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DISTRICT III

September 7, 2022

To:

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Circuit Court Judge
Electronic Notice

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Nicolle M. Wilson 344830
Robert Ellsworth Corr. Center
21425-A Spring St.
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1710-CRNM State of Wisconsin v. Nicolle M. Wilson (L. C. No. 2018CF1749)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Nicolle Wilson filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Wilson's convictions for two counts of theft in a business setting and one count of fraud against a financial institution. Wilson filed a response to the no-merit report raising numerous challenges to her convictions and sentences, and counsel filed a supplemental no-merit report. Wilson subsequently filed a supplemental response. Upon our independent review of the record as mandated by ***Anders v.***

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

California, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In 2018, Wilson was working as a bookkeeper for the Eau Claire County Humane Association ("the Association"). According to the third amended complaint, on September 9, 2018, without authorization, Wilson took the Association's checkbook and wrote a check to herself in the amount of $60,000, signing the check with the name of the Association's executive director. Wilson then opened an account at Royal Credit Union ("RCU") and deposited the check into that account. RCU subsequently issued Wilson a certified check in the amount of $60,000, which was payable to an individual associated with a company that Wilson had recently retained to build a home.

On September 12, 2018, Wilson deposited a check in the amount of $60,000 into her personal checking account at Associated Bank. That check was drawn on an account that Wilson held at U.S. Bank titled "Wilson Accounting and Tax Services LLC." Wilson then issued a check from her personal checking account at Associated Bank in the amount of $60,000, payable to the Association. Those funds were paid to the Association.

On September 18, 2018, Wilson issued a personal check from her Associated Bank account to U.S. Bank in the amount of $60,000. On the same date, however, the check that Wilson had deposited into her personal checking account at Associated Bank on September 12 from the U.S. Bank account titled "Wilson Accounting and Tax Services LLC" was returned for insufficient funds. As a result, Wilson's personal checking account at Associated Bank became significantly overdrawn.

Because of Wilson's conduct, Associated Bank suffered a loss in the amount of $59,716.66. Given that Wilson had "issued two worthless check payments shortly following a worthless check deposit of the same dollar amount," the third amended complaint alleged that Wilson "had knowledge of the fraudulent check activity and conducted the activity as an attempt to benefit from an inflated account balance"—a practice commonly known as check kiting.

The third amended complaint also alleged that in 2010, Wilson had been hired by emBARK, a dog daycare facility, to help with its finances. Upon reviewing its financial records, emBARK discovered that during the year 2018, Wilson had written $24,238 in checks from emBARK to herself, to her accounting business, and to RCU, all without emBARK's permission.

Based on these allegations, the third amended complaint charged Wilson with seven offenses: (1) theft in a business setting (greater than $10,000 but not exceeding $100,000); (2) fraud against a financial institution (greater than $10,000 but not exceeding $100,000); (3) forgery; (4) uttering a forgery; (5) unauthorized use of an entity's identifying information or documents; (6) fraud against a financial institution (greater than $10,000 but not exceeding $100,000); and (7) theft in a business setting (greater than $10,000 but not exceeding $100,000). Counts 1 through 6 pertained to the alleged check-kiting scheme involving the Association, RCU, Associated Bank, and U.S. Bank. Count 7 pertained to Wilson's alleged theft from emBARK.

The parties ultimately reached a plea agreement. The agreement provided that Wilson would plead no contest to theft in a business setting (greater than $10,000 but not exceeding $100,000) (Count 1); fraud against a financial institution (greater than $10,000 but not exceeding

$100,000) (Count 2); and an amended charge of theft in a business setting (greater than $5,000 but not exceeding $10,000) (Count 7). In exchange for Wilson's no-contest pleas, the State would recommend that the remaining charges be dismissed and read in. The parties agreed to jointly request a presentence investigation report (PSI). The plea agreement further provided that if the parties were unable to reach an agreement regarding restitution, then both sides would be free to argue at sentencing. If the parties reached an agreement regarding restitution, then the State "would limit its incarceration argument to the recommendation of the PSI."

Following a plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Wilson had signed, the circuit court accepted Wilson's no-contest pleas to Counts 1, 2 and 7, concluding they were knowingly, intelligently, and voluntarily entered. Wilson agreed that the court could rely on the probable cause portion of the criminal complaint as the factual basis for her pleas, and she confirmed that the facts alleged in the criminal complaint were accurate. Based on the allegations in the criminal complaint, the court found that there was an adequate factual basis for Wilson's pleas.

