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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

February 22, 2022

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

Mark S. Rosen
Electronic Notice

Juanita A. Acker 435677
Taycheedah Correctional Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2021AP385-CRNM State of Wisconsin v. Juanita A. Acker (L.C. # 2018CF2945)
2021AP386-CRNM State of Wisconsin v. Juanita A. Acker (L.C. # 2018CF4411)

Before Brash, C.J., Donald, P.J., and White, 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).

Juanita A. Acker pled guilty to two misdemeanors and two felonies, and she pled no-contest to three additional felonies. The circuit court imposed an aggregate, evenly bifurcated twenty-six year term of imprisonment. She appeals.

Appellate counsel, Attorney Mark S. Rosen, filed a no-merit report and two supplemental no-merit reports pursuant to WIS. STAT. RULE 809.32 (2019-20).[1] Acker filed a response. Upon

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

consideration of the no-merit reports, Acker's response, and a review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

On June 25, 2018, the State filed a criminal complaint in Milwaukee County Circuit Court case No. 2018CF2945, charging Acker with twenty-one crimes.[2] All of the charges involved allegations of harm to or endangerment of her minor children A.C., B.A.C., A.M.C., C.C., and J.N.C, during the period from June 14, 2016, through June 14, 2018. While the case was pending, the State filed a criminal complaint on September 13, 2018, in Milwaukee County Circuit Court case No. 2018CF4411, charging Acker with four crimes against her daughter K.C., then twenty-one years old, during periods from April 2009 through April 2015, when K.C. was a minor. The two sets of charges were joined for trial.

Acker disputed the allegations against her for some time but, on the first day of trial—September 23, 2019—she advised the circuit court that she wanted to resolve the charges with a plea agreement. Pursuant to that agreement, Acker entered pleas other than not guilty to seven charges, as follows:

> ●Case No. 2018CF2945 - Count 1, as to A.C.: physical abuse of a child, intentionally causing bodily harm, a Class H felony, to which Acker pled no contest and for which she faced a $10,000 fine and six years of imprisonment, *see* WIS. STAT.

[2] The criminal complaint also charged a codefendant with seven crimes. The judgment resolving the charges against the codefendant is not before the court in the instant appeals.

§§ 948.03(2)(b), 939.50(3)(h) (2017-18).[3] This charge was amended from one of repeated acts of physical abuse of the same child.

●Case No. 2018CF2945 - Count 11, as to B.A.C.: physical abuse of a child, intentionally causing bodily harm by conduct that creates a high probability of great bodily harm, a Class F felony, to which Acker pled no contest and for which she faced a $25,000 fine and twelve years and six months of imprisonment, *see* WIS. STAT. §§ 948.03(2)(c); 939.50(3)(f) (2017-18). This charge was amended from one of attempted first-degree intentional homicide.

●Case No. 2018CF2945 - Counts 13 and 16, as to A.M.C. and B.A.C., respectively: neglecting a child, a Class A misdemeanor, to which Acker pled guilty and for which she faced a $10,000 fine and nine months in jail as to each count, *see* WIS. STAT. § 948.21(2), (3)(f), 939.51(3)(a) (2017-18).[4]

●Case No. 2018CF2945 - Count 23, as to C.C.: first-degree recklessly endangering safety, a Class F felony, to which Acker pled guilty and for which she faced a $25,000 fine and twelve years and six months of imprisonment, *see* WIS. STAT. § 941.30(1), 939.50(3)(f) (2017-18).

●Case No. 2018CF2945 - Count 25, as to J.N.C.: causing mental harm to a child, a Class F felony, to which Acker pled guilty and

[3] The charges in Milwaukee County Circuit Court case No. 2018CF2945 spanned two versions of the Wisconsin Statutes, the 2015-16 version and the 2017-18 version. The charging documents do not state the version under which the State charged Acker. The applicable statutory text for the felonies remained the same under each version. We cite the version in effect when the State filed the criminal complaint. *Cf.* ***State v. Hurley***, 2015 WI 35, ¶1 n.3, 361 Wis. 2d 529, 861 N.W.2d 174.

[4] The State charged Acker in case No. 2018CF2945 with misdemeanor child neglect during the period from June 14, 2016, through June 14, 2018, in violation of "sec. 948.21(1)(a)." The applicable judgment of conviction—Form CR-204—reflects that she stands convicted of two violations of that statute. However, WIS. STAT. § 948.21(1)(a) (2015-16) defined misdemeanor child neglect only for the portion of the charging period that included June 14, 2016, through April 17, 2018. Effective on April 18, 2018, the legislature repealed and recreated WIS. STAT. § 948.21. *See* 2017 Wis. Act 283, § 5; WIS. STAT. § 991.11. Following the effective date of the statutory amendments, § 948.21(1)(a) (2017-18), did not define a crime. The crime of misdemeanor child neglect was instead codified in WIS. STAT. § 948.21(2), (3)(f) (2017-18). When Acker pled guilty to misdemeanor child neglect, she acknowledged that she had committed the elements of that crime as it existed on and after April 18, 2018, under § 948.21(2), (3)(f) (2017-18). Accordingly, on remittitur, we direct the circuit court to amend the applicable judgment of conviction to reflect that Acker pled guilty to misdemeanor child neglect as codified in § 948.21(2), (3)(f) (2017-18). *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (court may correct clerical errors at any time).

