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DISTRICT I

April 18, 2023

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

2021AP236-CRNM State of Wisconsin v. Timothy T. Humphrey, Jr. (L.C. # 2019CF3762)

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).

Timothy T. Humphrey, Jr., appeals from a judgment of conviction, entered upon his guilty plea to one count of burglary. He also appeals from the order denying his postconviction motion for sentence modification. Appellate counsel, Ann Auberry, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Humphrey was advised of his right to file a response, but he has not responded. Upon this

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

court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgment and order.

In the early morning of August 19, 2019, within an hour, two homes were broken into while their residents were home. The residents of both homes reported seeing two young black males, one with a white tank top and a shotgun and the other with a dark hooded sweatshirt or jacket. Electronics were taken from both homes, including an iPhone from the second home. The owner was able to track the phone with the "Find my iPhone" application. The GPS information was conveyed to law enforcement, which located a black SUV at the approximate location. Police attempted to stop the vehicle "[m]ultiple times," but "[e]ach time, the vehicle fled away from officers at very high rates of speed," disregarding traffic signs and signals.

During one of the attempted stops, the SUV reached speeds of 110 miles per hour. The stop ended when the SUV ran a red light and t-boned a Chevrolet Tahoe. The SUV flipped and landed upside down. Police swarmed the SUV with their guns drawn and ordered the occupants out of the vehicle. One of the occupants, later identified as Humphrey, got out and fled on foot, but was apprehended within a block. When he was taken into custody, Humphrey had eighteen corner cuts of cocaine in his pocket. The driver of the SUV, Justin Ellis, had to be extracted from the SUV with machinery before he could be arrested.

A criminal complaint charged Humphrey with two counts of home invasion burglary contrary to WIS. STAT. § 943.10(2)(e). Humphrey agreed to resolve his case with a guilty plea to one of the counts. In exchange, the State would read in and dismiss the other charge and recommend ten years of initial confinement. The circuit court accepted Humphrey's plea and

later sentenced him to six years of initial confinement and three years of extended supervision. The circuit court specified that Humphrey was not eligible for either the challenge incarceration program or the substance abuse program.

Humphrey filed a postconviction motion seeking sentence modification based on a new factor. At sentencing, Humphrey's trial attorney told the court that he did not believe there were "grounds for the substance abuse early release program." In his postconviction motion, Humphrey claimed he had a history of substance abuse and had, in fact, used both alcohol and cocaine prior to the burglaries. He argued that his "significant substance abuse history and need for treatment is a fact which would have been highly relevant to the Court in reaching its sentencing decision regarding [his] eligibility and need for the [Substance Abuse] Program."

The circuit court denied the motion without a hearing. It explained that Humphrey's history of drug and alcohol abuse was not a new factor because it was something known to Humphrey at the time of sentencing. Further, even if it were a new factor, sentence modification would not have been warranted because the court "did not find the defendant ineligible for the early release program based on any assumptions about his substance abuse treatment needs (or lack thereof); it found the defendant ineligible for these programs because he is [an] inappropriate candidate for early release based on his prior performance on probation[.]" Humphrey appeals.

The first potential issue counsel discusses is whether the circuit court "complied with its obligation to establish Humphrey's [guilty] plea … was knowing, intelligent and voluntary." Our review of the record—including the plea questionnaire and waiver of rights form and addendum, attached jury instructions, and plea hearing transcript—confirms that the circuit court

complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court also informed Humphrey of the effects of a read-in offense, as recommended by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. There is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Humphrey's plea was anything other than knowing, intelligent, and voluntary.

The second potential issue appellate counsel addresses is whether the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. We also note that Humphrey's nine-year sentence is well within the fifteen-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, this court is satisfied that the no-merit report properly analyzes this issue as without arguable merit.

The final potential issue appellate counsel addresses is whether the circuit court properly applied new-factor law or erroneously exercised its discretion in denying the postconviction motion. A new factor is a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *and see* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. If the circuit

court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. *See* ***Harbor***, 333 Wis. 2d 53, ¶37.

Information known to the defendant at the time of sentencing is not a new factor. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673. Thus, the circuit court did not err when it determined that Humphrey's substance abuse history was not a new factor, and there is no arguable merit to claiming that the circuit court improperly denied the postconviction motion.[2]

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ann Auberry is relieved of further representation of Humphrey in this matter. *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] There is also no arguable merit to a claim that the circuit court improperly exercised its discretion when it determined that even if there were a "new" substance abuse factor to consider, it did not warrant sentence modification. As the circuit court explained, the sentence imposed was not based on Humphrey's substance use or related needs but rather on Humphrey's prior performance on probation.