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DISTRICT II

October 18, 2023

To:

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Circuit Court Judge
Electronic Notice

Hon. Brad Schimel
Circuit Court Judge
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Clerk of Circuit Court
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Kenneth L. Kinchen, #672726
New Lisbon Correctional Inst.
P.O. Box 2000
New Lisbon, WI 53950-2000

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

2020AP2151-CRNM State of Wisconsin v. Kenneth L. Kinchen (L.C. #2017CF15)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

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).

Kenneth L. Kinchen appeals a judgment convicting him of six counts of identity theft for financial gain. He also appeals from the order denying his motion for sentence modification. Appellate counsel, Jorge R. Fragoso,¹ filed a no-merit report pursuant to WIS. STAT.

¹ Kinchen is now represented by Attorney David Malkus.

RULE 809.32 (2019-20),² and *Anders v. California*, 386 U.S. 738 (1967). Kinchen received a copy of the report, was advised of his right to file a response, and has not responded. We have independently reviewed the Record and the no-merit report as mandated by *Anders*. We conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm. *See* WIS. STAT. RULE 809.21.

On January 4, 2017, the State charged Kinchen with six counts of identity theft for financial gain. According to the criminal complaint, Kinchen opened credit cards using the identification information of six individuals and used those cards for various purchases. At a hearing on June 4, 2018, trial counsel told the circuit court that the State was investigating additional charges and had not made a pretrial offer. On July 20, 2018, the State filed two read-in lists, which contained a combined total of twenty-four additional instances of identity theft committed by Kinchen.

Kinchen ultimately pled guilty to the six charged offenses. Following a colloquy, the circuit court accepted Kinchen's guilty pleas. The circuit court sentenced Kinchen to three years of initial confinement and three years of extended supervision on each count with the first three counts being consecutive and the remaining counts concurrent. The court also imposed restitution in the amount of \$17,949.79. Kinchen, by counsel, filed a postconviction motion requesting eligibility for the Substance Abuse Program. He also filed a pro se motion for sentence modification, arguing a new factor on the grounds that he tested positive for COVID-19 and was a high-risk inmate. Following a hearing, the postconviction court granted counsel's

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

motion and denied Kinchen's pro se motion. The court amended the judgment of conviction to reflect Kinchen's eligibility for the Substance Abuse Program. This appeal follows.

Appellate counsel's no-merit report addresses three issues: (1) whether Kinchen's guilty pleas were knowing, intelligent, and voluntary; (2) whether the circuit court properly exercised its sentencing discretion; and (3) whether the postconviction court properly denied Kinchen's motion for sentence modification.

As to the first issue, we conclude that the plea colloquy, together with the plea questionnaire/waiver of rights form, and the attached jury instruction, demonstrate Kinchen's understanding of the information to which he was entitled and that his pleas were knowing, voluntary, and intelligent. *See State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Thus, there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Kinchen's pleas were anything other than knowing, intelligent, and voluntary.

With regard to the circuit court's sentencing decision, we note that sentencing is a matter for the circuit court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court should consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It should also determine which objective or objectives are of greatest importance. *See Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court must consider several primary factors, including the gravity of the offense, the character of

the offender, and the protection of the public, as well as additional factors it may wish to consider. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court’s discretion. *See id.* The Record reveals that the court considered and applied the relevant sentencing factors, focusing specifically on the gravity of the offenses and the impact Kinchen’s conduct had on the victims. The resulting sentence was within the potential maximum 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). Therefore, there would be no arguable merit to a challenge to the court’s sentencing discretion.

Any claim that the circuit court erred by denying Kinchen’s postconviction motion for sentence modification would also lack arguable merit. A motion for sentence modification based on a new factor must demonstrate the existence of a new factor by clear and convincing evidence. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is one 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.” *Id.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). We have reviewed the Record and agree that there would be no arguable merit to a claim that the postconviction court denied Kinchen’s motion.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved from further representing Kenneth L. Kinchen in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals