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DISTRICT I

January 10, 2023

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

Jay R. Pucek
Electronic Notice

James Johnson 699910
Dodge Correctional Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2022AP988-CRNM State of Wisconsin v. James Johnson (L.C. # 2020CF55)

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).

James Johnson appeals a judgment of conviction entered upon his guilty pleas to second-degree reckless homicide, child neglect resulting in bodily harm, and two counts of physically abusing a child with the intent to cause bodily harm to the child. Johnson's 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 Johnson did not file a response. Upon

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

consideration of the no-merit report and an independent review of 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 January 1, 2020, Johnson's girlfriend, A.M., left her fourteen-month-old son, A.L., in Johnson's care at her home in Milwaukee. During the afternoon, Johnson became angry because A.L. would not stop crying. Johnson bit A.L. on the back and arm and struck him repeatedly in the head. In the early evening, Johnson telephoned A.M. and told her that he was unable to rouse A.L. from a nap. A.M. rushed home from work and found A.L. cold to the touch and unresponsive. A.M. called the police, and Johnson fled the scene. Law enforcement officers and firefighters arrived at A.M.'s home soon thereafter. First responders tried to resuscitate A.L. but could not do so and pronounced him dead. Johnson went to the police station some time later and turned himself in voluntarily. The State charged him with first-degree reckless homicide, child neglect resulting in death, and two counts of physically abusing a child with the intent to cause bodily harm to the child.

Johnson elected to resolve the case with a plea agreement that involved charge concessions from the State but no sentencing concessions. Pursuant to the terms of the agreement, Johnson pled guilty to an amended charge of second-degree reckless homicide and an amended charge of child neglect resulting in bodily harm. He also pled guilty to the two original charges of physically abusing a child with the intent to cause bodily harm to the child. The circuit court accepted Johnson's guilty pleas.

At sentencing, Johnson faced a twenty-five-year term of imprisonment and a \$100,000 fine for the second-degree reckless homicide conviction. *See* WIS. STAT. §§ 940.06(1),

939.50(3)(d). He also faced six years of imprisonment and a \$10,000 fine for each conviction for child neglect resulting in bodily harm and physical abuse of a child with the intent to cause bodily harm to a child. *See* WIS. STAT. §§ 948.21(2), (3)(d), 948.03(2)(b), 939.50(3)(h). The State asked the circuit court to sentence Johnson to an aggregate thirty-seven-year term of imprisonment bifurcated as twenty-four years of initial confinement and thirteen years of extended supervision. Johnson sought an aggregate ten-year term of initial confinement and did not propose a recommended term of extended supervision. The circuit court followed the State's recommendation. For the homicide conviction, the circuit court imposed the maximum term of imprisonment, bifurcated as fifteen years of initial confinement and ten years of extended supervision. For the other three convictions, the circuit court imposed three consecutive four-year terms of imprisonment, each bifurcated as three years of initial confinement and one year of extended supervision. The circuit court awarded Johnson the 469 days of sentence credit that he requested, and, in a subsequent hearing, the circuit court ordered him to pay restitution in the amount of \$5,000. He appeals.

In the no-merit report, appellate counsel discusses the potential issues of whether Johnson entered his guilty pleas knowingly, intelligently, and voluntarily; whether the circuit court properly exercised its sentencing discretion; whether the circuit court awarded sufficient sentence credit; and whether the restitution order was valid. This court is satisfied that appellate counsel properly analyzed these issues, and we agree with appellate counsel that further pursuit of these issues would lack arguable merit. Only a brief additional discussion is warranted regarding aspects of the plea hearing and the restitution hearing.

Turning first to the plea proceeding, the record shows that Johnson did not sign the plea questionnaire and waiver of rights form that his trial counsel filed at the outset of the plea hearing on February 9, 2021. His trial counsel explained to the circuit court that counsel had reviewed the form with Johnson two days earlier during a meeting at the jail, where the parties were separated by a glass partition as a precaution necessitated by the COVID-19 pandemic. Johnson confirmed during the plea hearing that he had reviewed the questionnaire with his trial counsel, that he answered the questions truthfully, and that he would have signed the questionnaire if he had been able to do so. Moreover, and more importantly, a plea questionnaire is not an essential component of the plea procedure; rather, the questionnaire is a tool that the circuit court may use in conducting a plea colloquy. *See State v. Hoppe*, 2009 WI 41, ¶30, 317 Wis.2d 161, 765 N.W.2d 794. In this case, our review of the record confirms appellate counsel’s assessment that the plea colloquy satisfied the circuit court’s obligations when accepting a guilty plea. Accordingly, the absence of Johnson’s signature on the plea questionnaire does not provide an arguably meritorious basis for further proceedings.

As to restitution, we have considered whether Johnson could pursue an arguably meritorious challenge to the restitution order on the ground that he was not personally present at the restitution hearing. We conclude that he could not do so. A defendant is not required to be present at a restitution hearing. *See* WIS. STAT. § 971.04. Rather, at a restitution hearing “[a]ll parties interested in the matter shall have an opportunity to be heard, personally or through counsel[.]” *See* WIS. STAT. § 973.20(14)(d). Here, the issue of restitution was first raised at sentencing, where the State provided documentation to Johnson and his trial counsel in support of a \$5,000 restitution request. Johnson’s trial counsel, however, asked for time to review the

restitution request with Johnson. Therefore, at the conclusion of the sentencing proceeding, the circuit court scheduled the matter for a restitution hearing.² At that hearing, counsel appeared, waived Johnson’s appearance, and advised that Johnson was “in agreement” with the request for \$5,000 in restitution. In light of the foregoing, this court is satisfied that a challenge to the restitution order would be frivolous within the meaning of *Anders*. See § 973.20(14)(d); see also *State v. Leighton*, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126 (rejecting a postconviction challenge to restitution where the defendant previously stipulated to the amount of restitution ordered).

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.

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 James Johnson. 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

² Pursuant to WIS. STAT. § 971.04(1)(g), a defendant must be present at sentencing but, as occurred here, the circuit court may impose restitution after the sentencing hearing has concluded. See *State v. Perry*, 181 Wis. 2d 43, 57-58, 510 N.W.2d 722 (Ct. App. 1993).