel that this issue lacks arguable merit. A motion for sentence modification based on a new factor must establish a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234

N.W.2d 69 (1975). The existence of a new factor, however, does not require sentence modification. ***State v. Harbor***, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. "Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence." ***Id.*** "[I]f the court determines that in the exercise of its discretion, the alleged new factor would not justify sentence modification, the court need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law." ***Id.***, ¶38. Here, Carter moved for sentence modification on the basis that she was ineligible for CIP. The circuit court explained that it gave no significant weight to Carter's eligibility for CIP in its sentencing determination, and that her ineligibility was therefore not a new factor. The court also determined that, even if Carter's ineligibility for CIP was a new factor, sentence modification was not justified due to the severity of the offense and the read-in offenses, Carter's culpability, the impact on the victims, and the significant benefit Carter already received under the plea agreement. Accordingly, any challenge to the circuit court's decision would be wholly frivolous.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further 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 and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of any further representation of Dianne Carter 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