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DISTRICT I

November 14, 2023

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Circuit Court Judge
Electronic Notice

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

2023AP889-CRNM State of Wisconsin v. Anthony Jerome Dukes
(L.C. # 2020CF3664)

Before White, 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).

Anthony Jerome Dukes appeals a judgment of conviction entered upon his guilty pleas to robbery and substantial battery, both as a party to a crime. He also appeals two postconviction orders. Appellate counsel, Attorney Leonard D. Kachinsky, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Dukes did not file a response. Upon consideration of the no-merit report and an independent review of the

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

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 June 21, 2020, police went to a Milwaukee residence on South Seventh Street in response to a robbery complaint. At the residence, police found L.L.N., who had a bloody towel wrapped around his head. He reported that while making a purchase at a gas station that day he observed two men in hooded sweatshirts near a gray SUV. Soon after L.L.N. drove home from the gas station, he realized that the gray SUV was parked near his car and then he saw two subjects in sweatshirts running towards him. One of the subjects hit L.L.N. twice on the head with a brick. The subjects next searched L.L.N.'s pockets and took his wallet, which contained L.L.N.'s veteran's affairs card and driver's license. Surveillance video from the gas station and from a residence near L.L.N.'s home allowed police to identify the owner of the SUV. Police arrested the owner's boyfriend, Johnny Allen Hopgood.

While Hopgood was incarcerated, he made several telephone calls to Dukes. During those calls, Dukes said that he "wasn't trying to kill" anyone, and Dukes also acknowledged his understanding that Hopgood would not implicate Dukes in the June 21, 2020 incident. Police then obtained cell phone records, which showed that handsets assigned the telephone numbers used by Hopgood and Dukes in June 2020 were in the immediate vicinity of L.L.N.'s residence at the time of the attack on L.L.N. The State charged Dukes, as a party to a crime, with robbery and with aggravated battery of a victim sixty-two years of age or older.

Dukes decided to resolve the charges with a plea agreement. Pursuant to its terms, he pled guilty to the original robbery charge and to an amended charge of substantial battery, both as a party to a crime. The State agreed in exchange to seek a "substantial" prison sentence

without specifying a recommended term of imprisonment. The State also agreed to move for dismissal of another case against Dukes in which he faced a charge of bail jumping. The circuit court accepted Dukes's guilty pleas and granted the State's motion to dismiss the bail jumping charge.

The case proceeded to sentencing. For the robbery conviction, Dukes faced a maximum penalty of fifteen years of imprisonment and a $50,000 fine. *See* WIS. STAT. §§ 943.32(1)(a), 939.50(3)(e), 939.05 (2019-20). The circuit court imposed five years and six months of imprisonment bifurcated as two years and six months of initial confinement and three years of extended supervision. For the substantial battery conviction, Dukes faced a maximum penalty of three years and six months of imprisonment and a $10,000 fine. *See* WIS. STAT. §§ 940.19(2), 939.50(3)(i), 939.05 (2019-20). The circuit court imposed a consecutive, evenly bifurcated two-year term of imprisonment. The circuit court found Dukes eligible for the challenge incarceration program after serving eighteen months of initial confinement, granted him the 123 days of sentence credit that he requested for his time in custody prior to sentencing, and ordered him to pay $160 in restitution.

Dukes filed a postconviction motion for sentence modification on the ground that a person serving a sentence for battery, a crime specified in WIS. STAT. § 940.19, is statutorily excluded from participating in the challenge incarceration program. *See* WIS. STAT. § 302.045(2)(c). The circuit court granted relief by restructuring his consecutive sentences, ordering that Dukes serve the battery sentence first and the robbery sentence second. Dukes moved for reconsideration, asserting that the remedy was insufficient to allow him to participate in the program. The circuit court denied reconsideration.

We first consider whether Dukes could pursue an arguably meritorious challenge to his guilty pleas. We conclude that he could not do so. At the outset of the plea hearing, the circuit court established that Dukes was twenty-two years old and had a tenth-grade education. The circuit court then conducted a thorough plea colloquy that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record demonstrates that Dukes entered his guilty pleas knowingly, intelligently, and voluntarily. *See* ***Bangert***, 131 Wis. 2d at 257. Further pursuit of this issue would lack arguable merit.[2]

A defendant who enters a valid guilty plea normally forfeits all nonjurisdictional defects and defenses, including constitutional claims. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. In light of that forfeiture, we agree with appellate counsel that no arguably meritorious basis exists to pursue issues arising prior to Dukes's guilty pleas here.

We next consider whether Dukes could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been

[2] Trial counsel filed a plea questionnaire and waiver of rights form and an addendum and noted on the forms that Dukes did not sign them due to precautions necessitated by the COVID-19 pandemic. Dukes confirmed during the plea hearing that he and his trial counsel had reviewed the forms together and that he had answered the questions on the forms truthfully. The absence of Dukes's signature on the forms does not provide an arguably meritorious basis for further postconviction or appellate proceedings. A plea questionnaire and waiver of rights form is not an essential component of the plea procedure but rather 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, the record shows that the plea colloquy satisfied the circuit court's obligations when accepting a guilty plea.

demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence[.]" ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offenses, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that are relevant in imposing a sentence and the weight to assign to each relevant factor. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

Here, the circuit court identified community protection, deterrence, and Dukes's rehabilitation as the primary sentencing goals, and the circuit court discussed appropriate factors that it viewed as relevant to achieving those goals. The circuit court found that the crimes were serious, emphasizing that Dukes struck an elderly man on the head with a brick and injured him so severely that he required hospital treatment and stitches. The circuit court discussed Dukes's character, particularly noting certain mitigating considerations, including his lack of a prior criminal record, his employment history, and his involvement in raising his children. The circuit court also gave him credit for accepting responsibility and relieving his victim of the obligation to testify at trial. In assessing the need to protect the public, however, the circuit court found that

the nature of the crimes and the amount of premeditation they required indicated that Dukes posed a danger to the community.

