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DISTRICT I

July 12, 2022

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Nikila N. Hennings
5406 N. 39th St
Milwaukee, WI 53209

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

2020AP48-CRNM State of Wisconsin v. Nikila N. Hennings (L.C. # 2018CF2625)

Before Brash, C.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).

Nikila N. Hennings appeals from an amended judgment,¹ entered on her guilty plea, convicting her on one count of theft between \$5,000 and \$10,000, as party to a crime. Appellate counsel, Annice M. Kelly, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S.

¹ A judgment of conviction was originally entered on January 2, 2019, after sentencing. However, restitution was held open at that time. A restitution hearing was held on February 21, 2019, after which the circuit court entered an amended judgment. This appeal is taken from the February 21 judgment.

738 (1967), and WIS. STAT. RULE 809.32 (2019-20).² Hennings was advised of her right to file a response, but she has not responded. Upon this court's independent review of the record, as mandated by *Anders*, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On April 19, 2018, Glendale police were dispatched to a theft complaint at a Batteries and Bulbs store. Police met with the Vice President of Operations, J.O., and employee J.N., who was in charge of inventory control. J.O. and J.N. explained that multiple iPhones and other electronics had started going missing around March 27, 2018. J.N. explained that the inventory was kept in a locked room, and only people with an appropriate "badge controlled by a pad" can enter the room. Inside the room are cabinets, which can only be opened with a key, and only certain people have a key. Employees must also be supervised when opening the cabinets. When items began going missing, J.N. installed a camera in the room and "planted some phones to see exactly when they were being stolen." On video, J.N. saw two employees, Hennings and Breana White, taking phones.

Hennings and White were arrested. White told police that their team leader, Angelina Lache, had given her a key to the cabinet and instructions on how to steal items. White said that she and Hennings would take items and, after their shift, they would meet Lache and divide the items three ways. White said she had taken iPhones, which she sold for \$50-100, and iPads, which she sold for \$60-80. Hennings also said that she had gotten a key from Lache and that she and White would meet Lache after their shift to split items. Hennings acknowledged taking ten

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

to twenty items from the store, mostly iPhones, which she sold for about \$50 each. Lache initially denied any involvement in the thefts, but searches of the women's personal phones revealed multiple text messages between the three regarding stealing and selling phones. Lache then claimed she had received about fifty phones from Hennings and White. J.N. informed police that there were 542 missing items worth \$254,647.

All three women were charged, in a single complaint, with one count of theft of between \$5,000 and \$10,000 as party to a crime. Hennings agreed to resolve her case with a plea, in exchange for which the State would recommend incarceration, imposed and stayed for three years of probation, with the length of any incarceration and conditions of probation left to the circuit court. The circuit court conducted a plea colloquy and accepted Hennings' guilty plea. It later sentenced Hennings to twenty-four months of initial confinement and eighteen months of extended supervision, imposed and stayed for three years of probation with ninety days in jail as a condition. At a subsequent restitution hearing, the circuit court ordered \$150,000 in restitution to Batteries and Bulbs, joint and several with White and Lache. Hennings appeals.

The first issue appellate counsel addresses in the no-merit report is whether Hennings "enter[ed] a knowing and voluntary plea" and "whether the circuit court's plea colloquy was sufficient." Circuit courts "have a number of duties at a plea hearing to ensure that a defendant's guilty or no contest plea is knowing, intelligent, and voluntary[.]" *State v. Pegeese*, 2019 WI 60, ¶23, 387 Wis. 2d 119, 928 N.W.2d 590. These duties are derived from statute and judicial mandate and require the circuit court to, among other things: (1) determine the extent of the defendant's education and general comprehension; (2) ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea; (3) establish the defendant's understanding of the nature of the crime with which they are

charged and the applicable range of punishments; (4) ascertain whether a factual basis exists to support the plea; (5) inform the defendant of the constitutional rights being waived by entering a plea and verify that the defendant understands they are giving up these rights; (6) establish personally that the defendant understands that the court is not bound by the terms of any plea agreement; and (7) provide the deportation warning listed in WIS. STAT. § 971.08(1)(c). *See Pegeese*, 387 Wis. 2d 119, ¶23; *see also State v. James Brown*, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. If the circuit court fails at one of these duties, the defendant may subsequently be entitled to plea withdrawal. *See State v. Johnson*, 2012 WI App 21, ¶9, 339 Wis. 2d 421, 811 N.W.2d 441; *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

Appellate counsel’s analysis of this issue is severely lacking. The report states only: “The court determined that Ms. Hennings was capable of making a knowing and voluntary decision. It advised her of the crime charged, the penalties and the constitutional rights she was giving up. As such, Ms. Hennings’ plea colloquy was not deficient and she enter[ed] a knowing and voluntary plea.” The circuit court’s finding that Hennings could make a knowing and voluntary decision is beneficial insofar as it is a factual determination, but that finding has no bearing on whether the circuit court appropriately followed its mandatory duties at the colloquy. It is also not enough for the circuit court to advise a defendant of the crime charged, potential penalties, and rights being waived; the circuit court must also verify that the defendant understands those components. Moreover, information regarding the crime, penalties, and constitutional rights is not the only information to be conveyed via the plea colloquy.

