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DISTRICT II

September 29, 2021

To:

Hon. David M. Bastianelli
Circuit Court Judge
Electronic Notice

Hon. Larisa V. Benitez-Morgan
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County
Electronic Notice

Winn S. Collins
Electronic Notice

Michael D. Graveley
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Dustin C. Haskell
Electronic Notice

Darrell B. Galvin, #361861
New Lisbon Correctional Inst.
P.O. Box 2000
New Lisbon, WI 53950-2000

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

2020AP1363-CRNM State of Wisconsin v. Darrell B. Galvin (L.C. #2017CF278)

Before Neubauer, Reilly and Grogan, 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).

Darrell B. Galvin appeals from a judgment of conviction and an order of the circuit court.¹ Galvin's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT.

¹ The Honorable David M. Bastianelli presided over the plea and sentencing proceedings. The Honorable Larisa Benitez-Morgan entered the order denying the postconviction motion.

RULE 809.32 (2019-20)² and *Anders v. California*, 386 U.S. 738 (1967).³ Galvin was sent a copy of the report, but has not filed a response. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment and order because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Galvin was charged with four counts of delivery of heroin, three grams or less, with penalty enhancers for delivery near a school, as a repeater, and as a subsequent offense. Pursuant to a plea agreement, Galvin pled guilty to one count of delivery of heroin, three grams or less, with the repeater and subsequent offense enhancers but without the delivery near a school enhancer. The remaining counts were dismissed, and two counts of uttering a forgery in a separate case were dismissed and read-in for sentencing purposes, with a stipulated \$100 in restitution. Also pursuant to the plea agreement, the State recommended three to five years of initial confinement and remained silent as to extended supervision. The court sentenced Galvin to ten years of initial confinement and five years of extended supervision, and made him ineligible for the Challenge Incarceration Program (CIP) or Substance Abuse Program (SAP).

Galvin moved for sentence modification to make him eligible for SAP. He argued that his substance abuse treatment needs were a new factor that warranted sentence modification.

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

³ Attorney Jorge R. Fragoso was appointed to represent Galvin on appeal. After Attorney Fragoso filed the no-merit report, Attorney Dustin C. Haskell was substituted as counsel for Galvin in this appeal.

The circuit court determined that Galvin had not identified a new factor for sentence modification purposes, and denied the motion.

The no-merit report addresses whether there would be arguable merit to a challenge to Galvin'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 Galvin signed, satisfied the court's mandatory duties to personally address Galvin and determine information such as Galvin's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he 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 Galvin'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.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. 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, Galvin'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 Galvin 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 also agree with counsel’s assessment that there would be no arguable merit to a claim that the circuit court relied on inaccurate information at sentencing based on the court’s incorrectly naming one of Galvin’s prior convictions. See *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant has a due process right to be sentenced based on accurate information). We adopt the analysis in the no-merit report on that issue and do not address it further. We discern no other basis to challenge the sentence imposed by the circuit court.⁴

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court’s decision denying Galvin’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 highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either

⁴ By prior order, we directed no-merit counsel to address whether there would be arguable merit to a postconviction motion seeking sentence credit. Counsel filed a supplemental no-merit report concluding that this issue would lack arguable merit. We agree with the assessment in the supplemental no-merit report, and we do not address this issue further.

because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked” by the court and the parties. *Rosado v. State*, 70 Wis. 2d 280, 288. 234 N.W.2d 69 (1975). Here, Galvin moved for sentence modification to make him eligible for SAP on the basis that the circuit court unknowingly overlooked Galvin’s substance abuse issues and need for treatment at the time of sentencing. The postconviction court determined that the sentencing court had considered Galvin’s substance abuse issues and any need for treatment and that Galvin’s substance abuse issues were therefore not a new factor. We agree with no-merit counsel’s assessment that the record establishes that the sentencing court considered evidence as to Galvin’s substance abuse issues at the time of sentencing. Accordingly, Galvin’s substance abuse issues are not a new factor for sentence modification purposes. Any challenge to the circuit court’s decision would be wholly frivolous.

Accordingly, this court accepts the no-merit report, affirms the conviction and order, and discharges appellate counsel of the obligation to represent Galvin further in this appeal. Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved from further representing Darrell B. Galvin in this appeal. *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