The circuit court ordered a PSI. The PSI recommended sentences of one to two years' initial confinement followed by one to two years' extended supervision on each of the three charges to which Wilson had pled. The PSI did not specify whether those sentences should run concurrently or consecutively to one another.

The parties subsequently reached an agreement regarding the amount of restitution. Specifically, they agreed that Wilson owed $59,716.66 in restitution to Associated Bank and $71,713.85 in restitution to emBARK. With the addition of a ten percent surcharge, the parties agreed that Wilson owed a total of $144,573.56 in restitution.

A sentencing hearing took place two days after the parties informed the circuit court of their agreement regarding restitution. At the beginning of the hearing, both the State and Wilson's attorney made corrections to the PSI. The State then made its sentencing argument and recommended that the court impose concurrent sentences of two years' initial confinement followed by five years' extended supervision on Count 1, two years' initial confinement followed by five years' extended supervision on Count 2, and two years' initial confinement followed by two years' extended supervision on Count 7.

Wilson's attorney began his sentencing argument by directing the circuit court to several letters that had been submitted in support of Wilson's character. The court confirmed that it had reviewed those letters. Wilson's attorney then recommended that the court place Wilson on probation for five years, with a condition of six to nine months of jail time with Huber privileges. Wilson exercised her right of allocution.

During its sentencing remarks, the circuit court stated that its primary objectives in sentencing Wilson were the protection of the public, punishment of the defendant, and the payment of restitution to the victims. The court ultimately sentenced Wilson to five years' initial confinement followed by five years' extended supervision on Count 1; a consecutive term of five years' probation on Count 2; and two years' initial confinement followed by two years' extended supervision on Count 7, concurrent to Wilson's sentence on Count 1.

The no-merit report first addresses whether there would be arguable merit to a claim that Wilson's trial attorney was constitutionally ineffective by failing to file any motions to suppress evidence. Appellate counsel asserts that she has "reviewed the file and investigated the manner in which law enforcement obtained evidence against Ms. Wilson and did not find a basis to file

any motion to suppress in this case." Wilson does not argue—either in her response to the no-merit report or in her supplemental response—that her trial attorney was ineffective by failing to move to suppress evidence. Having independently reviewed the record, we do not discern any arguably meritorious basis for trial counsel to have filed a suppression motion. We therefore agree with appellate counsel that any ineffective assistance claim on this basis would lack arguable merit.

The no-merit report next asserts that there is no arguably meritorious basis to challenge the validity of Wilson's no-contest pleas. Upon reviewing the record, we agree with counsel's conclusion that this issue lacks arguable merit. The circuit court's plea colloquy, supplemented by the plea questionnaire and waiver of rights form that Wilson signed, informed Wilson of the elements of the offenses, the penalties that could be imposed, and the constitutional rights that she waived by entering no-contest pleas. The court confirmed that Wilson was forty-eight years old; had over twenty years of education; understood the English language; and had not consumed any alcohol, medications, or drugs during the last twenty-four hours. The court also confirmed that no promises had been made to Wilson to induce her to enter her pleas. In addition, the court provided the deportation warning required by WIS. STAT. § 971.08(1)(c), and found that the allegations in the criminal complaint provided an adequate factual basis for Wilson's pleas.

The circuit court did not personally advise Wilson that it was not bound by the terms of the plea agreement, as required by ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683

N.W.2d 14.[2] In her response to the no-merit report, Wilson asserts that the "only reason" she agreed to the plea deal was because "[c]onfinement was to be capped at the recommendation of the [PSI] if restitution was agreed upon prior to sentencing." Wilson contends that if she had known the court could "go over the deal," she "would have never taken the deal to plead no contest" and would have gone to trial.

Wilson is not entitled to relief on this basis because the record shows that she received the benefit of the plea agreement, and the error was therefore harmless. *See* ***State v. Johnson***, 2012 WI App 21, ¶¶12, 14, 339 Wis. 2d 421, 811 N.W.2d 441. The plea agreement provided that, if the parties reached an agreement regarding restitution, the State would cap its initial confinement recommendation at the amount recommended by the PSI.[3] The PSI recommended sentences of one to two years' initial confinement followed by one to two years' extended supervision on each of the three charges to which Wilson had pled, without specifying whether those sentences should be concurrent or consecutive. If consecutive, the sentences recommended

