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DISTRICT I

June 1, 2022

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

2021AP1387-CRNM State of Wisconsin v. Ruby G. McMiller (L.C. # 2018CF3825)
2021AP1388-CRNM State of Wisconsin v. Ruby G. McMiller (L.C. # 2018CF4160)

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).

Ruby G. McMiller appeals judgments of conviction entered upon her guilty pleas to first-degree recklessly endangering safety by use of a dangerous weapon and to first-degree intentional homicide. Her appellate counsel, Attorney Mark S. Schoenfeldt, filed a no-merit report. McMiller did not file a response. This court has considered the no-merit report, and we have independently reviewed the records as mandated by ***Anders v. California***, 386 U.S. 738

(1967), and WIS. STAT. RULE 809.32 (2019-20).[1] We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21. ¶

In Milwaukee County Circuit Court case No. 2018CF3825, which underlies appeal No. 2021AP1387-CRNM, the State alleged in a criminal complaint that early in the morning of August 3, 2018, McMiller was a passenger in an SUV that was stopped at a red light in the 2100 block of West North Avenue in Milwaukee. A silver car pulled up next to the SUV, and the driver of that car, Q.T.T., exchanged pleasantries with the driver of the SUV. McMiller, who was known to both Q.T.T. and to her passenger, K.R.B., then shouted, "hey, take this number down," and fired seven gunshots, striking K.R.B. in the back and Q.T.T. in the arm before the SUV drove away. An officer who was dispatched to the scene of the alleged shooting found seven nine-millimeter casings near the traffic light. The State went on to allege that on April 6, 2017, McMiller had been convicted of the felony offense of battery by prisoner in Milwaukee County Circuit Court case No. 2016CF5441, and that she had also earlier been convicted of battery by prisoner in Milwaukee County Circuit Court case Nos. 2015CF1731 and 2012CF101. The State charged McMiller with two counts of first-degree recklessly endangering safety by use of a dangerous weapon and one count of possessing a firearm while a felon.

[1] The no-merit report that Attorney Schoenfeldt filed in these matters totals forty-five pages of text, but twenty-five of those pages consist of block quotations. For example, on pages eight through twenty-seven of the no-merit report, Attorney Schoenfeldt has reproduced the plea hearing transcript almost entirely, including the selection of the next court date. We remind Attorney Schoenfeldt that in no-merit proceedings, we have access to the record and an obligation to review the record independently. We look to appellate counsel's no-merit report to assist us in considering the potential issues that the record may contain and to advise us why, in counsel's view, those issues lack arguable merit. *See* WIS. STAT. RULE 809.32(1) (2019-20). Reproducing large portions of the record within the body of the no-merit report buries counsel's discussion of the issues in an inflated document and impedes our review. All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In Milwaukee County Circuit Court case No. 2018CF4160, which underlies appeal No. 2021AP1388-CRNM, the State filed a criminal complaint alleging that on the afternoon of August 26, 2018, in the 3200 block of West Brown Street in Milwaukee, R.H. was in a car with T.T. The two men were waiting to meet a third man, who had arranged to buy some marijuana from T.T. When the purported purchaser got into the car, a woman approached the car, pointed a gun at T.T., and searched his pockets while the purported marijuana purchaser took cash and other items from R.H. The gunwoman then shot T.T. in the face and fled along with the purported marijuana purchaser. T.T. died at the scene. Police recovered a spent nine-millimeter cartridge casing in the car where T.T. died, and further investigation revealed that the casing matched those found at the scene where Q.T.T. and K.R.B. were shot. R.H. gave a statement to police and identified McMiller as the gunwoman. On August 30, 2018, police arrested McMiller in the bedroom of a Milwaukee residence, and a detective recovered a nine-millimeter handgun from a bin of clothes outside the bedroom door. According to the complaint, police determined that the gun in the clothes bin had fired the casing found at the West Brown Street shooting scene and also had fired the seven casings found at the West North Avenue shooting scene. The State charged McMiller in case No. 2018CF4160 with one count of first-degree intentional homicide by use of a dangerous weapon and one count of armed robbery as a party to a crime.

McMiller denied the charges in both cases and requested jury trials. The State moved to join the two cases for a single trial, and the circuit court granted the motion over McMiller's objections. The parties subsequently agreed to adjourn a January 2019 trial date to permit McMiller to conduct further investigation following receipt of a police report reflecting that her DNA was detected on the gun found in the home where she was arrested. After further adjournments, the trial was rescheduled for February 17, 2020, but on that date, McMiller elected

to resolve the charges with a plea agreement. Pursuant to its terms, she pled guilty in case No. 2018CF3825 to one count of first-degree recklessly endangering safety by use of a dangerous weapon, and she pled guilty in case No. 2018CF4160 to first-degree intentional homicide. The weapons enhancer alleged as part of the latter charge was dismissed outright, and the remaining counts were dismissed and read in for sentencing purposes.

