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DISTRICT I

December 6, 2022

To:

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

2022AP262-CRNM State of Wisconsin v. Jody T. Byrd (L.C. # 2018CF5136)

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).

Jody T. Byrd appeals a judgment of conviction entered upon his guilty pleas to one count of second-degree reckless homicide by use of a dangerous weapon as a party to a crime, and one count of possessing a firearm while a felon, all as a habitual offender. Appellate counsel, Attorney Marcella De Peters, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Byrd did not file a response. This court

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

has considered the no-merit report, and we have independently reviewed 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.

The State alleged in a criminal complaint that on October 22, 2018, Byrd and several co-actors entered a Milwaukee residence in the 400 block of East Auer Avenue. A witness at the scene heard Byrd say that he was going to "knock out" Clarence Perkins, then observed Byrd produce a gun and fire a shot at Perkins. While the witness was fleeing from the room to rescue his daughter, the witness heard several more shots. Police first arrived at the scene on October 23, 2018, and found Perkins on the ground with multiple gunshot wounds. He was taken to a hospital, where he was pronounced dead. A medical examiner conducted an autopsy and determined that Perkins had sustained a gunshot wound to the chest and additional gunshot wounds to his legs. The medical examiner concluded that Perkins died of his wounds and that the death was a homicide. The criminal complaint included further allegations that Byrd had previously been convicted of a felony offense in 2010, two misdemeanor offenses in 2016, and one misdemeanor offense in 2018, and that all four prior convictions remained of record and unreversed on October 22, 2018. The State charged Byrd, as a habitual offender, with one count of first-degree reckless homicide as a party to a crime while armed with a dangerous weapon and one count of possessing a firearm while a felon.

Byrd decided to resolve the charges with a plea agreement. He agreed to plead guilty to an amended charge of second-degree reckless homicide as a party to a crime and to admit that he committed the crime as a habitual offender based on a prior felony conviction within the

previous five years.[2] He also agreed to plead guilty to the charge of possessing a firearm while a felon and to admit that he committed the crime as a habitual offender based on three misdemeanor convictions within the previous five years. The State and the defense were free to recommend the disposition that each party believed appropriate. The circuit court accepted Byrd's guilty pleas.

The matter proceeded to sentencing. For second-degree reckless homicide as a party to a crime, while armed and as a habitual offender, Byrd faced thirty-six years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 940.06(1), 939.05, 939.50(3)(d), 939.63(1)(b), 939.62(1)(c) (2017-18). The circuit court imposed a thirty-year term of imprisonment bifurcated as twenty years of initial confinement and ten years of extended supervision. For possessing a firearm while a felon as a habitual offender, Byrd faced twelve years of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g), 939.62(1)(b) (2017-18). The circuit court imposed a consecutive, evenly bifurcated ten-year term of imprisonment. The circuit court denied Byrd eligibility for both the challenge incarceration program and the Wisconsin substance abuse program, ordered him to pay $4,087 in restitution, and awarded him 432 days of credit against his homicide sentence for the time he spent in custody prior to sentencing.

[2] A person may be sentenced as a habitual offender if, *inter alia*, the person "was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the [person] presently is being sentenced[.]" *See* WIS. STAT. § 939.62(2). The five-year period excludes time that the person spent in actual confinement serving a criminal sentence. *See* ***id.*** During the plea hearing, Byrd admitted that on November 23, 2010, he was convicted of the felony offense of second-degree sexual assault of a child. He also admitted that he subsequently spent more than three years in actual confinement serving a sentence for that conviction, and that the time in confinement sufficiently expanded the five-year period preceding October 22, 2018, as to include November 23, 2010.

The Department of Corrections subsequently notified the circuit court that 432 days of credit for time in custody in connection with this case appeared excessive because the sentencing date of December 19, 2019, was 423 days after Byrd committed his crimes on October 22, 2018. In response, the circuit court entered an order amending the judgment of conviction. The circuit court found that Byrd was entitled to 421 days of credit for the time he spent in custody following his arrest on October 24, 2018, until the date of sentencing. Byrd appeals.

We first consider whether Byrd could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty pleas were not knowing, intelligent, and voluntary. We are satisfied that appellate counsel properly analyzed this issue and correctly concluded that Byrd could not mount such a challenge. The circuit court conducted a thorough plea colloquy that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* WIS. STAT. § 971.08; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); ***State v. Pegeese***, 2019 WI 60, ¶23, 387 Wis. 2d 119, 928 N.W.2d 590. The record—including the plea questionnaire and waiver of rights form and addendum that Byrd signed; the attached jury instructions describing the elements of the crimes to which he pled guilty; and the plea hearing transcript—demonstrates that Byrd entered his guilty pleas knowingly, intelligently, and voluntarily. Additional discussion is not warranted.