[2] The plea questionnaire and waiver of rights form that Wilson signed contained the following statement: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty." In ***State v. Hampton***, 2004 WI 107, ¶69, 274 Wis. 2d 379, 683 N.W.2d 14, however, our supreme court rejected the State's argument that a circuit court could satisfy its duty to personally advise a defendant that it was not bound by the terms of the plea agreement "by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea agreement." Instead, the circuit court "must make certain through dialogue that the defendant understands that the court is not bound by other people's promises." ***Id.*** Although the court may use the plea questionnaire during the plea hearing as an aid in "explaining … the court's role in sentencing," the court must nevertheless "ask the question that ascertains that the defendant understands what he [or she] has been told." ***Id.***

[3] When reciting the plea agreement on the record at the plea hearing, Wilson's trial attorney stated that if the parties reached an agreement regarding restitution, the State would "limit its incarceration argument to the recommendation of the PSI." Wilson's response to the no-merit report shows that she understood the term "incarceration," as used by her trial attorney, to mean initial confinement.

by the PSI would amount to a maximum of six years' initial confinement followed by six years' extended supervision. The State complied with the plea agreement by recommending concurrent terms of two years' initial confinement on each of the three counts. The total amount of initial confinement imposed by the circuit court—i.e., five years—was also within the PSI's aggregate recommendation of six years' initial confinement. Under these circumstances, Wilson's alleged belief that her initial confinement would be "capped at the recommendation of the [PSI]" does not constitute a manifest injustice permitting Wilson to withdraw her pleas because the amount of initial confinement that the court imposed was, in fact, within the range recommended by the PSI.

Wilson also asserts that she should be permitted to withdraw her no-contest pleas because the State did not provide a "specific breakdown" regarding the amount of restitution claimed by emBARK until the day before the sentencing hearing. Wilson does not explain why this fact would provide a basis for plea withdrawal, however, given that the plea agreement expressly recognized that the parties had not yet reached an agreement regarding restitution. In other words, Wilson knew at the time she entered her pleas that the amount of restitution remained in dispute. Under these circumstances, Wilson does not explain why the alleged lack of a restitution breakdown prevented her from making a knowing, intelligent, and voluntary decision to enter no-contest pleas.

Moreover, in the supplemental no-merit report, appellate counsel explains that emails between Wilson and her trial attorney show that a restitution breakdown was sent to Wilson on April 27, 2020—four days before Wilson signed the plea questionnaire and waiver of rights form and ten days before the plea hearing. Any argument that Wilson lacked sufficient information

about the State's claimed restitution amounts before entering her pleas would therefore lack arguable merit.

Wilson also suggests that her pleas are invalid because there were "at least six different Assistant District Attorney[]s" assigned to her case "due to issues with the District Attorney's office due to the District Attorney coming into work drunk and sexual harassment issues hence forcing his resignation." Wilson does not, however, explain why these alleged facts give rise to a manifest injustice permitting her to withdraw her no-contest pleas.

In the supplemental no-merit report, appellate counsel asserts that the court records show that only three assistant district attorneys appeared at hearings in Wilson's case. Appellate counsel further asserts that the then-district attorney was not assigned to Wilson's case and never filed any documents or made any appearances in her case. In her response to the supplemental no-merit report, Wilson asserts that the district attorney's conduct is nevertheless relevant because "the District Attorney does review the agreements that the Assistant District Attorneys are presenting" and "his state of mind could hinder his judgment." This speculative assertion provides no basis for an arguably meritorious claim for plea withdrawal.

The no-merit report next asserts that any challenge to the circuit court's exercise of its sentencing discretion would lack arguable merit. Having reviewed the record, we agree with counsel's description, analysis, and conclusion that there are no arguably meritorious grounds to challenge Wilson's sentences. Before imposing sentences authorized by law, the court considered the seriousness of the offenses; Wilson's character, including her prior convictions for theft by an employee and theft in a business setting; the need to protect the public; the need to punish Wilson for her conduct; and Wilson's ability to pay restitution. *See* ***State v. Gallion***,

2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Wilson's sentences are well within the maximum allowed by law. As such, they are presumptively neither unduly harsh nor unconscionable, nor are they "so excessive and unusual" as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Furthermore, there would be no arguable merit to a claim that the conditions of Wilson's extended supervision were not "reasonable and appropriate" under the circumstances of this case. *See* ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499 (2002).

In her response to the no-merit report, Wilson challenges her sentences on numerous grounds, none of which have arguable merit. First, Wilson asserts that various news articles show that the Association suffered no monetary loss as a result of her conduct. Wilson contends these articles constitute a new factor warranting sentence modification and also show that the circuit court relied on an improper factor when sentencing her.

