OFFICE OF THE CLERK
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 III

November 29, 2022

To:

Hon. Mitchell J. Metropulos
Circuit Court Judge
Electronic Notice

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Laura M. Force
Electronic Notice

Jefren E. Olsen
Electronic Notice

Charles M. Stertz
Electronic Notice

Kendra K. Bruley 680658
Robert Ellsworth Corr. Center
21425-A Spring St.
Union Grove, WI 53182-9408

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

2020AP1525-CRNM State of Wisconsin v. Kendra K. Bruley (L. C. No. 2017CF697)

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).

Kendra Bruley appeals from a judgment of conviction, following a no-contest plea, of one count of homicide by intoxicated use of a vehicle. She also appeals from an order denying her postconviction motion for sentence modification. Bruley's appellate attorneys, Laura M. Force and Jefren E. Olson, have filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2019-20),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Bruley received a copy of the report, was advised of her right to file a response, and she has responded. We have independently reviewed the record and the no-merit report as mandated by ***Anders***. We conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm. *See* WIS. STAT. RULE 809.21.

On August 14, 2017, Bruley was charged with one count of injury by intoxicated use of a vehicle, causing great bodily harm. According to the complaint, on the evening of August 11, 2017, an intoxicated Bruley struck Stephen Gebert while he was riding his motorcycle. A subsequent blood test indicated that Bruley's blood alcohol content was .237. Gebert later died from his injuries, and an amended complaint charged Bruley with one count of homicide by intoxicated use of a vehicle.

Bruley ultimately pled no contest to homicide by intoxicated use of a vehicle. The circuit court held a plea hearing, where it conducted a colloquy and accepted Bruley's no-contest plea. The court sentenced Bruley to fifteen years' incarceration, bifurcated as seven years of initial confinement followed by eight years of extended supervision. Bruley later filed a postconviction motion for sentence modification, arguing that a new factor warranted sentence modification. The court held a hearing on the motion and denied Bruley's request for sentence modification. This appeal follows.

Appellate counsels' no-merit report addresses two issues: (1) whether Bruley's plea was valid; and (2) whether the circuit court properly exercised its sentencing discretion.

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

As to the first issue, we conclude that the plea colloquy, together with the plea questionnaire/waiver of rights form, which was signed by Bruley, and the attached jury instruction, demonstrate Bruley's understanding of the information to which she was entitled and that her plea was knowing, voluntary, and intelligent. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Thus, there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Bruley's plea was anything other than knowing, intelligent, and voluntary.

With regard to the circuit court's sentencing decision, we note that sentencing is a matter for the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court should 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 should 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 must consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, as well as additional factors it may wish to consider. *See* ***State v. Odom***, 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.*** The record reveals that the court thoughtfully considered and applied the relevant sentencing factors, focusing specifically on protecting the public and the impact of Bruley's conduct on the victim's family. The resulting sentence was within the potential maximum authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and 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). Therefore, there would be no arguable merit to a challenge to the court's sentencing discretion.

Any claim that the circuit court erred by denying Bruley's postconviction motion for sentence modification would also lack arguable merit. Bruley's postconviction motion argued that at the time of sentencing, the parties had overlooked the opinion of Bruley's treatment provider regarding her ongoing rehabilitative needs, and that, as a result, the court incorrectly concluded that Bruley was fully rehabilitated at the time of sentencing.

A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law for our de novo review. *See* ***id.***, ¶33.

The postconviction court denied Bruley's motion, finding that the information presented did not constitute a "new factor" because the treatment provider's opinion regarding Bruley's continued rehabilitative needs was in the record prior to sentencing. The court also reiterated its rationale for Bruley's sentence, stating that even if Bruley had presented a new factor, it would not have affected the court's sentencing decision. We agree with counsel that further pursuit of this issue would lack arguable merit.

In her response to counsels' no-merit report, Bruley contends that she did not fully understand the proceedings, that neither party completed an accident reconstruction, and that the circuit court did not view a video of the accident, which Bruley contends would have been a

mitigating factor at sentencing. We have already determined that Bruley's plea was knowing, voluntary, and intelligent; therefore, any contention that Bruley did not understand the proceedings would lack arguable merit. Bruley's complaint about inadequate accident reconstruction also lacks arguable merit, as it is unclear how this claim relates either to her plea or sentence. In any event, entry of a valid guilty or no-contest plea constitutes a waiver of nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. As to her contention that the court did not view the video of the accident, thereby affecting its sentencing decision, we have already determined that the court properly considered the relevant sentencing factors and did not erroneously exercise its sentencing discretion therefore making it irrelevant whether the court viewed the video.

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

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorneys Laura M. Force and Jefren E. Olson are relieved of further representation of Kendra Bruley 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