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DISTRICT I

December 20, 2022

To:

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Circuit Court Judge
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Jay R. Pucek
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2109-CRNM State of Wisconsin v. Khari Kahalil Jones
(L.C. # 2020CF1648)

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).

Khari Kahalil Jones appeals a judgment of conviction entered upon his guilty pleas to fleeing and to possessing a firearm while a felon. His appellate counsel, Attorney Jay R. Pucek, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).¹ Jones did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders*, we conclude that no

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

arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police on patrol in a marked squad car on April 25, 2020, saw a vehicle that had stopped in the middle of the 7000 block of West Beckett Avenue in Milwaukee. A check of the registration tag on the vehicle revealed that the vehicle had been reported stolen. Police conducted a traffic stop but when the officers instructed the driver to turn off the vehicle, the driver accelerated and fled. Police pursued the vehicle, which crashed into a street sign and lost a tire before coming to a stop. The driver, subsequently identified as Jones, then attempted to flee on foot, but officers caught up to him and took him into custody. Officers searched Jones's flight path and found a loaded semi-automatic handgun. A review of Wisconsin court records revealed that Jones had a 2014 felony conviction for armed robbery. The State charged Jones with fleeing a traffic officer and possessing a firearm while a felon.

Jones decided to resolve the charges with a plea agreement. Pursuant to its terms, he pled guilty as charged, and the State agreed to recommend a global disposition of eighteen months of initial confinement and thirty-six months of extended supervision, consecutive to any other sentence.

At sentencing, Jones faced a maximum penalty of a \$10,000 fine and three years and six months of imprisonment for fleeing a traffic officer. *See* WIS. STAT. §§ 346.04(3), 346.17(3)(a), 939.50(3)(i). Jones also faced a maximum penalty of a \$25,000 fine and ten years of imprisonment for possessing a firearm while a felon. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g). For the fleeing conviction, the circuit court imposed a four and one-half year term of imprisonment—a term that exceeded the statutory maximum—bifurcated as one year and six

months of initial confinement and three years of extended supervision. For possessing a firearm while a felon, the circuit court imposed a six and one-half year term of imprisonment bifurcated as one year and six months of initial confinement and five years of extended supervision. The circuit court ordered Jones to serve his sentence for fleeing concurrently with a revocation sentence that he was already serving for his 2014 armed robbery conviction, and the circuit court ordered Jones to serve his sentence for possessing a firearm while a felon consecutive to his other sentences. The circuit court found Jones ineligible for both the challenge incarceration program and the Wisconsin substance abuse program and awarded him the ninety-one days of sentence credit that he requested.

Soon after the sentencing hearing, the Department of Corrections (DOC) contacted the circuit court and requested review of Jones's sentence for fleeing, noting that fleeing is a Class I felony for which the term of extended supervision may not exceed two years. *See* WIS. STAT. §§ 346.04(3), 346.17(3)(a), 973.01(2)(d)6. The DOC also requested review of the sentence credit that Jones received, explaining that the credit awarded against his consecutive sentence for possessing a firearm while a felon appeared duplicative. In support of the latter request, the DOC attached a copy of a revocation order and warrant regarding Jones's revocation sentence for the 2014 armed robbery. The document showed that Jones received credit against his revocation sentence for his time in custody for the period beginning with his arrest in the instant case on April 25, 2020, and continuing until his return to prison to serve the revocation sentence.

In response to the DOC's requests for review, the circuit court entered an order commuting the extended supervision component of Jones's sentence for fleeing, reducing that component from three years to the statutory maximum term of two years. The circuit court also modified Jones's sentence credit award in two respects. First, the circuit court vacated the credit

awarded against Jones's consecutive sentence for possessing a firearm while a felon. Second, the circuit court directed that Jones receive a total of 278 days of credit against his sentence for fleeing, an award that represented each day that Jones spent in custody following his arrest on April 25, 2020, until his sentencing in this case on January 28, 2021. The circuit court then entered an amended judgment of conviction reflecting the terms of the postconviction order. Jones appeals.

We first consider whether Jones could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty pleas were not knowing, intelligent, and voluntary. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The record shows that at the outset of the plea hearing, after placing Jones under oath, the circuit court established that he was twenty-five years old and that he had a high school education. The circuit court also established that Jones had signed a plea questionnaire and waiver of rights form and addendum, and that he had reviewed those documents with his trial counsel and understood their contents. *See State v. Pegeese*, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court went on to conduct a colloquy with Jones as required when accepting a plea other than not guilty. *See id.*, ¶23; *see also* WIS. STAT. § 971.08.

