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DISTRICT I

November 2, 2021

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

2020AP413-CRNM State of Wisconsin v. Paul E. Mitchell (L.C. # 2016CF961)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Paul E. Mitchell pled guilty to three felonies, all arising on March 2, 2016. Upon his guilty plea to possession with intent to deliver more than fifteen grams of cocaine, but not more than forty grams of cocaine, he faced maximum penalties of a $100,000 fine and twenty-five years of imprisonment. *See* WIS. STAT. §§ 961.41(1m)(cm)3., 939.50(3)(d) (2015-16).[1] Upon his guilty plea to possession of a firearm while a felon, he faced maximum penalties of a $25,000

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

fine and ten years of imprisonment. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g) (2015-16). Upon his guilty plea to bail jumping, he faced maximum penalties of a $10,000 fine and six years of imprisonment. *See* WIS. STAT. §§ 946.49(1)(b), 939.50(3)(h) (2015-16). The circuit court imposed a fifteen-year term of imprisonment for the drug offense, bifurcated as eight years of initial confinement and seven years of extended supervision. For the other two convictions, the circuit court imposed evenly bifurcated sentences of six years of imprisonment and four years of imprisonment, respectively. The circuit court ordered Mitchell to serve the three sentences concurrently with each other, but consecutive to any other sentence. The circuit court found Mitchell ineligible for the challenge incarceration program and the Wisconsin substance abuse program and, following a restitution hearing, the circuit court ordered Mitchell to pay restitution in the amount of $6,336.64. In postconviction proceedings, the circuit court determined that Mitchell was not entitled to any sentence credit. He appeals.

Appellate counsel, Attorney Marcella De Peters, filed a no-merit report on Mitchell's behalf pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. In that report, Attorney De Peters discussed Mitchell's competency to proceed, the validity of Mitchell's guilty pleas, and the circuit court's exercise of sentencing discretion. Following a preliminary review of the record, we determined that the transcript of the restitution hearing had not been prepared, and, at our direction, Attorney De Peters requested preparation of the missing transcript. She subsequently filed a supplemental no-merit report explaining her conclusion that a challenge to the restitution order would lack arguable merit. Mitchell then filed two responses. Upon consideration of the no-merit reports, Mitchell's responses, and an independent review of the entire record as required by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, two police officers patrolling in Milwaukee on March 2, 2016, saw a black Honda Pilot speeding in the area of Hampton Avenue and 20th Street. When they attempted to stop the Honda, the driver accelerated to evade the officers. During the ensuing chase, the Honda collided with two other vehicles. After the second collision, the Honda's driver got out of the car and fled on foot. The officers apprehended the fleeing suspect, subsequently identified as Mitchell, when he tried to get into the first car that he struck. Police searched Mitchell incident to the arrest and found $5,885 in his pocket. Police also searched the Honda and found two loaded handguns, 31.38 grams of cocaine, and a digital scale.

Further investigation revealed that on March 2, 2016, Mitchell was facing felony charges in Milwaukee County Circuit Court case No. 2014CF3249, and was out of custody on bond with a condition that he not commit any new crimes. Additionally, the State determined that Mitchell had at least two prior felony drug convictions, one within the previous five years. The State charged Mitchell with five felonies as a habitual offender: possession with intent to deliver more than fifteen grams of cocaine but not more than forty grams of cocaine as a second or subsequent narcotics offense; two counts of possessing a firearm while a felon; and two counts of bail jumping. The State also charged him with one misdemeanor count of obstructing an officer.

Mitchell disputed the charges for some time, but eventually he decided to resolve the case with a plea agreement. Pursuant to its terms, the State agreed to move to dismiss and read in the misdemeanor count, one of the two counts of possessing a firearm as a felon, and one of the two counts of bail jumping; and to strike all of the penalty enhancers alleged in connection with the other three charges. Mitchell agreed to plead guilty to the three unenhanced felony charges that the State would not dismiss, and he agreed that the two vehicle collisions that he caused on

March 2, 2016, would be treated as read-in crimes for which he would be subject to restitution. Each party was free to recommend whatever disposition the party thought was appropriate. Additionally, Mitchell was free to dispute the amount of restitution that he owed, but he "agree[d] to restitution in an amount that would ultimately be approved by the court." The circuit court accepted Mitchell's guilty pleas in May 2017, and the matters subsequently proceeded to sentencing.

