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**DISTRICT I**

March 29, 2022

*To*:

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Dennis Thomas, Jr. 615883
Thompson Correctional Center
434 State Farm Road
Deerfield, WI 53531-9562

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

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2021AP13-CRNM State of Wisconsin v. Dennis Thomas, Jr. (L.C. # 2019CF1520)

Before Donald, 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).**

Dennis Thomas, Jr., appeals from judgments of conviction and a postconviction order in this matter.[1] Appellate counsel, Attorney Brian Patrick Mullins, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Thomas did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

Thomas pled no contest to the felony charge of leaving the scene of a traffic accident that involved a death (hit and run), and he pled guilty to the misdemeanor charge of operating a motor vehicle while intoxicated as a second offense. For the hit and run conviction, Thomas faced maximum penalties of twenty-five years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 346.67(1), 346.74(5)(d), 939.50(3)(d). The circuit court imposed a twelve-year term of imprisonment bifurcated as seven years of initial confinement and five years of extended supervision. For operating a motor vehicle while intoxicated, Thomas faced a minimum fine of $350, a maximum fine of $1,100, a minimum jail sentence of five days, and a maximum jail sentence of six months. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)2. The circuit court

[1] The notice of appeal states that Thomas appeals from a judgment convicting him of a felony and from a postconviction order. The record reflects that the clerk of circuit court entered two judgments in this case, one for Thomas's felony conviction and one for his misdemeanor conviction. The postconviction order resolved issues regarding both the felony and the misdemeanor. The rules of appellate procedure mandate that an attorney who concludes that appellate proceedings would lack arguable merit and whose client will not consent to closing the file without action "shall file in circuit court a notice of appeal of the judgment of conviction or final adjudication and of any order denying a postconviction or postdisposition motion." *See* WIS. STAT. RULE 809.32(1), (2)(a) (2019-20). Accordingly, we construe the notice of appeal in this case as encompassing the judgments of both the felony and the misdemeanor convictions, as well as the postconviction order addressing both matters. All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

imposed a six-month jail sentence.[2] The circuit court ordered Thomas to serve the two sentences concurrently and granted him the 186 days of sentence credit that he requested. The circuit court also denied him eligibility for the Wisconsin substance abuse program and the challenge incarceration program, and ordered him to pay restitution of $23,214.63.

Thomas filed a postconviction motion challenging the sentencing decision on various grounds. The circuit court granted his request for an additional day of sentence credit and otherwise denied relief. This appeal followed.

The State alleged in a criminal complaint that on April 6, 2019, Thomas drove his car into a Milwaukee intersection in the 5800 block of North Teutonia Avenue and collided with a vehicle driven by L.R.D. A security guard saw Thomas walking near the area shortly after the collision and approached him. When Thomas said that he had been driving a vehicle involved in a crash, the guard returned Thomas to the crash site, where police had already arrived. L.R.D. was pronounced dead at the scene. A blood test revealed that Thomas had a blood alcohol content of .218g/100ml, nearly three times the legal limit for operating a motor vehicle. The State charged Thomas with three felonies: homicide by intoxicated use of a vehicle; homicide by intoxicated use of a vehicle while having a prohibited blood alcohol concentration; and hit and run resulting in death.

The accident reconstruction unit of the Milwaukee police department subsequently determined that Thomas had the right-of-way when he entered the intersection and that, while he

[2] The circuit court did not impose a fine for operating a motor vehicle while intoxicated as a second offense. We discuss the circuit court's omission later in this opinion and order.

attempted to brake before colliding with L.R.D., she did not make a similar attempt. The police also determined that, immediately before the collision, L.R.D. was travelling at approximately thirteen miles over the speed limit with a prohibited blood alcohol content of .08g/100ml, and that she entered the intersection after disregarding a stop sign. The State therefore concluded that at a trial on the homicide charges, the prosecution would be unable to overcome a defense that the accident would have occurred and L.R.D. would have died even if Thomas had exercised due care and had not been intoxicated. *See* WIS. STAT. § 940.09(2)(a).