We also agree with appellate counsel's conclusion that Byrd could not mount an arguably meritorious claim that 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. Before pronouncing sentence, the circuit court identified deterrence and protection of the community as the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The circuit court's discussion included consideration of

the mandatory sentencing factors, namely, "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 sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, 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 findings that Byrd was ineligible to participate in the challenge incarceration program and the Wisconsin substance abuse program. We independently conclude that Byrd could not pursue an arguably meritorious challenge to those findings.

Both the challenge incarceration program and the Wisconsin substance abuse program are prison treatment programs. *See* WIS. STAT. §§ 302.045(1), 302.05(1)(am). When an inmate successfully completes either program, the inmate's remaining confinement time is converted to extended supervision time. *See* §§ 302.045(3m)(b), 302.05(3)(c)2. A circuit court normally exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's discretionary decisions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m).[3] However, a person serving a sentence for a crime

[3] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05, 973.01(3g).

specified in WIS. STAT. ch. 940, is statutorily disqualified from participating in either program. *See* §§ 302.045(2)(c), 302.05(3)(a)1. Byrd therefore is disqualified from program participation while serving his sentence for second-degree reckless homicide in violation of WIS. STAT. § 940.06(1) (2017-18). Additionally, when he completes his twenty-year term of initial confinement for that offense, Byrd—who was twenty-six years old on the day of sentencing in these matters—will be well past forty years old and therefore statutorily disqualified from participating in the challenge incarceration program. *See* § 302.045(2)(b) (barring participation in that program if the inmate has attained the age of forty years before participation would begin).

As to Byrd's eligibility for the Wisconsin substance abuse program during his final years of initial confinement, the circuit court stressed that Byrd was a repeat offender with a substantial criminal history who "armed himself with a firearm and ... fired upon an unarmed person and shot him dead inside a residence where a child was present." The circuit court therefore found that the offenses were aggravated and necessitated the confinement time imposed. The circuit court's decision to find Byrd ineligible to reduce his confinement time by participating in the Wisconsin substance abuse program is thus supported by the record and the overall sentencing rationale. *See* ***Owens***, 291 Wis. 2d 229, ¶¶7-9. Indeed, the gravity of the offense alone is a sufficient reason to exclude a defendant from prison treatment programs leading to early release. *See* ***State v. Steele***, 2001 WI App 160, ¶11, 246 Wis. 2d 744, 632 N.W.2d 112. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Appellate counsel does not discuss the circuit court's order that Byrd pay $4,087 in restitution. The record reflects that Byrd stipulated to restitution in that amount. *See* WIS. STAT. § 973.20(13)(c). A challenge to the order would therefore be frivolous within the meaning of

Anders. *Cf.* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (defendant may not challenge on appeal a sentence that he or she affirmatively approved).

Finally, we have considered whether Byrd could pursue an arguably meritorious challenge to the circuit court's order reducing his award of sentence credit from 432 days to 421 days. Appellate counsel does not discuss this issue. We independently conclude that a challenge would lack arguable merit.

Pursuant to WIS. STAT. § 973.155(1)(a), "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Here, the circuit court inquired at sentencing regarding the number of days that Byrd had spent in custody and then ordered that he receive 432 days of credit. Trial counsel, however, had requested 422 days of credit, explaining that Byrd had been in jail since October 24, 2018.[4] While the period from October 24, 2018, through the December 19, 2019 sentencing date was 422 days, that period included the day of sentencing.[5] "[A] defendant is not entitled to sentence credit for the date on which he or she is sentenced." ***State v. Kontny***, 2020 WI App 30, ¶12, 392 Wis. 2d 311, 943 N.W.2d 923. Such a sentence credit award would result in duplicative credit for that day, because that day is counted as service of the first day of the sentence. *See* ***id.*** Accordingly, the circuit court properly awarded Byrd 421 days of sentence credit in the postconviction order.

[4] The record does not include an explanation for the difference between counsel's sentence credit request and the circuit court's order, but the discrepancy appears to reflect the circuit court's slip of the tongue.

[5] The number of days in the time period at issue here can be readily determined at http://www.timeanddate.com/date/duration.html. *Cf.* ***Townsend v. Fuchs***, 522 F.3d 765, 767 n.1 (7th Cir. 2008).

Our independent review of the record does not disclose any other potential issues for appeal. 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 judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Jody T. Byrd on appeal. *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