We first consider whether Mitchell could raise an arguably meritorious claim that he was not competent to proceed with criminal litigation. We agree with appellate counsel that he could not do so. The circuit court referred Mitchell for a competency evaluation early in the proceedings after his trial counsel advised that, in two other criminal cases pending against Mitchell in front of other circuit court judges, competency evaluations had been ordered and were underway. The examining psychologist, Dr. Deborah L. Collins, filed a report stating that Mitchell was "motivated and able to reply to the charges," he understood the available pleas, he could "reason among plea options," and he "displayed the capacity to understand the risks attendant to proceeding to the resolution of a case through a trial or plea bargain." Dr. Collins noted that Mitchell had "proven to be a challenging client," but that he exhibited "no clear indication of an underlying formal mental illness," and she opined to a reasonable degree of professional certainty that he was competent to proceed. Neither the State nor Mitchell disputed Dr. Collins's conclusions. The circuit court found that Mitchell was competent to proceed.

"[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. This court will uphold a circuit court's competency determination unless that determination is clearly erroneous.

See ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychologist's report and the standard of review, any further proceedings in regard to Mitchell's competence would lack arguable merit.

We next consider whether Mitchell 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 Mitchell was thirty years old and that he had a high school education. The circuit court also established that Mitchell had signed a guilty plea questionnaire and waiver of rights form and addendum and that he understood their contents. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Mitchell 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. The record—including the plea questionnaire and waiver of rights form and addendum, the attached documents describing the elements of the crimes to which Mitchell pled guilty, and the plea hearing transcript—demonstrates that Mitchell entered his guilty pleas knowingly, intelligently, and voluntarily.

Mitchell disagrees. He first claims that he has an arguably meritorious basis for challenging his guilty plea to the charge of possessing a firearm as a felon because the State did not attach a certified copy of a judgment of conviction to the criminal complaint as proof that he was a felon. The claim lacks merit. The complaint alleged the prior felony conviction and Mitchell admitted his status as a felon by pleading guilty. Nothing further is required. *See* ***State v. Black***, 2001 WI 31, ¶¶15-16, 242 Wis. 2d 126, 624 N.W.2d 363.

Second, Mitchell claims that he has arguably meritorious bases for challenging his guilty plea to the charge of bail jumping because the State did not prove that he was released on bond at the time of his conduct in this case, and he did not know that he could dispute the allegation at trial; the circuit court did not describe the bond conditions with which he did not comply; and "no evidence [existed] that Mitchell had committed any new crimes" while on bond. The claim lacks merit. A defendant who pleads guilty gives up the right to require the State to prove his or her guilt. *See* ***Black***, 242 Wis. 2d 126, ¶15. Moreover, while Mitchell states that he "did not know ... that he ha[d] the right to have the mater[ia]l presented at trial and ... to challenge [its] v[era]city ... before a jury," the record shows otherwise. He assured the circuit court during his plea colloquy that he understood that he was giving up his right to a jury trial where the State would be required to prove each element of the charges against him beyond a reasonable doubt before the jury could find him guilty. As to Mitchell's suggestion that no evidence existed that he committed any new crimes, we remind him that he pled guilty to committing two other crimes while on bond.

Third, Mitchell claims that he has an arguably meritorious basis to challenge his guilty pleas because the circuit court did not explain to him the mechanics of bifurcated sentencing. This claim lacks merit. The circuit court told Mitchell the maximum term of imprisonment that he faced for each conviction, "and no additional dissection of the potential punishment is required." *See* ***State v. Sutton***, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146.

We conclude that no arguably meritorious basis exists for Mitchell to challenge the validity of his guilty pleas. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We also conclude that Mitchell 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 stated that protection of the community was the primary sentencing objective and that deterrence was also a "real concern." The circuit court then discussed the sentencing factors that it had considered in fashioning dispositions to achieve the sentencing goals. *See* ***id.***, ¶¶41-43. The circuit court's considerations were proper and relevant and 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.

