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DISTRICT I

January 18, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Kenosha Corr. Center
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Kenosha, WI 53143

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

2022AP591-CRNM State of Wisconsin v. Kevin Michael Aussprung
(L.C. # 2021CF802)

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).

Kevin Michael Aussprung appeals a judgment of conviction entered after he pled guilty to operating a motor vehicle while intoxicated as a fifth offense. His appellate counsel filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE

809.32 (2019-20).[1] Aussprung was advised of his right to file a response and 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 arguably meritorious issues exist for an appeal, and therefore we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, E.J.J. called 911 at approximately 11:43 a.m. on August 28, 2020. E.J.J. reported having seen a person who "looked impaired" driving a Chevy Cruz. E.J.J. said that the vehicle had moved erratically through traffic and that the driver might be intoxicated. E.J.J. provided the Cruz's license plate number, and described the nature of the erratic driving and where it occurred. Police determined that Aussprung was the owner of the vehicle and further determined that he was prohibited from operating a motor vehicle with a blood alcohol concentration of .02% or above. Three officers were dispatched to Aussprung's home in Milwaukee County at approximately 11:45 a.m. Upon arrival, the officers saw a vehicle matching the description provided by E.J.J. in the driveway of the residence. When one of the officers approached the vehicle, the person in the driver's seat, subsequently identified as Aussprung, spoke to the officer through the open door of the car. The officer smelled a strong odor of intoxicants and noted that Aussprung's speech was slurred. A second officer spoke to

[1] After filing the no-merit report, Aussprung's original appellate counsel withdrew from Aussprung's representation for reasons unrelated to this appeal. The State Public Defender appointed Attorney Sarah Barwise Joseph as successor appellate counsel. We then established a deadline of September 19, 2022, for Aussprung to file a response to the no-merit report, if he chose to do so, and we notified him and Attorney Joseph of that deadline. Neither he nor Attorney Joseph elected to file anything in this court thereafter. While the court was preparing the instant opinion for release, the State Public Defender advised us that on October 26, 2022, it appointed Attorney David Malkus as successor appellate counsel to replace Attorney Joseph. All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Aussprung's neighbor, who stated that she saw Aussprung "drive into his driveway and stumble out of his car at 11:30 a.m." Police arrested Aussprung.

The results of a preliminary test of Aussprung's breath revealed an alcohol concentration of 0.144 grams of ethanol per 210 liters of breath.[2] A review of the records maintained by the Wisconsin Department of Transportation reflected that Aussprung had previously been convicted of operating while intoxicated on four occasions and that his driving privileges were revoked. Additionally, the DOT records showed that Aussprung was subject to an order prohibiting him from operating a motor vehicle without an ignition interlock device, and police determined that the Chevy Cruz lacked that equipment. The State charged Aussprung with operating a motor vehicle while intoxicated as a fifth offense, operating a motor vehicle while his operating privileges were revoked, and failing to install an ignition interlock device.

Aussprung elected to resolve the charges with a plea agreement. Pursuant to its terms, he pled guilty to operating a motor vehicle while intoxicated as a fifth offense. The State agreed to seek a prison sentence without specifying a recommended length of that sentence and to move to dismiss the remaining charges.[3]

[2] A test of Aussprung's blood subsequently revealed a blood alcohol concentration of .174%.

[3] The parties told the circuit court at the start of the plea hearing that the State would move to read in the dismissed charges for sentencing purposes. However, at the conclusion of the plea colloquy, the circuit court asked if the State sought an "outright" dismissal of the charges that Aussprung did not admit, and the State agreed to that disposition. Aussprung did not object, and we do not see any basis on which he could allege that he was aggrieved by the outright dismissals. Accordingly, he cannot challenge them on appeal. *See* WIS. STAT. RULE 809.10(4) (providing that an appeal brings before this court rulings adverse to the appellant).

At sentencing, Aussprung faced a mandatory minimum fine of $600, and a mandatory minimum confinement term of one year in prison; he faced a presumptive minimum confinement term of one year and six months in prison; and he faced a maximum penalty of a $25,000 fine and ten years of imprisonment. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)5., 939.50(3)(g).[4] The circuit court imposed the mandatory minimum fine of $600. The circuit court also imposed five years and six months of imprisonment, bifurcated as two years of initial confinement and three years and six months of extended supervision. The circuit court found Aussprung ineligible for the challenge incarceration program, delayed his eligibility for the Wisconsin substance abuse program until he had completed two years of confinement, and awarded him the two days of sentence credit that he requested. He appeals.

We first consider whether Aussprung could pursue an arguably meritorious claim for plea withdrawal on the ground that he did not enter his guilty plea knowingly, intelligently, and

[4] Aussprung acknowledged in the circuit court proceedings that, upon conviction for operating a motor vehicle while intoxicated as a fifth offense, he faced a mandatory minimum fine of $600, and mandatory minimum confinement time of one year. No arguably meritorious basis exists for Aussprung to dispute that he faced such mandatory minimum penalties. The applicable statute provides, in pertinent part, that a convicted person "shall be fined not less than $600[.]" *See* WIS. STAT. § 346.65(2)(am)5. As to confinement:

> The court shall impose a bifurcated sentence under [WIS. STAT. §] 973.01, and the confinement portion of the bifurcated sentence imposed on the person shall be not less than one year and 6 months. The court may impose a term of confinement that is less than one year and 6 months if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record.