Nevertheless, our review of the record satisfies us that the circuit court properly fulfilled its obligations for accepting a guilty plea. Hennings completed a questionnaire and waiver of rights form and addendum. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d

627 (Ct. App. 1987). The circuit court verified that Hennings had reviewed the forms with counsel and that she understood them before signing them. The circuit court reviewed the form's biographical information and Hennings' ability to understand the proceedings. It confirmed that, other than the agreement with the State, no threats or promises had been made for the plea. The circuit court also provided the immigration warning.

The circuit court did not specifically review all of the constitutional rights Hennings was giving up with her plea. It confirmed she understood she was giving up the rights to a trial, a unanimous jury, and putting the State to its proof, but did not expressly review that Hennings was giving up the rights to remain silent or to testify, to present evidence, and to subpoena and confront witnesses. However, the circuit court referred to the plea questionnaire and asked Hennings if she understood that by signing and filing the form, she was indicating that she wanted "to give up all of the constitutional rights listed on the form[.]" Hennings answered affirmatively. The trial court also asked trial counsel if he was satisfied that Hennings understood all of the rights she was giving up, and trial counsel answered affirmatively. Thus, the record as a whole reflects Hennings' understanding of the constitutional rights she was surrendering. See *Pegeese*, 387 Wis. 2d 119, ¶¶38-40.

The circuit court reviewed the elements of theft and received Hennings' acknowledgment that she understood those elements. A copy of WIS JI—CRIMINAL 1441 regarding theft was submitted with the plea questionnaire; Hennings initialed next to each of the elements. The

circuit court did not expressly review party to a crime liability,³ but did ask counsel if he was satisfied that Hennings understood her liability under the party to a crime statute. Counsel answered affirmatively. The circuit court also reviewed the maximum possible penalties with Hennings, obtained her acknowledgement that the court was not bound by the terms of any plea agreement, and ascertained that it could use the criminal complaint as a factual basis for her plea.

The plea questionnaire and waiver of rights form and addendum, the jury instructions, and the court's colloquy satisfactorily advised Hennings of the elements of her offenses and the potential penalties she faced, and otherwise complied with the requirements for ensuring that a plea is knowing, intelligent, and voluntary. Thus, there is no arguable merit to a challenge to the validity of Hennings' plea.

The second issue appellate counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It must also determine which objective or objectives are of greatest importance. *See Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. *See State v. Odom*,

³ We note that, according to the complaint, which Hennings agreed could be used as a factual basis for the plea, Hennings admitted taking ten to twenty phones, almost any combination of which exceeded \$5,000. When an actor may be held directly liable for an offense, it is not necessary for the circuit court to additionally explain party to a crime liability. *See State v. Calvin Brown*, 2012 WI App 139, ¶¶12-13, 345 Wis. 2d 333, 824 N.W.2d 916.

2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See id.*

Appellate counsel's analysis regarding sentencing is sufficient. Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The forty-two month sentence ordered is well within the seventy-two-month range authorized by law. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Further, the imposed and stayed sentence is not so excessive so as to shock the public's sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to challenging the circuit court's exercise of sentencing discretion.

The final issue appellate counsel discusses is whether the circuit court erroneously exercised its discretion in ordering Hennings to pay \$150,000 in joint and several restitution. *See State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526.

Under WIS. STAT. § 973.20(1r), the circuit court “shall order the defendant to make full or partial restitution” unless it finds a specific reason not to do so. “[R]estitution is the rule and not the exception[.]” *See State v. Wiskerchen*, 2019 WI 1, ¶22, 385 Wis. 2d 120, 921 N.W.2d 730 (citations omitted). The restitution statute “reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution.” *See id.* (citation omitted). The primary purpose of restitution is to compensate the victim, not to punish the defendant. *See id.* In determining whether to order restitution and, if so, the amount, the circuit court is to consider the amount of the victim's loss, the defendant's financial resources, the defendant's present and future earning ability, the needs and earning ability of the defendant's dependents, and any other factors the court deems appropriate. *See* § 973.20(13)(a).

Appellate counsel also sufficiently analyzes this issue. Batteries and Bulbs had reported over \$254,000 in inventory missing and submitted various receipts for their purchases of that inventory, made in the months prior to the arrest. At the restitution hearing, Hennings' attorney argued on her behalf that she had no ability to pay such a significant amount of restitution. Counsel also argued that Hennings had not admitted to taking nearly that much inventory, and he asserted that "there were a lot of people stealing phones," so a more appropriate restitution amount was "something like 10 or \$20,000 joint or several."

White and Lache had previously been ordered to pay \$150,000 in restitution. This amount, the circuit court explained,⁴ "was set acknowledging the limits and ability to pay and also trying to take into account that there may have been losses that were not—would not be attributable to the three defendants in this case." Additionally, the defendants' ages at the time of arrest ranged from twenty-four to twenty-nine years of age, and the restitution amount was set considering "the young age of the defendants in this case, [and] their projected ability to earn and work throughout approximately the next forty years or more[.]" Though terse, the circuit court's decision reflects an adequate exercise of discretion. There is no arguable merit to challenging the imposition of restitution.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

⁴ Electronic circuit court docket entries indicate that White, Lache, and Hennings were all sentenced by the same judge.

IT IS FURTHER ORDERED that Attorney Annice M. Kelly is relieved of further representation of Hennings 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