The matters proceeded to sentencing on July 13, 2020. For first-degree recklessly endangering safety by use of a dangerous weapon, McMiller faced maximum penalties of seventeen and one-half years of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 941.30(1), 939.50(3)(f), 939.63(1)(b) (2017-18). The circuit court imposed a sentence that exceeded the statutory maximum term of imprisonment, ordering McMiller to serve thirty years of imprisonment bifurcated as twenty years of initial confinement and ten years of extended supervision. For first-degree intentional homicide, McMiller faced a mandatory penalty of life imprisonment. *See* WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a) (2017-18). The circuit court imposed the mandatory sentence. Pursuant to WIS. STAT. § 973.014(1g)(a)2. (2017-18), the circuit court also determined that she was eligible for release to extended supervision after serving forty-five years of confinement. The circuit court ordered McMiller to serve her sentences concurrently, awarded her the 684 days of sentence credit that she requested, and set restitution at zero.

Soon after the sentencing proceedings concluded, the Department of Corrections contacted the circuit court and requested review of McMiller's sentence in case No. 2018CF3825. As grounds for the request, the DOC noted that first-degree recklessly endangering safety is a Class F felony for which the term of initial confinement may not exceed seven years and six months and the term of extended supervision may not exceed five years. *See*

WIS. STAT. §§ 941.30(1), 973.01(2)(b)6m., (d)4. (2017-18). Further, the DOC noted that the penalty enhancer for committing the crime by use of a dangerous weapon permitted the circuit court to impose not more than five additional years of imprisonment, none of which could be imposed as extended supervision. *See* WIS. STAT. § 939.63(1)(b), 973.01(2)(c) (2017-18); ***State v. Volk***, 2002 WI App 274, ¶¶2, 36, 258 Wis. 2d 584, 654 N.W.2d 24. In response to the DOC's request for review, the circuit court promptly entered an order commuting McMiller's sentence for first-degree recklessly endangering safety by use of a dangerous weapon to a term of seventeen and one-half years of imprisonment bifurcated as twelve and one-half years of initial confinement and five years of extended supervision.[2] She appeals.

We first consider whether McMiller could pursue an arguably meritorious claim for plea withdrawal on the ground that her 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 McMiller was twenty-five years old and that she had completed high school. The circuit court also established that McMiller had signed a plea questionnaire and waiver of rights form and addendum in each of the two cases and that she understood the contents of those documents. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court probed McMiller's disclosure that she had been diagnosed with mental illnesses. McMiller confirmed that she consistently took her prescribed medications for those mental illnesses and that she had taken her medications the previous evening. McMiller further told the circuit court that the medications helped her to think clearly,

[2] The no-merit report does not discuss the defect in the original sentence imposed in case No. 2018CF3825, the inquiry about that sentence from the Department of Corrections, or the order commuting the sentence.

that she had not taken any other alcohol or drugs within the past twenty-four hours, and that she was proceeding in court "with a clear head" and "a good understanding of what [was] going on." The circuit court then conducted a colloquy with McMiller that complied with the circuit court's obligations when accepting a guilty plea. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08.[3] The records—including the plea questionnaire and waiver of rights forms and addenda, the attached jury instructions that McMiller signed describing the elements of the crimes to which she pled guilty, and the plea hearing transcript—demonstrate that McMiller entered her guilty pleas knowingly, intelligently, and voluntarily. Further pursuit of this issue would lack arguable merit.

We next conclude that no arguably meritorious basis exists for further pursuit of the issues McMiller raised prior to her guilty pleas, including her objections to joinder of case Nos. 2018CF3825 and 2018CF4160, and her request to discharge her trial counsel for suggesting that she provide information to the State. A defendant who enters a valid guilty 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. Accordingly, further pursuit of the issues that McMiller raised in the proceedings conducted before her guilty pleas would be frivolous within the meaning of ***Anders***.

[3] We have considered that, during the plea colloquy with McMiller, the circuit court warned her about the risks of deportation and other potential immigration consequences of her guilty pleas using language that deviated somewhat from that required by WIS. STAT. § 971.08(1)(c). Minor deviations from the statutory language, however, do not undermine the validity of a plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173. Moreover, before a defendant may seek plea withdrawal based on a failure to comply with § 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 McMiller could make such a showing.

We next conclude that McMiller could not pursue an arguably meritorious claim for resentencing on the ground that the circuit court imposed an excessive sentence for first-degree recklessly endangering safety by use of a dangerous weapon. Pursuant to WIS. STAT. § 973.13, "[i]n any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings."[4]

We also conclude that McMiller could not pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. Our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence[.]" ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court at sentencing must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the

[4] This court recently observed in an unpublished, authored opinion that in circumstances where a defendant receives an excessive bifurcated sentence but the circuit court did not exceed the maximum allowable term for one of the two components of such a sentence—initial confinement or extended supervision—a defendant is entitled to a new sentencing hearing. *See* ***State v. LeBlanc***, No. 2020AP62-CR, unpublished slip op. ¶12 (WI App July 30, 2021). In the instant case, however, both components of the bifurcated sentence for first-degree recklessly endangering safety by use of a dangerous weapon exceeded the maximum allowable terms, so the circuit court had the discretion to commute both components to the statutory maximums without a hearing pursuant to WIS. STAT. § 973.13. *See* ***LeBlanc***, No. 2020AP62-CR, ¶12.