See § 346.65(2)(am)5. The statute thus permits the circuit court to impose less than one year and six months of confinement if the circuit court makes certain findings. Because the statute requires a bifurcated term of imprisonment, however, the statute does not permit the circuit court to impose less than one year of confinement. *See* § 973.01(2)(b) (providing that "[t]he portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year").

voluntarily. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). We conclude that the record would not support such a claim.

At the outset of the combined plea and sentencing hearing, the circuit court established that Aussprung was thirty-three years old and had a college degree. The circuit court further established that Aussprung had signed a plea questionnaire and waiver of rights form and addendum after reviewing them with his trial counsel and that he understood the content of those documents. *See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (providing that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The circuit court went on to conduct a colloquy with Aussprung that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* WIS. STAT. § 971.08; *see also* ***Bangert***, 131 Wis. 2d at 266-72; ***Hoppe***, 317 Wis. 2d 161, ¶18. The record—including the plea questionnaire and waiver of rights form and addendum that Aussprung signed; the attached jury instruction describing the elements of the crime to which he pled guilty; and the transcript of the plea proceeding—demonstrates that Aussprung entered his guilty plea knowingly, intelligently, and voluntarily. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We have also considered whether Aussprung could pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We conclude that he could not do so. The circuit court indicated that the primary sentencing goals were punishment and deterrence, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶40-43. The circuit court's discussion included consideration of appropriate factors, including the mandatory sentencing factors of "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 circuit court imposed the mandatory minimum fine required by law. A postconviction request for a lesser fine would thus be frivolous within the meaning of ***Anders***. *See* ***State v. Sittig***, 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977) (explaining that a statutory provision "for a mandatory minimum sentence leaves the courts with no alternative but to impose a sentence of not less than the minimum prescribed").

In selecting the prison component of Aussprung's penalty, the circuit court rejected Aussprung's request for a term of confinement that did not exceed the one-year mandatory minimum term and that was shorter than the eighteen-month presumptive minimum term. The circuit court properly resolved the question by considering whether a term of confinement shorter than the presumptive minimum would serve the community's best interests and not harm the public. *See* WIS. STAT. § 346.65(2)(am)5. The circuit court found that a sentence less than the presumptive minimum would undermine the message that driving under the influence is forbidden and that "there's a serious consequence" for such conduct. The circuit court ultimately concluded that the circumstances of the offense—specifically, the risk that Aussprung posed by driving a motor vehicle in a residential area in the late morning while he had a high blood alcohol concentration—warranted no less than two years of initial confinement followed by three years and six months of extended supervision. Although the confinement portion of the sentence exceeded both the mandatory minimum and the presumptive minimum terms, the sentence was well within the maximum ten-year term of imprisonment allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and was 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). A

challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We have additionally considered whether Aussprung could mount a challenge to his sentence on the grounds that, during the sentencing proceeding, the circuit court advised the parties that it had independently reviewed the four criminal cases in which Aussprung had previously been convicted of operating a motor vehicle while intoxicated, and the circuit court discussed aspects of all four of those cases.[5] We conclude that a challenge on this basis would lack arguable merit.

While a defendant has a due process right to be sentenced on the basis of reliable information, that right is not violated when the sentencing court conducts a file review of other cases to determine "the institutional memory of the court" regarding relevant sentencing considerations, so long as the defendant has the opportunity to rebut that information. *See* ***State v. Counihan***, 2020 WI 12, ¶¶39, 43, 48-49, 390 Wis. 2d 172, 938 N.W.2d 530. Aussprung's behavioral patterns and prior convictions were clearly relevant sentencing considerations. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 n.11. Additionally, Aussprung had the opportunity to rebut the information from his prior cases that the circuit court reviewed. At multiple points during the sentencing proceeding, Aussprung responded to inquiries from the circuit court by confirming on the record that the information under discussion was accurate. Additionally, the criminal complaint in the instant case identified each of his four prior

[5] The record reflects that the circuit court accessed documents filed in the earlier cases, presumably through the Judicial Dashboard. *See* https://www.wicourts.gov/courts/offices/ccap.htm (last visited Dec. 21, 2022).

convictions for operating while intoxicated by noting the arrest date, conviction date, and originating jurisdiction, allowing Aussprung to challenge any aspect of those cases that he believed was subject to dispute. Accordingly, we are satisfied that a due process challenge to Aussprung's sentence based on the circuit court's review of his prior case files would be frivolous within the meaning of ***Anders***.

Finally, we have considered whether Aussprung could pursue an arguably meritorious challenge to the circuit court's findings regarding his eligibility for the challenge incarceration program and the Wisconsin substance abuse program. Both are prison treatment programs, and an inmate who successfully completes either program will normally have his or her remaining initial confinement time converted to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. *But see* ***State v. Gramza***, 2020 WI App 81, ¶3, 395 Wis. 2d 215, 952 N.W.2d 836. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions 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).[6]

In this case, the circuit court found that Aussprung would not benefit from the challenge incarceration program, which includes personal development counselling and military drill, because he had a college degree and an employment history. The circuit court therefore found him ineligible to participate. As to the Wisconsin substance abuse program, the circuit court

[6] 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).

found that Aussprung might benefit from participation but that he must first serve the initial confinement time imposed "to impress upon [him] the absolute seriousness" of his conduct. The circuit court therefore determined that his eligibility would begin after he served two years of confinement, that is, if his extended supervision was revoked and he was required to return to prison. In light of the foregoing, we are satisfied that a challenge to the circuit court's exercise of discretion in regard to Aussprung's eligibility for the challenge incarceration program and the Wisconsin substance abuse program would be frivolous within the meaning of ***Anders***.

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 David Malkus is relieved of any further representation of Kevin Michael Aussprung 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