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 I

April 11, 2023

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Milwaukee County
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

Pamela Moorshead
Electronic Notice

James Edward Hutchins, Sr. 171319
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2021AP262-CRNM State of Wisconsin v. James Edward Hutchins, Sr.
(L.C. # 2017CF2438)

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 Edward Hutchins, Sr., appeals a judgment of conviction entered after he pled guilty to first-degree reckless homicide, mutilating a corpse, and causing mental harm to a child. Appellate counsel, Attorney Pamela Moorshead, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Hutchins filed a response, and Attorney Moorshead filed a supplemental no-merit report in reply. Upon

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

consideration of the no-merit reports, Hutchins's response, 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 criminal complaint reflects that on May 24, 2017, Hutchins brought his five-year-old son, J.H., to the home of Hutchins's sister. Hutchins then drove away in a car that belonged to Tyvitta Dischler, J.H.'s mother. After Hutchins left the home, his sister noticed bruises on J.H.'s forehead and a cut on J.H.'s head. She took J.H. to the hospital, where he told doctors: "my momma stood in front of the gun, and my daddy killed my momma." J.H. also told an investigator that Hutchins was "really mad" when he shot Dischler, and that after Dischler fell to the ground, Hutchins grabbed J.H. and threw him down, causing J.H.'s head to hit the floor.

The complaint further reflects that, based on J.H.'s statements, police entered Hutchins's home. There, they found Dischler's body, which had been set on fire. A forensic pathologist performed an autopsy and determined that Dischler had suffered a gunshot wound that travelled from the top of her head into her midbrain and a second gunshot wound that travelled from behind her right ear into her left frontal lobe. Further, Dischler had sustained severe burns over sixty percent of her body. The pathologist concluded that Dischler's death was a homicide.

The State filed an information charging Hutchins with first-degree intentional homicide and with physical abuse of a child by recklessly causing great bodily harm to that child, both by use of a dangerous weapon. The State additionally charged Hutchins with possession of a firearm by a felon.

Hutchins decided to resolve the case with a plea agreement. Pursuant to its terms, the State filed an amended four-count information charging Hutchins in count one with first-degree

reckless homicide, in count two with causing mental harm to a child, in count three with possessing a firearm while a felon, and in count four with mutilating a corpse. Hutchins pled guilty as charged to counts one, two, and four, and the State moved to dismiss count three outright. The State agreed to recommend thirty years of initial confinement as a global disposition for the three convictions and to make no recommendation regarding the length of extended supervision.

At sentencing, Hutchins faced a maximum penalty of sixty years of imprisonment for first-degree reckless homicide. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b) (2017-18). The circuit court imposed a fifty-year term of imprisonment for that offense and bifurcated the term as thirty years of initial confinement and twenty years of extended supervision. Hutchins faced a maximum penalty of a $25,000 fine and twelve and one-half years of imprisonment for each of his convictions for causing mental harm to a child and for mutilating a corpse. *See* WIS. STAT. §§ 948.04(1), 940.11(1), 939.50(3)(f) (2017-18). The circuit court imposed evenly bifurcated sentences of ten years and four years, respectively, for those two crimes. The circuit court ordered Hutchins to serve his three sentences concurrently, and it allowed Hutchins the 135 days of sentence credit that he requested. He appeals.

In the no-merit report, appellate counsel first considers whether Hutchins could pursue an arguably meritorious claim for plea withdrawal on the ground that his pleas were not entered knowingly, intelligently, and voluntarily. We agree with appellate counsel that he could not do so.

Near the outset of the plea hearing, the circuit court established that Hutchins had signed a plea questionnaire and waiver of rights form reflecting that he was forty-nine years old and had

a high school diploma as well as several years of post-secondary school education. The circuit court also established that Hutchins understood the form and its addendum and had reviewed them with his trial counsel. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶37-38, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Hutchins that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08(1). The record—including the plea questionnaire and waiver of rights form and its addendum, the attached jury instructions describing the elements of the crimes to which Hutchins pled guilty, and the plea hearing transcript—demonstrate that Hutchins entered his guilty pleas knowingly, intelligently, and voluntarily. *See* ***Pegeese***, 387 Wis. 2d 119, ¶21. Further pursuit of this issue would lack arguable merit.

We also conclude that Hutchins could not 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. The circuit court indicated that punishment, deterrence, and rehabilitation were the primary sentencing objectives, and the circuit court discussed the sentencing factors that it considered in fashioning dispositions to achieve its sentencing goals. *See* ***id.***, ¶¶41-43. The circuit court's considerations were proper and relevant and included 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 dispositions imposed were less than the aggregate maximum penalties that the law allows, *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 public 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 lack arguable merit.[2]

In the response to the no-merit report, Hutchins alleged that his trial counsel was ineffective in a variety of ways. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that specific acts or omissions of counsel "were outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Although Hutchins touched on several aspects of his case in his response to the no-merit report, we agree with appellate counsel's characterization of the response as primarily alleging that his trial counsel was ineffective for failing to obtain a psychological examination to support a defense of "temporary insanity." A defendant may avoid responsibility for criminal conduct if the defendant can show that, "at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct

[2] For the sake of completeness, we observe that Hutchins could not pursue an arguably meritorious challenge to the circuit court's findings that he is ineligible for the challenge incarceration program and the Wisconsin substance abuse program while confined. Hutchins is statutorily disqualified from participating in those prison programs while serving his concurrent sentences in this case. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1. (providing that a person is excluded from each program while serving certain sentences, including a sentence for a crime specified in WIS. STAT. ch. 940).

or conform his or her conduct to the requirements of law." *See* WIS. STAT. § 971.15(1). Hutchins suggests that a psychologist's assessment would have allowed him to make such a showing.