need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

Here, the circuit court identified protection of the public, punishment, deterrence, and McMiller's rehabilitation as the sentencing goals, and the circuit court discussed appropriate factors that it viewed as relevant to achieving those goals. The circuit court found that both of the crimes were "most grave," and that the homicide was "of the most aggravated sort" because it was deliberate, cruel, and without any justification. In considering McMiller's character, the circuit court recognized "a marked change" in McMiller since the cases arose, and the circuit court praised her for making "demonstrated progress" in her behavior and the ways in which she expressed herself. Although the circuit court acknowledged some concern that McMiller's expressions of remorse might be self-serving, the circuit court nonetheless found that they were genuine. The circuit court addressed the need to protect the public, finding that McMiller had a history of committing violent offenses while living in the community and a history of engaging in premeditated assaultive behavior while she was in custodial placements. The circuit court found that her offenses reflected a pattern of escalating violence, and that the level of violence she exhibited was "indicative of someone who is in need of secure[] correctional placement and a lengthy period of incarceration."

The circuit court ultimately concluded that McMiller's improved behavior during the pendency of the instant cases and her decision to accept responsibility and enter guilty pleas warranted allowing her an opportunity for release to extended supervision. To that end, the

circuit court found her eligible for release after serving forty-five years of confinement, *see* WIS. STAT. § 973.014(1g)(a)2. (2017-18), and the circuit court allowed her to serve her homicide sentence in case No. 2018CF4160 concurrently with both her contemporaneously imposed sentence in case No. 2018CF3825, and her earlier-imposed sentence for battery that she was already serving.[5]

The circuit court considered appropriate factors in sentencing McMiller. The factors were relevant and proper.[6] The records do not reflect an arguably meritorious basis for further proceedings in regard to McMiller's sentences.

[5] The circuit court expressly stated at sentencing that McMiller's sentences in case Nos. 2018CF3825 and 2018CF4160 were concurrent with each other. The circuit court did not make an express statement that the sentences were also concurrent with the sentence that McMiller was already serving, but the circuit court's silence on that question created a presumption of a concurrent sentence in the absence of a statutory or judicial declaration to the contrary. *See* ***State v. Oglesby***, 2006 WI App 95, ¶21, 292 Wis. 2d 716, 715 N.W.2d 727. The records here confirm that the circuit court intended concurrent sentences: the judgments of conviction in both cases provide that the sentences are concurrent with each other and with the earlier-imposed sentence.

[6] The circuit court at sentencing properly did not make a finding in case No. 2018CF3825 that McMiller was subject to a mandatory minimum five-year term of initial confinement for first-degree recklessly endangering safety by use of a dangerous weapon. According to the complaint in that case, McMiller was subject to such a mandatory minimum term because she had previously been convicted of a violent felony, namely, battery by prisoner in violation of WIS. STAT. § 940.20(1) (2017-18). In support, the State invoked WIS. STAT. § 973.123(2), (3)(a) (2017-18) (requiring a mandatory minimum five-year term of initial confinement for certain violent offenses involving use of a firearm if the person was prohibited from possessing a firearm based on a prior conviction for a violent felony). McMiller acknowledged during her plea hearing in February 2020 that she was subject to a mandatory minimum sentence in case No. 2018CF3825. Pursuant to § 973.123(5), however, the provisions of § 973.123 do not apply to sentences imposed after July 1, 2020. Because McMiller's sentencing ultimately took place on July 13, 2020, the mandatory minimum was inapplicable. Neither the State nor the defense argued at sentencing that McMiller was subject to a mandatory minimum sentence for first-degree recklessly endangering safety by use of a dangerous weapon, and the circuit court fashioned her sentences without suggesting that a mandatory minimum sentence was required for that crime. We conclude that the sun-setting of the mandatory minimum sentencing provisions set forth in § 973.123, does not provide an arguably meritorious basis for postconviction proceedings.

Last, appellate counsel advises that, in his view, McMiller could not pursue an arguably meritorious claim that her trial counsel was ineffective. 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). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that "were outside the wide range of professionally competent assistance." *See* ***id.*** at 690. 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." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

We conclude that the records in these matters do not demonstrate an arguably meritorious ground on which McMiller could challenge trial counsel's effectiveness. In reaching that conclusion, we have considered that, although the records suggest that trial counsel should have objected to the excessive sentence that the circuit court imposed for first-degree recklessly endangering safety by use of a dangerous weapon, no basis appears in the records for alleging prejudice from the omission. The circuit court commuted the excessive portions of the sentence and, because McMiller's sentences are concurrent, her service of twelve and one-half years of initial confinement for first-degree recklessly endangering safety by use of a dangerous weapon will not increase the time that she must serve before she is eligible for supervised release from her confinement for first-degree intentional homicide. Accordingly, a claim of ineffective assistance of counsel for failing to object at sentencing to the excessive term of imprisonment would lack arguable merit.

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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of any further representation of Ruby G. McMiller. *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