In the no-merit report, appellate counsel examines whether Jones could pursue an arguably meritorious claim that the plea colloquy was inadequate because the circuit court did not advise him explicitly that it could impose the maximum penalties allowed by law and because the circuit court did not state the fines that Jones faced for each offense. We agree with appellate counsel's conclusion that any such claim would be frivolous within the meaning of *Anders*. The information at issue was included on the plea questionnaire and waiver of rights form that Jones signed, and Jones confirmed that he had reviewed that document with his trial

counsel and that he understood it. *See State v. Moederndorfer*, 141 Wis. 2d 823, 828-29, 416 N.W.2d 627 (Ct. App. 1987) (explaining that the circuit court may use a plea questionnaire and waiver of rights form to assist in ensuring that a defendant’s guilty plea is entered knowingly, intelligently and voluntarily). Moreover, appellate counsel advises us that Jones could not pursue an arguably meritorious claim for plea withdrawal based on a defective colloquy because Jones would be unable to allege that, at the time of his pleas, he lacked knowledge or understanding of the information that he was entitled to receive before the circuit court accepted his guilty pleas. *See Bangert*, 131 Wis. 2d at 274. Appellate counsel’s advisements are supported by the totality of the record, and we accept them.

Accordingly, we are satisfied that the record—including the plea questionnaire and waiver of rights form, the addendum, and the attached jury instructions—demonstrates that Jones knew and understood the information that he was entitled to receive and shows that he entered his guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08; *see also Bangert*, 131 Wis. 2d at 266-72. Further pursuit of this issue would lack arguable merit.

We next conclude that Jones could not pursue an arguably meritorious claim for resentencing based on the excessive sentence originally imposed for the Class I offense of fleeing a traffic officer. 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.” In this case, the circuit court imposed the maximum allowable term of one year and six months of initial confinement for the Class I conviction, *see* WIS. STAT. § 973.01(2)(b)9., but the circuit court imposed more than the two years of extended supervision for such a conviction allowed under § 973.01(2)(d)6. Upon

recognizing the error, the circuit court vacated the excessive portion of the sentence. In light of § 973.13, pursuit of resentencing would be frivolous within the meaning of *Anders*.

We also conclude that Jones could not pursue an arguably meritorious claim for sentence modification based on a challenge to the circuit court's exercise of sentencing discretion. Our review is limited to determining if the circuit court erroneously exercised its discretion. *See 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 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 and deterrence as the primary sentencing goals, and the circuit court discussed appropriate factors that it viewed as relevant to achieving those goals. The circuit court discussed the gravity of the offenses, finding that the

fleeing offense was “low level,” but that Jones created a “great danger” by possessing a loaded gun. In considering Jones’s character, the circuit court credited the information provided by his mother that he was both a “straight-A student” and a good athlete in high school, and the circuit court also found that Jones had strong family relationships that would benefit him when he was released from confinement. The circuit court addressed the need to protect the community, emphasizing the risks that guns pose to public safety and describing Jones’s loaded weapon as a “disaster just waiting to happen.” The circuit court went on to find that Jones had previously received a prison sentence, but “that didn’t stop him from the activity that’s in front of the [c]ourt now,” and that his failure to “get the message” increased the need to protect the public.

The circuit court considered that Jones had been serving a term of community supervision for his 2014 armed robbery conviction when he committed the crimes in this case, and the circuit court took into account that his supervision for the earlier conviction was revoked as a consequence of the actions underlying the instant case. The circuit court concluded that the nature of the fleeing warranted a term of imprisonment that was concurrent with the revocation term imposed for the 2014 armed robbery but that the more aggravated firearms offense in this case required an additional period of confinement. Relatedly, the circuit court found Jones ineligible for both the challenge incarceration program and Wisconsin substance program, explaining that his conduct warranted all of the additional confinement time imposed.²

² An inmate who successfully completes either the challenge incarceration program or the Wisconsin substance program will have his or her remaining confinement time converted to time on extended supervision. *See* WIS. STAT. §§ 302.045(3m)(b), 302.05(3)(c)2.

The circuit court identified the factors it considered in sentencing Jones. The factors were proper and relevant. The record does not reflect an arguably meritorious basis for further proceedings in regard to Jones's sentences.

We also conclude that Jones could not mount an arguably meritorious challenge to the decision modifying his sentence credit. Specifically, we are satisfied that the circuit court properly determined in its postconviction order that Jones's time in custody prior to his sentencing in the instant case should not be credited against his sentence for possessing a firearm while a felon. The record shows that Jones received credit against both his revocation sentence and his concurrent fleeing sentence for all of the 278 days that he spent in custody between his arrest and his sentencing in the instant case.³ Those same days may not also be credited against Jones's consecutive sentence for possessing a firearm while a felon. See *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) ("Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.").

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.

³ The record shows that the ninety-one days of sentence credit that the circuit court originally awarded to Jones at the sentencing hearing constituted a portion of the 278 days that Jones spent in custody following his arrest in this case on April 25, 2020, until his sentencing on January 28, 2021. In the postconviction order, the circuit court awarded Jones credit against his fleeing sentence for the entirety of those 278 days. Jones is not aggrieved by the circuit court's order increasing the credit awarded against his fleeing sentence, and therefore he cannot challenge the increase on appeal. See WIS. STAT. RULE 809.10(4) (providing that an appeal brings before this court rulings that are adverse to the appellant).

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

IT IS FURTHER ORDERED that Attorney Jay R. Pucek is relieved of any further representation of Khari Kahalil Jones. *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