Mitchell asserts that he has an arguably meritorious claim that the circuit court erroneously exercised its sentencing discretion because the circuit court did not give a reason for requiring him to serve the sentences in this case consecutive to a previously imposed sentence that he was already serving. This claim lacks merit. When a defendant faces sentencing for a crime that is distinct from a past offense for which the defendant previously was sentenced and is serving time, the circuit court is not required to identify additional reasons for imposing a consecutive sentence if the circuit court "has considered the proper factors, explained its rationale for the overall sentence it imposes, and the sentence is not unreasonable[.]" *See* ***State v. Matke***, 2005 WI App 4, ¶¶18-19, 278 Wis. 2d 403, 692 N.W.2d 265.

Mitchell next asserts that he has an arguably meritorious claim that the circuit court erred because it did not determine "the a[]verage sentence" for the crimes that Mitchell committed, and the sentences therefore ran afoul of the constitutional bar against cruel and unusual punishment. *See* U.S. CONST. amend. VIII. There is no merit to this claim. "What constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is

within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual." ***State v. Ninham***, 2011 WI 33, ¶85, 333 Wis. 2d 335, 797 N.W.2d 451 (citations and brackets omitted). Moreover, "[a] sentence is clearly cruel and unusual only if 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.'" ***Id.*** (citations and some quotations marks omitted). The sentences imposed here were well within the limits of the maximum sentences allowed by law and cannot be considered shocking or unconscionable. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

In sum, the record reflects that the circuit court properly exercised its sentencing discretion. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Mitchell next asserts that his trial counsel was ineffective at sentencing for failing to obtain a psychologist's report to support his theory that his criminal conduct flowed from the bereavement he suffered when his parents passed away in 2007. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, nothing in the record suggests that Mitchell was prejudiced by his trial counsel's actions in not obtaining a psychological assessment for his sentencing. The circuit court accepted trial counsel's suggestion that Mitchell's criminal behavior was sparked by his parents' deaths, expressly recognizing that Mitchell's loss was a tragedy and finding that it "might send a young man off the rails." The circuit court found, however, that the deaths occurred when Mitchell was twenty years old and "at an age where [he] knew better" than to commit crimes. Further, the circuit court found that Mitchell had many chances to address his

rehabilitative needs since the deaths of his parents, but he did not take advantage of his opportunities. Accordingly, the record does not suggest any reasonable probability that the outcome of the sentencing would have been different if Mitchell's trial counsel had obtained a psychological assessment for the proceeding. *See* ***id.*** at 694 (explaining that, 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"). Further pursuit of this issue would lack arguable merit.

We next consider whether Mitchell 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 treatment program normally 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.; *but see* ***State v. Gramza***, 2020 WI App 81, 395 Wis. 2d 215, 952 N.W.2d 836. 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).[2] In this case, the circuit court found that Mitchell's rehabilitative needs were a secondary concern and that his failure to take advantage of the treatment offered to him during an earlier period of

[2] 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).

probation reflected that his "prior contacts with corrections didn't have much of an impact," necessitating that he serve the entirety of the initial confinement imposed in the instant case. The eligibility decision was thus consistent with the sentencing rationale. Further pursuit of this issue would lack arguable merit.

We also conclude that Mitchell could not pursue an arguably meritorious claim for sentence credit. The record shows that all of the time that Mitchell spent in presentence custody after his arrest on March 2, 2016, until his sentencing in Milwaukee County Circuit Court case No. 2014CF3249, was credited to those earlier imposed sentences, and the circuit court ordered Mitchell to serve his sentences in this case consecutive to any other sentence. Dual credit on consecutive sentences is not permitted. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Further pursuit of this issue would lack arguable merit.

We next consider whether Mitchell could pursue an arguably meritorious challenge to the order that he pay restitution of $6,336.64 to S.V., the driver of one of the vehicles involved in the collisions that Mitchell caused on March 2, 2016.[3] We conclude that he could not do so.

WISCONSIN STAT. § 973.20(1r) provides that a circuit court shall order the defendant to pay restitution "to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record." This provision applies to read-in offenses, whether they are dismissed or not charged. *See* WIS. STAT. § 973.20(1g). Mitchell therefore could not mount an arguably meritorious claim that the circuit court wrongly considered S.V.'s request for restitution.