The parties then resolved the case with a plea agreement. Pursuant to that agreement, the State filed an amended information that eliminated the two homicide charges and instead charged Thomas with misdemeanor counts of operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration, each as a second offense. Upon pleas other than not guilty to the misdemeanor charge of operating a motor vehicle while intoxicated as a second offense and to the original felony charge of hit and run, the State agreed to seek dismissal of the remaining misdemeanor charge and to recommend a term of six to eight years of initial confinement for the felony conviction. The circuit court accepted Thomas's pleas of guilty and no contest, respectively, to the charges of operating while intoxicated as a second offense and hit and run. The circuit court dismissed the remaining charge, and the case proceeded immediately to sentencing.

We first consider whether Thomas could pursue a claim for plea withdrawal on the ground that his 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 Thomas had signed a plea questionnaire and waiver of rights form and addendum, had reviewed those documents with his trial counsel, and understood their contents.

*See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (providing that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The questionnaire reflected that Thomas was thirty years old and had completed four years of college. The circuit court then conducted a plea colloquy as required by ***Bangert***, 131 Wis. 2d at 266-72, and WIS. STAT. § 971.08, establishing on the record that, among many other matters, Thomas understood the charges against him, the penalties that he faced, and the constitutional rights that he gave up by entering pleas other than not guilty.

In the no-merit report, appellate counsel considers whether Thomas could mount an arguably meritorious claim that the plea colloquy was inadequate because the circuit court did not review the elements of the offenses with Thomas. During a plea colloquy, "a circuit court must establish that a defendant understands every element of the charges to which he pleads[.]" ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, Thomas filed jury instructions along with his plea questionnaire and his initials appear next to each element. Thomas told the circuit court that he had reviewed the instructions with his trial counsel and that he understood them. We therefore agree with appellate counsel that the circuit court properly determined during the plea colloquy that Thomas understood the elements of the offenses. *See* ***id.***, ¶56 (stating that the circuit court may establish the defendant's understanding of the elements by reference to a document signed by the defendant that includes the elements).

Appellate counsel also considers whether Thomas could seek plea withdrawal because the circuit court failed to advise him that it was not bound by the terms of any plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶¶32, 38, 274 Wis. 2d 379, 683 N.W.2d 14. ***Hampton*** requires that when "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the

recommendations of the prosecuting attorney are not binding on the court." ***Id.***, ¶32 (citation and emphasis omitted). The record shows, however, that Thomas received the charge and sentence concessions that the State recommended under the plea agreement. Specifically, the circuit court allowed the State to amend the homicide charges to misdemeanor charges of unlawful operation of a motor vehicle, the circuit court dismissed one of those misdemeanors, and the circuit court imposed a term of initial confinement for hit and run that fell within the range that the State recommended. Because the circuit court followed the plea agreement, the omission of a warning during the plea colloquy that the circuit court was not bound by that agreement was an insubstantial defect that does not warrant plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441.

Appellate counsel also points out that the circuit court did not warn Thomas in conformity with WIS. STAT. § 971.08(1)(c) about the risks of deportation and other potential immigration consequences that accompanied his guilty and no-contest pleas. The warnings, however, appeared on the plea questionnaire. We therefore agree with appellate counsel that, because Thomas had actual knowledge of the information that the circuit court should have provided, the omission of immigration warnings does not provide an arguably meritorious basis to challenge the pleas.[3] *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶38, 378 Wis. 2d 504, 904 N.W.2d 773.

[3] We observe that, before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Thomas could make such a showing.

In sum, we agree with appellate counsel that no arguably meritorious basis exists for Thomas to challenge the validity of his guilty and no-contest pleas. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We next consider whether Thomas could pursue an arguably meritorious challenge to his sentence for operating a motor vehicle while intoxicated as a second offense. Sentencing lies within the circuit court's discretion and judicial review is limited to a determination of whether the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17, 40-43, 270 Wis. 2d 535, 678 N.W.2d 197. A sentencing decision constitutes a proper exercise of discretion when the decision is based upon the facts of record and the appropriate law. *See* ***State v. Owens***, 2006 WI App 75, ¶7, 291 Wis. 2d 229, 713 N.W.2d 187. In this case, WIS. STAT. § 346.65(2)(am)2., required the circuit court to fine Thomas not less than $350 upon his conviction for operating a motor vehicle while intoxicated as a second offense. *See* ***State v. Duffy***, 54 Wis. 2d 61, 64-65, 194 N.W.2d 624 (1972) (holding that a statute imposing a minimum penalty leaves the sentencing court with no alternative but to impose at least the minimum required). The circuit court did not impose any fine for that offense. Thomas, however, is not aggrieved by the omission. Accordingly, he cannot challenge it on appeal. *See* WIS. STAT. RULE 809.10(4) (appeal brings before this court rulings adverse to the appellant).