The fact that the Association suffered no monetary loss as a result of Wilson's conduct is not a new factor warranting sentence modification because it was known to the circuit court at the time of Wilson's sentencing. *See* ***State v. Harbor***, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828 ("A new factor is one that was 'not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" (citation omitted)). The third amended complaint clearly alleged that although Wilson had stolen $60,000 from the Association, she later wrote a check to the Association for $60,000, and those funds were paid to the Association. When it was subsequently discovered that the funds in Wilson's account at Associated Bank were insufficient to pay that amount, Associated Bank—not the Association—

suffered a financial loss. Accordingly, Wilson was ordered to pay restitution to Associated Bank, not the Association. These facts were known to the parties and to the court at the time of sentencing. As such, Wilson cannot show that the Association's lack of monetary loss constitutes a new factor warranting sentence modification. Nor has Wilson shown that the court relied on any improper factors or inaccurate information when sentencing her.

Wilson next asserts that S.J., the Association's executive director, improperly told the PSI author that Wilson exhibited "no remorse" for her conduct. Wilson appears to contend that it is impossible for a person to "determine the remorse of someone else." A defendant's lack of remorse, however, is a proper factor for a court to consider at sentencing. *See* ***State v. Williams***, 2018 WI 59, ¶56, 381 Wis. 2d 661, 912 N.W.2d 373. Moreover, we are aware of no law stating that it is improper for a victim to comment at sentencing on his or her belief regarding a defendant's level of remorse. In addition, while the circuit court indicated during its sentencing remarks that it did not believe Wilson was remorseful, that comment was not based on S.J.'s statement. Instead, the court concluded that Wilson lacked remorse because she had been convicted of similar offenses in the past but had nevertheless stolen large amounts of money in this case. On this record, there would be no arguable merit to a claim that the court erroneously exercised its sentencing discretion by considering what it perceived to be Wilson's lack of remorse.

Wilson next asserts that her sentences are improper because defendants in other Eau Claire County cases have "received extremely minimal sentences" for offenses that Wilson believes are more serious than those she committed. This claim lacks arguable merit because "[i]ndividualized sentencing" is "a cornerstone to Wisconsin's criminal justice jurisprudence." *See* ***Gallion***, 270 Wis. 2d 535, ¶48. "[N]o two convicted felons stand before the sentencing court

on identical footing .... and no two cases will present identical factors." ***Id.*** (alterations in original; citation omitted). As appellate counsel aptly notes, while Wilson asserts that other offenders received more lenient sentences than she did, she "makes no mention of those offenders' criminal histories or any other information that a court would consider when fashioning sentences for those individuals." We agree with appellate counsel that Wilson's argument in this regard essentially asks us to compare "apples to oranges" and, therefore, does not provide an arguably meritorious basis to challenge Wilson's sentences.

Wilson next suggests that, when imposing sentence, the circuit court improperly relied on the fact that she had previously been revoked from extended supervision. The PSI reflected that Wilson was revoked from extended supervision in 2006 and was reconfined for eighteen months. Although Wilson now claims that the revocation was actually the fault of her probation agent and that she did not do anything wrong, she did not raise that argument in the circuit court or attempt to make any corrections to the PSI in that regard. Under these circumstances, the court appropriately relied on Wilson's previous convictions, and on the fact that she had been revoked from extended supervision in one of those cases, as evidence that Wilson "really hasn't learned."

Wilson also asserts that she did not have access to the Association's checks, that she did not sign any checks, and that any money paid to her by the Association was approved by its director. To the extent Wilson raises these assertions to show that she did not, in fact, commit the crimes to which she pled, we note that a valid no-contest plea waives all nonjurisdictional defects and defenses. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. As such, Wilson cannot now argue that she is entitled to relief because she did not commit the crimes in question. In addition, because the factual allegations that Wilson now raises would have been known to her at the time of sentencing, but were not brought to the circuit court's

attention, she cannot argue that those allegations constitute new factors warranting sentence modification. *See* ***Harbor***, 333 Wis. 2d 53, ¶57.

Wilson next argues that the circuit court ordered her to undergo a psychological evaluation, but that service is not available to her in prison. To the extent Wilson means to argue that her inability to obtain a psychological evaluation is a new factor warranting sentence modification, that claim lacks arguable merit. A new factor must be something that was "highly relevant" to the imposition of the defendant's sentence. ***Id.***, ¶40 (citation omitted). Here, the court ordered Wilson to undergo a psychological evaluation as a condition of her extended supervision, which clearly shows that the court did not expect or intend Wilson to complete the evaluation while in prison. Consequently, Wilson cannot show that her ability to receive a psychological evaluation while in prison was "highly relevant" to the imposition of her sentences.