> for which she faced a $25,000 fine and twelve years and six months of imprisonment, *see* WIS. STAT. §§ 948.04(1), 939.50(3)(f) (2017-18).
>
> ●Case No. 2018CF4411 - Count 1, as to K.C.: physical abuse of a child, intentionally causing bodily harm, a Class H felony, to which Acker pled no contest and for which she faced a $10,000 fine and six years of imprisonment, *see* WIS. STAT. § 948.03(2)(b), 939.50(3)(h) (2011-12).[5]

The State agreed to recommend a global disposition of fifteen to eighteen years of initial confinement for the seven convictions and moved to dismiss and read in the remaining eighteen charges.

The circuit court accepted Acker's pleas of guilty and no-contest, and the matters proceeded to sentencing a few months later. In case No. 2018CF2945, the circuit court imposed an evenly bifurcated ten-year term of imprisonment for causing bodily harm to B.A.C. (Count 11); a consecutive, evenly bifurcated six-year term of imprisonment for recklessly endangering C.C. (Count 23); a consecutive evenly bifurcated six-year term of imprisonment for causing mental harm to J.N.C. (Count 25); a concurrent evenly bifurcated term of four years of imprisonment for physically abusing A.C. (Count 1); and concurrent nine-month sentences for each count of misdemeanor child neglect of A.M.C. and B.A.C. (Counts 13 and 16). For the conviction in case No. 2018CF4411, physically abusing K.C., the circuit court imposed an evenly bifurcated four-year term of imprisonment consecutive to the sentences imposed in case No. 2018CF2945. The circuit court found Acker ineligible for the challenge incarceration

[5] The charging period for the crime of physically abusing K.C. in violation of WIS. STAT. § 948.03(2)(b) (2011-12) was April 8, 2011, through April 7, 2012. With exceptions not relevant here, violations of that statute must be prosecuted before the victim reaches the age of twenty-six years. *See* WIS. STAT. § 939.74(2)(cm). The State brought the charge when K.C. was twenty-one years old, well within the statute of limitations.

program and the Wisconsin substance abuse program and awarded her the 548 days of sentence credit that she requested.

We first consider whether Acker could pursue an arguably meritorious challenge to the validity of her guilty and no-contest pleas. Acker completed plea questionnaire and waiver of rights forms reflecting that she was forty-six years old and had a college education, and the circuit court established that she had discussed the contents of those forms with her trial counsel and that she understood them. *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 Acker that complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), WIS. STAT. § 971.08.

The circuit court's duties during a plea colloquy include the obligation to "establish that a defendant understands every element of the charges to which [the defendant] pleads[.]" ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." ***Id.***, ¶56. In this case, Acker attached the jury instructions for each offense to her plea questionnaires. The circuit court found that Acker had reviewed those jury instructions with her trial counsel and that she and her trial counsel had discussed the ways that her conduct satisfied the elements of each offense. The circuit court then reviewed portions of each attached instruction with Acker on the record and confirmed that she understood each one.

The circuit court also found that Acker understood the rights she waived by entering pleas of guilty and no contest and that she understood the maximum penalties that she faced upon conviction for each offense. Further, Acker confirmed her understanding that the circuit court was not bound by the plea agreement and could impose any sentence up to the maximum penalties allowed by law. She assured the circuit court that she had not been promised anything outside of the plea agreement to induce her guilty and no-contest pleas and that she had not been threatened. In sum, the records—including the plea questionnaire and waiver of rights forms and addenda, the jury instructions attached to those forms, and the plea hearing transcript—demonstrate that Acker entered her guilty and no-contest pleas knowingly, intelligently, and voluntarily. *See* ***Pegeese***, 387 Wis. 2d 119, ¶23. We therefore conclude that a challenge to the knowing, intelligent, and voluntary nature of her pleas would lack arguable merit.