[3] The record reflects that no other victim in the case sought restitution.

Mitchell also could not mount an arguably meritorious challenge to the amount of restitution awarded to S.V. "The determination of the amount of restitution to be ordered (and thus whether a victim's claim should be offset or reduced for any reason) is reviewed under the erroneous exercise of discretion standard." ***State v. Longmire***, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534 (emphasis omitted). We uphold factual findings that are part of a discretionary decision unless they are clearly erroneous. *See* ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). We affirm the circuit court's decision if the circuit court applied a correct legal standard, logically interpreted the facts, and used a rational process to reach a reasonable conclusion. *See* ***Longmire***, 272 Wis. 2d 759, ¶16.

S.V. testified at the restitution hearing that, before the collision, his 1998 Toyota Avalon was in "perfect" condition and was worth $3,100. He further testified that, after the collision, the car was "barely drivable" and was considered "totaled." Mitchell suggests in his response to the no-merit report that he can pursue an arguably meritorious claim that he is not responsible for the entirety of the $3,100 in damages to S.V.'s car because responsibility for the damages is "shared." Mitchell is not clear regarding who he believes shares responsibility for causing the damages. Regardless, the claim lacks arguable merit because when a defendant plays a part in a criminal episode resulting in damages to a victim, the defendant may properly be held to pay the entirety of the damages caused by the crime. *See* ***State v. Madlock***, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999).

There is also no arguable merit to a claim that the circuit court erroneously determined the extent of S.V.'s lost wages due to the collision. S.V. testified that he worked as a delivery driver and that he was unable to work for a month after the collision because the car's back lights did not work. He presented a payroll summary from his employer to demonstrate that he lost

wages of $3,236.64 during the four weeks required to render his car operable. The circuit court found that S.V. required a drivable car in order to do his job and that he lost the wages he would have earned during the time that he was unable to drive his car. These findings of fact are supported by the testimony and therefore are not clearly erroneous.

Further, the circuit court applied proper legal standards in determining that S.V.'s lost wages of $3,236.64 were compensable as restitution. A circuit court may order restitution for "all special damages ... substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing." *See* WIS. STAT. § 973.20(5)(a). "Lost wages are a type of special damages." ***State v. Muth***, 2020 WI 65, ¶50, 392 Wis. 2d 578, 945 N.W.2d 645. S.V. could have pursued his lost wages in a negligence action. *See* ***Burlison v. Janssen***, 30 Wis. 2d 495, 502-03, 141 N.W.2d 274 (1966). While the circuit court considered testimony that S.V. had received some money from his father to fix the Toyota's rear lights, the circuit court reasonably concluded that Mitchell was not entitled to a setoff for that money against his restitution obligation. *See* ***Ellsworth v Schelbrock***, 2000 WI 63, ¶7, 235 Wis. 2d 678, 611 N.W.2d 764 (explaining that a victim's receipt of money from a collateral source for expenses does not redound to the benefit of the tortfeasor).

Mitchell suggests that his trial counsel was ineffective for failing to argue that he was unable to pay restitution. The record shows no deficiency. As the circuit court explained at the outset of its ruling, Mitchell had "agreed to pay restitution as part of the plea agreement, so the issue is the amounts." The record also shows no prejudice. A defendant has the burden to prove an inability to pay restitution. *See* ***Madlock***, 230 Wis. 2d at 336. Mitchell described a work history, albeit limited, to the psychologist who conducted his competency evaluation.

Finally, Mitchell suggests that he has an arguably meritorious claim that the circuit court should have ordered him to pay restitution only after he is released from prison. We disagree. Mitchell admits that while imprisoned he earns a small wage that is available to use towards his restitution obligation. Moreover, the Department of Corrections (DOC) is authorized by statute to collect restitution from an inmate's prison account. *See* ***State v. Williams***, 2018 WI App 20, ¶2, 380 Wis. 2d 440, 909 N.W.2d 177. "Once the [sentencing] court orders restitution, it is within the DOC's authority to collect it from an inmate." ***Id.***, ¶7.

Our independent review of the record does not disclose any other potential issues warranting discussion. 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 judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Paul E. Mitchell 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