Thomas also could not pursue an arguably meritorious challenge to any other component of the disposition imposed for operating a motor vehicle while intoxicated as a second offense. He received a time-served jail sentence, and any challenge to that sentence is therefore moot. *See* ***State v. Walker***, 2008 WI 34, ¶14, 308 Wis. 2d 666, 747 N.W.2d 673. As to the circuit court's orders imposing a one-year driver's license revocation and a one-year restriction limiting his motor vehicle operating privileges to those vehicles equipped with an ignition interlock

device, those orders represent the minimums that the law requires. *See* WIS. STAT. §§ 343.30(1q)(b)3., 343.301(1g), (2m)(a).

We turn to the remainder of the circuit court's sentencing decisions. We agree with appellate counsel that Thomas could not pursue an arguably meritorious challenge to the circuit court's exercise of discretion in imposing a twelve-year term of imprisonment for hit and run and requiring him to serve the term concurrently with his misdemeanor sentence. The circuit court indicated that protection of the community was the primary sentencing goal, and the circuit court discussed the factors that it viewed as relevant to achieving that goal. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶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. The sentence imposed was within the maximum allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and was not so excessive as to shock public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

Appellate counsel does not discuss the circuit court's order that Thomas pay a total of $23,214.63 in restitution. The record reflects that Thomas stipulated to restitution in that amount. *See* WIS. STAT. § 973.20(13)(c). Further proceedings regarding restitution therefore would lack arguable merit. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126 (explaining that a defendant cannot appeal a restitution order to which he or she stipulated).

Appellate counsel does examine whether Thomas could pursue an arguably meritorious challenge to the postconviction order denying his motion for modification of his prison sentence so as to render him eligible to participate in the Wisconsin substance abuse program and the challenge incarceration program. In his postconviction motion, Thomas sought relief both on the ground that the circuit court erroneously exercised its discretion in denying him eligibility for the programs in the first instance, and on the ground that a new factor warranted modifying his prison sentence to include a finding of program eligibility. In denying relief, the circuit court clarified and reaffirmed its conclusion that, in light of the gravity of Thomas's conduct, participation in the programs was not warranted.[4] *See* ***State v. Steele***, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112 (reflecting that a circuit court properly exercises its discretion when it relies on appropriate sentencing factors to determine an inmate's eligibility for prison programs). The circuit court further determined that Thomas's claimed new factor—that L.R.D. would have died even if Thomas had remained at the scene of the collision—was not "highly relevant" to the sentencing decision. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (holding that a new factor is something "highly relevant to the imposition of sentence"). We are satisfied that appellate counsel properly analyzed these issues and correctly concluded that further pursuit of sentence modification on either ground would lack arguable merit. Additional discussion of these issues is not required.

Finally, we conclude that Thomas could not pursue an arguably meritorious challenge to the circuit court's postconviction order declining to consider his request under WIS. STAT.

[4] Upon successful completion of either the Wisconsin substance abuse program or the challenge incarceration program, an inmate's remaining initial confinement time is converted to time on extended supervision. *See* WIS. STAT. §§ 302.045(3m)(b), 302.05(3)(c)2.

§ 343.301(3)(b) for a reduction in the cost of an ignition interlock device. That subsection permits a cost reduction based on the defendant's indigence. The circuit court determined that Thomas may renew his request for a cost reduction when he is released from confinement and is eligible for an ignition interlock device. Because Thomas's future financial circumstances are unknown, the circuit court properly determined that his claim was not ripe. *See* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (providing that issues are not ripe for adjudication and will not be addressed when they depend on hypothetical or future facts).

Our independent review of the record does not disclose any other potential issues for appeal. Therefore, 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 judgments of conviction and the postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Brian Patrick Mullins is relieved of any further representation of Dennis Thomas, Jr. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*