As indicated in footnote four of this opinion, the circuit court's plea colloquy established Acker's understanding of the elements of misdemeanor child neglect as that offense was codified in WIS. STAT. § 948.21(2), (3)(f) (2017-18), from April 18, 2018, through the end of the charging period on June 16, 2018.[6] The charges of misdemeanor child neglect, however, also spanned the period from June 16, 2016, through April 17, 2018. During that period, the crime was codified in WIS. STAT. § 948.21(1)(a) (2015-16), and was comprised of different elements from those

[6] Effective on April 18, 2018, the elements of misdemeanor child neglect under WIS. STAT. § 948.21(2),(3)(f) (2017-18) were: (1) the child had not attained the age of eighteen years; (2) the defendant was a person responsible for the welfare of the child; (3) the defendant, through action or failure to take action, and for reasons other than poverty, failed to provide necessary care, food, clothing, medical care, shelter, or education, or failed to provide protection from exposure to controlled substances or to controlled substance analogs, or to drug abuse; (4) the failure to provide seriously endangered the physical, mental, or emotional health of the child; (5) the failure to provide was negligent; and (6) the natural and probable consequences of the neglect would be death, great bodily harm, sexual victimization, emotional damage, or bodily harm, although the harm did not occur. *See* ***id.***; *see also* WIS JI—CRIMINAL 2150.

required to prove a violation of the amended statute.[7] We agree with appellate counsel that the statutory amendments do not provide an arguably meritorious basis for Acker to challenge her pleas. Acker pled guilty to two counts of misdemeanor child neglect as that crime was codified in § 948.21 during a portion of the charging period, and therefore she entered guilty pleas to an existing Wisconsin offense. *See* ***State v. Beamon***, 2013 WI 47, ¶23, 347 Wis. 2d 559, 830 N.W.2d 681 (reflecting that "all crimes are defined by statute"). Further, her pleas protect her from future prosecution for any allegations of child neglect involving the identified victims at any time during the charging period, because when the State charges "a continuing crime, 'a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period.'" *See* ***State v. Schultz***, 2020 WI 24, ¶42, 390 Wis. 2d 570, 939 N.W.2d 519 (citations and emphasis omitted). Accordingly, a challenge to Acker's pleas based on the amendments to § 948.21 that occurred during the charging period would be frivolous within the meaning of ***Anders***.

A defendant who enters a valid guilty or no-contest plea normally forfeits all nonjurisdictional defects and defenses to the criminal charge. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. An exception is codified in WIS. STAT. § 971.31(10), which permits appellate review of an order denying a motion to suppress evidence notwithstanding the defendant's guilty or no-contest plea. Accordingly, we next consider

[7] Prior to April 18, 2018, the elements of misdemeanor child neglect were: (1) the child was under the age of 18 years; (2) the defendant was a person responsible for the welfare of the child; and (3) the defendant intentionally contributed to the neglect of the child. *See* WIS. STAT. § 948.21(1)(a) (2015-16); WIS JI—CRIMINAL 2150 (May 2009).

whether Acker could pursue an arguably meritorious challenge to the circuit court's order denying her suppression motion.

Acker sought to suppress evidence found when police executed a search warrant at her home. She argued that the search warrant affidavit did not support the warrant-issuing magistrate's decision to permit officers to execute the warrant without first knocking and announcing their presence. In deciding the motion, the circuit court considered whether the affidavit established "the requisite reasonable suspicion that knocking and announcing would be dangerous, futile or inhibit the effective investigation of a crime by allowing for the destruction of evidence." *See* ***State v. Eason***, 2001 WI 98, ¶1, 245 Wis. 2d 206, 629 N.W.2d 625. The circuit court concluded that the affidavit supported a conclusion that knocking and announcing the police presence would be dangerous to Acker and to third parties in light of allegations that Acker had a history of using common household items to set her home on fire, had tried to hang herself in the home, and that a gun was hidden in the home in an unknown location. Upon our independent review of the affidavit, we agree that the allegations were sufficient to establish reasonable suspicion that knocking and announcing before entry would be dangerous or would impede the investigation. Accordingly, an appellate challenge would lack arguable merit. *See* ***id.***, ¶9 (explaining that when reviewing a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous and we independently review the application of constitutional principles to those facts). Moreover, were we to conclude that the circuit court's analysis was wrong—and we do not—we would nonetheless conclude that further pursuit of the issue would lack arguable merit. The court commissioner who issued the warrant determined that the facts alleged in the supporting affidavit justified a no-knock entry, and the police were entitled to rely on that probable cause determination. *See* ***id.***, ¶68.