The circuit court appropriately considered a probationary disposition. *See* ***Gallion***, 270 Wis. 2d 535, ¶25. The circuit court concluded, however, that probation would unduly depreciate the gravity of Dukes's crimes. The court, therefore, concluded that Dukes must begin his rehabilitation in prison.

The circuit court identified the factors that it considered in fashioning an appropriate sentence. The factors were proper and relevant. *See* ***id.***, ¶¶41-43 & n.11. Moreover, the aggregate term of seven years and six months of imprisonment that the circuit court imposed was significantly less than the aggregate of eighteen and one-half years of imprisonment and $60,000 in fines that Dukes faced upon conviction of the offenses at issue here. Dukes, therefore, cannot pursue an arguably meritorious claim that his sentences in this case are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. We conclude that a challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We next conclude that Dukes could not pursue an arguably meritorious challenge to the order that he pay restitution in the amount of $160. Dukes stipulated to restitution in that amount. *See* WIS. STAT. § 973.20(13)(c). A challenge to the restitution order would, therefore, be frivolous within the meaning of ***Anders***. *Cf.* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (holding that a defendant may not challenge on appeal a sentence that he or she affirmatively approved).

We next conclude that Dukes could not mount an arguably meritorious challenge to the circuit court's decisions denying him eligibility for the Wisconsin substance abuse program and delaying his eligibility for the challenge incarceration program until he completed eighteen months of initial confinement. Upon successful completion of either program, an inmate's remaining initial confinement time is normally converted to time on extended supervision. *See* WIS. STAT. §§ 302.045(3m)(b), 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 defendant is statutorily disqualified from participation in the programs when serving sentences for certain crimes. *See* §§ 302.045(2)(c), 302.05(3)(a)1. As to other crimes for which a prison sentence is imposed, a circuit court exercises its sentencing discretion when determining both a defendant's eligibility for the programs and the date that the defendant's eligibility may begin. *See* WIS. STAT. § 973.01(3g)-(3m);[3] ***State v. White***, 2004 WI App 237, ¶¶2, 6-10, 277 Wis. 2d 580, 690 N.W.2d 880. We will sustain the circuit court's determinations 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.

Here, the presentence investigation report reflected that Dukes denied any substance abuse problems and any need for substance abuse treatment. The circuit court's decision finding him ineligible for the Wisconsin substance abuse program, therefore, reflects a reasonable conclusion that Dukes would not receive a meaningful benefit from that program. As to his delayed eligibility for the challenge incarceration program, the circuit court's sentencing remarks

[3] 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).

reflect the circuit court's intent to ensure that Dukes would spend sufficient time in prison to meet the sentencing goals. Further pursuit of this issue would lack arguable merit.

Last, we consider whether Dukes could pursue an arguably meritorious challenge to the circuit court's orders resolving his postconviction motions. Dukes asked the circuit court to modify his sentences by ordering them to run concurrently, arguing that concurrent sentences would allow him to participate in the challenge incarceration program. When the circuit court instead ordered Dukes to serve the battery sentence first and the robbery sentence second, he moved to reconsider, arguing that he must receive concurrent sentences before the Department of Corrections would consider placing him in the program.[4] Pointing to a memorandum filed by the DOC, the circuit court rejected that argument. The circuit court instead found that restructuring Dukes's consecutive sentences so that Dukes served the battery sentence first would permit his admission to the challenge incarceration program if he were otherwise deemed suitable to participate.[5] However, the circuit court found that, as reflected in the DOC's memorandum, Dukes had received an additional consecutive sentence in an unrelated matter and was statutorily excluded from participation in the challenge incarceration program until he completed that additional sentence.

[4] If the circuit court finds a defendant eligible to participate the challenge incarceration program, the DOC makes the final placement decision. *See* ***State v. Schladweiler***, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47-48 & n.11, 333 Wis. 2d 53, 797 N.W.2d 828.

[5] The DOC's memorandum advised that "[r]eversing the order of the counts would allow Mr. Dukes to complete his confinement time on [the battery count] which is a statutorily excluded offense and then be eligible to enroll in the challenge incarceration program while serving [the robbery sentence]." *See also* DAI Policy 300.00.12 I(C)1., https://doc.wi.gov/DepartmentPoliciesDAI/3000012.pdf (last visited October 23, 2023) (providing that an inmate serving consecutive sentences may be considered for admission to the challenge incarceration program after completing service of any disqualifying sentence).

The circuit court went on to conclude that Dukes's ineligibility for the challenge incarceration program due to his consecutive sentence in an unrelated matter was not a new factor constituting grounds for sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The circuit court explained that it understood at sentencing "that any number of factors might preclude [Dukes] from actually enrolling in that program, including if he were to be sentenced to consecutive time in any subsequent criminal matters." A fact known to the circuit court at the time of sentencing is not a new factor. *See* ***Harbor***, 333 Wis. 2d 53, ¶40. Further pursuit of this issue would lack arguable merit.

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 and postconviction orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of any further representation of Anthony Jerome Dukes on 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