Wilson also contends that she "never received a specific breakdown from the District Attorney's office" regarding the amount of restitution that it claimed she owed to emBARK. As discussed above, a restitution breakdown was sent to Wilson on April 27, 2020. Wilson further asserts that, since the time of her sentencing hearing, she has "recalled" additional information showing that the amount of restitution owed to emBARK should be reduced by $30,869.20. However, Wilson agreed to the amount of restitution claimed by the State prior to sentencing, and she never indicated at sentencing that any of the claimed items of restitution were erroneous. Wilson's claim that she has now "recalled" additional information that casts doubt on the amount of restitution owned to emBARK does not provide any basis to modify her sentences, as Wilson knew or reasonably should have known that information at the time of sentencing.

Wilson next asserts that her sentences are excessive because they exceed the recommendations contained in a "Bifurcated Sentence Recommendation Grid" promulgated by the Wisconsin Department of Corrections. This claim lacks arguable merit because the circuit court was not bound to follow the Department of Corrections' grid. Again, "[i]ndividualized sentencing" is "a cornerstone to Wisconsin's criminal justice jurisprudence." ***Gallion***, 270 Wis. 2d 535, ¶48. Moreover, as we have already explained, Wilson's sentences—which are well within the maximum allowed by law—are presumptively neither unduly harsh nor unconscionable. *See* ***Grindemann***, 255 Wis. 2d 632, ¶¶31-32.

Wilson also criticizes the circuit court for failing to consider her character and for not "get[ting] to know [her] as an individual." The record belies these assertions. The court expressly stated at sentencing that it had read the character letters that Wilson submitted. The court also specifically considered Wilson's criminal record—which included convictions for crimes similar to the offenses at issue in this case. The court further noted that Wilson's demeanor was "acceptable," that she was forty-eight years old, that she was highly educated, and that she was highly intelligent. Any claim that the court did not consider Wilson's character or failed to consider her "as an individual" would therefore lack arguable merit.

Wilson also asserts that there was "incorrect" information in the PSI. She does not, however, specifically identify any information in the PSI that she believes was incorrect. Both the State and Wilson's trial attorney made corrections to the PSI at sentencing, and Wilson did not indicate at that time that she believed any other information in the PSI was incorrect. Nor does Wilson allege that the circuit court actually relied on any inaccurate information in the PSI. On this record, there would be no arguable merit to a claim that Wilson is entitled to

resentencing because the court relied on inaccurate information in the PSI when imposing her sentences. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

Wilson next argues that the circuit court erred by failing to consider whether she should be placed on probation. Again, the record belies this assertion. Under Wisconsin law, "[p]robation should be the disposition unless: confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or [probation] would unduly depreciate the seriousness of the offense." ***Gallion***, 270 Wis. 2d 535, ¶44. Here, the court expressly concluded that probation was inappropriate because confinement was needed to protect the public from further criminal activity and because probation would unduly depreciate the seriousness of Wilson's offenses. As such, there would be no arguable merit to a claim that the court erred by failing to consider probation.

Wilson further contends that, had the circuit court placed her on probation, she would have been able to pay restitution to the victims in a more timely fashion. It is clear from the court's sentencing remarks, however, that the court believed protecting the public from Wilson's criminal conduct was more important than facilitating her ability to pay restitution. The court noted that, "[r]ealistically," it was unlikely that Wilson would ever pay the full amount of restitution because the court had prohibited her from performing accounting and bookkeeping services as a condition of her extended supervision. The court recognized that this condition would make it difficult for Wilson to earn money, thus impeding her ability to pay restitution. Nevertheless, the court believed this condition was necessary because it would limit Wilson's ability to "steal money" from other victims in the future. Under the circumstances of this case, there would be no arguable merit to a claim that the court erroneously exercised its sentencing discretion by prioritizing the protection of the public over Wilson's payment of restitution.

Finally, Wilson argues that the circuit court "sentenced [her] to prison because the Judge wanted to rehabilitate [her]," but she will not actually receive any rehabilitative programming while in prison because of her low scores on the COMPAS risk assessment. Contrary to Wilson's assertion, rehabilitation was not one of the court's sentencing objectives. Consequently, Wilson's inability to receive rehabilitative programming while in prison does not constitute a new factor warranting sentence modification because the availability of such programming was not "highly relevant" to the imposition of Wilson's sentences. *See* ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted).

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Melissa M. Petersen is relieved of any further representation of Nicolle Wilson in this matter pursuant to 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