We next conclude that Acker 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 deterrence and Acker's rehabilitation 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. Moreover, the aggregate twenty-six-year term of imprisonment that the circuit court imposed was significantly less than the aggregate of fifty-one years of imprisonment and $115,000 in fines that Acker faced upon conviction of the seven offenses here. Acker therefore cannot mount an arguably meritorious claim that her sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. We conclude that a challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We also conclude that Acker could not pursue an arguable meritorious challenge to the circuit court's determination that she is ineligible for the challenge incarceration program and the Wisconsin substance abuse program. A circuit court imposing a bifurcated sentence normally exercises its sentencing discretion when determining a defendant's eligibility for these programs. *See* WIS. STAT. § 973.01(3g)-(3m).[8] However, a person is statutorily disqualified from

[8] 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 Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

participating in either program if serving a sentence for a crime specified in WIS. STAT. § 948.03. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1. Additionally, an inmate is statutorily disqualified from participating in the challenge incarceration program if the inmate has reached the age of forty years old before his or her participation would begin. *See* § 302.045(2)(b). Accordingly, further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Acker suggests that she can pursue an arguably meritorious claim that her trial counsel was ineffective because he "bullied and lied" to her to induce her to sign the plea questionnaires and because he did not pursue a speedy trial on her behalf. A defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

In a supplemental no-merit report, appellate counsel explains that he explored the possibility of raising a claim that trial counsel coerced Acker to plead guilty and no-contest, but appellate counsel concluded that the claim lacked merit. With the supplemental no-merit report, appellate counsel included a copy of a letter that he received from Acker describing how her trial counsel insisted that "the [plea] deal was right for [her]." *Cf.* WIS. STAT. RULE 809.32(1)(f) (permitting appellate counsel to present facts outside the record to rebut allegations raised in response to a no-merit report). A lawyer who believes that a guilty or no-contest plea is in the defendant's best interest is not ineffective for recommending such a plea. *See* ***State v. Rock***, 92 Wis. 2d 554, 564, 285 N.W.2d 739 (1979). Rather, "[o]nce the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, [the lawyer] should use reasonable persuasion to guide the client to a sound decision." ***Id.*** (citation omitted). Further pursuit of this issue would lack arguable merit.

Appellate counsel also examines Acker's assertion that trial counsel was ineffective for failing to demand a speedy trial. We agree with appellate counsel's conclusion that Acker cannot pursue an arguable meritorious challenge on this ground. A defendant who enters a knowing, intelligent, and voluntary plea of guilty or no-contest cannot challenge the judgment of conviction on the ground that he or she was denied a speedy trial. *See* ***Foster v. State***, 70 Wis. 2d 12, 19-20, 233 N.W.2d 411 (1975). Accordingly, Acker cannot show prejudice from the alleged deficiency. There is therefore no merit to this claim.

Finally, we have considered whether Acker can pursue an arguably meritorious claim of ineffective assistance of counsel on the ground that trial counsel failed to raise a multiplicity challenge to four of the counts charged in case No. 2018CF2945. Charges are multiplicitous when they are identical in law and fact. *See* ***State v. Trawitzki***, 2000 WI App 205, ¶7, 238 Wis. 2d 795, 618 N.W.2d 884. Here, the State charged Acker in each of Counts 25-28 with causing mental harm to a child in violation of WIS. STAT. §948.04, during the period from June 14, 2016, through June 14, 2018. Although the State did not identify which child was the victim of each count, the probable cause section of the complaint identified four victims of these crimes: J.N.C., A.M.C., C.C., and A.C. "As a general rule when different victims are involved, there is a corresponding number of distinct crimes." ***State v. Rabe***, 96 Wis. 2d 48, 67, 291 N.W.2d 809 (1980) (citation omitted). Accordingly, the complaint showed that the four charges were not identical in fact. Further, when Acker pled guilty to Count 25, the State clarified that the count corresponded to the allegation that Acker caused mental harm to J.N.C. The circuit court accepted that clarification. *See* WIS. STAT. § 971.29(1); *see also* ***State v. Webster***, 196 Wis. 2d 308, 318, 538 N.W.2d 810 (Ct. App. 1995) (recognizing that § 971.29(1) permits amendments to the charging documents at any time prior to trial). The circuit court then dismissed and read-in

the other three charges of causing mental harm to a child. Because Counts 26-28 were all dismissed and read-in, we see no arguably meritorious basis on which Acker is prejudiced by the State's failure to clarify which victim corresponded to each of the three dismissed counts. *See* ***State v. Drown***, 2011 WI App 53, ¶14, 332 Wis. 2d 765, 797 N.W.2d 919 (explaining that the State is prohibited from future prosecution of crimes that are read-in at sentencing).

Our independent review of the records 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, upon remittitur, the circuit court shall oversee entry of an amended judgment of conviction—Form CR-204—for Acker's misdemeanor convictions in Milwaukee County Circuit Court case No. 2018CF2945, as required by footnote four.

IT IS FURTHER ORDERED that the judgment of conviction, amended as required by this opinion, reflecting Acker's misdemeanor convictions in Milwaukee County Circuit Court case No. 2018CF2945, the judgment of conviction reflecting Acker's felony convictions in that case, and the judgment of conviction in Milwaukee County Circuit Court case No. 2018CF4411, are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved of any further representation of Juanita A. Acker, effective on the date that an amended judgment of conviction in Milwaukee County Circuit Court case No. 2018CF2945, is entered as required by this opinion. *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