In reply to Hutchins's allegations, appellate counsel filed a supplemental no-merit report and a sworn affidavit. The affidavit describes the information available to trial counsel as well as the additional investigative steps that appellate counsel took following Hutchins's sentencing. Appellate counsel advises that, according to the discovery materials, Hutchins telephoned his mother on the day of the offenses and told her that Dischler was "starting sh*t" with him. After Hutchins shot Dischler, he telephoned his mother again and told her that he was "in trouble" and needed her to take care of his son. As the record confirms, he brought the child to the home of a family member following the shooting. We agree with appellate counsel that a reasonable attorney could conclude from Hutchins's deliberate actions and accompanying statements that he appreciated the wrongfulness of his conduct and that he could conform his conduct to the requirements of law.

Hutchins nonetheless asserts that the record reflects a basis for his proposed defense of "temporary insanity" and his related allegation of ineffective assistance of counsel for failing to obtain a psychological assessment to support that defense. Specifically, he points to the transcript of a pretrial conference in which he made an insolent remark to the circuit court.[3] We cannot conclude that Hutchins's display of disrespect to the circuit court, by itself or in concert

[3] The transcript reflects that, when the circuit court asked Hutchins if he "listen[ed]" Hutchins responded: "No, I don't, that's why I'm here." The circuit court viewed Hutchins as trying to be a "big shot" in the courtroom. At the next hearing, Hutchins apologized, and the circuit court assured him that it would not hold the interaction against him.

with his criminal conduct, constitutes a basis to pursue a claim of not guilty by reason of mental disease or defect in this case. Pursuant to WIS. STAT. § 971.15 (2), "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

Moreover, the information in appellate counsel's affidavit supports the conclusion that Hutchins could not demonstrate prejudice from trial counsel's failure to pursue a claim of not guilty by reason of mental disease or defect. Appellate counsel advises that she has received and reviewed "records from the Department of Corrections from 1986 to 2021. Those records indicate that when in custody, Mr. Hutchins has denied any mental illness, even after this offense. The records contain no reference to mental health problems or treatment at any time that Mr. Hutchins has been in custody." Hutchins has not provided any contrary records.[4] In light of the foregoing, we are satisfied that nothing presented to this court reflects an arguably meritorious basis for further proceedings based on Hutchins's mental health at the time of the crimes.

Hutchins also implies that his trial counsel was ineffective in the plea bargaining process because his trial counsel failed to "alert him" to the State's negotiating position and failed to discuss a plea agreement with him. The record shows, however, that Hutchins was in the

[4] Appellate counsel did not file any records with her supplemental no-merit report, but she advised us that she provided Hutchins with copies of his various records "to allow him to refute any characterization of th[os]e records" with which he disagrees. Hutchins did not provide any materials, either with his response to the no-merit report or in reply to appellate counsel's supplemental no-merit report. Hutchins, of course, had no obligation to provide anything to this court in connection with the instant no-merit proceeding. *See* ***State v. Allen***, 2010 WI 89, ¶58, 328 Wis. 2d 1, 786 N.W.2d 124. The record, however, does not demonstrate any basis to conclude that he suffered prejudice from trial counsel's failure to pursue a defense based on an alleged mental disease or defect, and nothing provided to us supports a different conclusion.

courtroom during a pretrial hearing when the State described its negotiating position in open court, so we cannot conclude that he was prejudiced by trial counsel's alleged failure to "alert him" to that position. The record also shows that Hutchins reached a plea agreement with the State and that he signed and filed a plea questionnaire describing the plea agreement before his plea hearing began. At the outset of the plea hearing, the State described the agreement on the record, and Hutchins personally advised the circuit court that the State's description was accurate. The record thus conclusively refutes Hutchins's claims that trial counsel failed to pursue a plea agreement and to discuss the agreement with Hutchins. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 30, 274 Wis. 2d 568, 682 N.W.2d 433.

Finally, Hutchins suggests that his trial counsel was ineffective for failing to provide mitigating information at sentencing, including information that at the time of his crimes, Hutchins was allegedly experiencing financial difficulties that prevented him from obtaining insulin for his diabetes; and information that Hutchins elected to resolve his case quickly to protect his son from participating in a trial. The record shows, however, that trial counsel's sentencing remarks highlighted Hutchins's prompt acceptance of responsibility, and trial counsel urged the circuit court to view that conduct as a basis for leniency, stressing that "he accepted responsibility.... He didn't even want to chance it with a hung jury or an acquittal. He just did not want to put his son through any more trauma.... I think that was a very mature decision." Trial counsel also discussed Hutchins's poor health, observing that, due to his diabetes, a lengthy term of initial confinement might prove to be a *de facto* life sentence.

The record thus reflects that, while trial counsel presented a sentencing argument that differed in some respects from the argument that Hutchins proposes now, trial counsel selected a reasonable sentencing strategy that focused on Hutchins's "mature" decision-making and that

offered a concrete reason to reject the State's request for a substantial term of initial confinement. Accordingly, no basis exists for an arguably meritorious challenge to trial counsel's actions at sentencing. *See* ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461 (explaining that "if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance").

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 Pamela Moorshead is relieved of any further representation of James Edward Hutchins, Sr., 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