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 II

November 29, 2023

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Jonathan D. Gunderson
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Christopher D. Garden #609170
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2022AP863-CRNM State of Wisconsin v. Christopher D. Garden (L.C. #2020CF634)

Before Neubauer, Grogan 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).

Christopher D. Garden appeals from a judgment convicting him of one count of possession of a firearm by a felon as a party to a crime and as a repeater. Garden also appeals from an order denying his postconviction motion for sentence modification. Appellate counsel, Jonathan D. Gunderson, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Garden was advised of his right to file a

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

response, but he has not responded. After reviewing the record and counsel's report, we conclude that there are no issues of arguable merit for appeal. Therefore, we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Around 6:30 p.m. on June 12, 2020, Kenosha police responded to the parking lot of an apartment building for a firearm-related complaint. When they arrived, they observed a group of five people around a black sedan. As one officer walked toward the group, he saw one of the individuals discard a firearm magazine cartridge. The officer drew his weapon and ordered the individuals to the ground; all complied. Police recovered four firearms from in and around the vehicle and a marijuana blunt in the center console of the car.

One of the individuals told police that he was a videographer who had been hired by the group to film a music video. Police obtained and viewed the video; it had sixteen segments, most of which involved at least one gun. Four of the five guns in the video were ones recovered in the parking lot. One of the video segments opened with Garden holding a gun; after fifty-two seconds, he hands the gun to another individual. The Department of Corrections issued a warrant for Garden "regarding his involvement in the events of June 12th."[2]

On June 13, 2020, another Kenosha police officer spotted Garden as a passenger in a vehicle. The officer knew Garden had an open warrant, so he made contact with the vehicle and arrested Garden. During the arrest, the officer smelled marijuana and asked Garden if he had any on his person. Garden stated that he had a bag in his jacket pocket. The State charged Garden

[2] The criminal complaint does not elaborate on why the Department issued a warrant, but it appears from other information in the record that Garden was on extended supervision for a prior felony conviction at the time he appeared in the video.

with four counts of possession of a firearm by a felon as a party to a crime and one count of disorderly conduct based on the video, and one count of possession of tetrahydrocannabinols, all as a repeat offender.

Garden and the State eventually reached an agreement under which Garden would plead guilty to the first firearm charge. The State would dismiss the remaining charges and recommend probation at sentencing. The circuit court accepted the plea, but ultimately imposed eight years and four months of imprisonment with no eligibility for either the challenge incarceration or substance abuse programs.

After sentencing, Garden filed a postconviction motion, alleging a new factor. Specifically, he claimed that his "treatment needs to address his substance abuse … went overlooked at sentencing" when the circuit court denied him program eligibility. The circuit court denied the motion, explaining that it "was fully aware of [Garden's] drug use" at the time of sentencing. Garden appeals.

As an initial matter, we note that although not discussed in the no-merit report, our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court generally satisfied its obligations for taking a guilty plea, 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 no-merit report recognizes, however, that the circuit court did not directly advise Garden personally and on the record that the court is not bound by any plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. Thus, the first two issues appellate counsel discusses in the no-merit report are whether Garden can withdraw his guilty

plea "due to ineffective assistance of counsel" and whether Garden can withdraw his guilty plea because the circuit court failed to advise him personally that it was not bound by the terms of the plea bargain.

The two prongs of an ineffective-assistance claim, deficient performance and prejudice, are well established, *see* ***State v. Williams***, 2000 WI App 123, ¶¶22-23, 237 Wis. 2d 591, 614 N.W.2d 11, so we need not discuss them in great detail here. The no-merit report first considers whether Garden could argue that trial counsel's conduct "fell below the reasonable standard when he failed to advise Mr. Garden that the Court was not bound by the terms of the plea bargain" and whether such a deficiency caused prejudice because Garden "would not have accepted the plea bargains and would have insisted on going to trial" had he been advised that the court was not bound by the plea bargain.

The record on appeal does not support a claim that trial counsel performed deficiently. The no-merit report does not indicate that Garden complained to appellate counsel about trial counsel's failure to provide this information; rather, appellate counsel presumes that trial counsel must have reviewed the information with Garden because both of them signed the plea questionnaire form, which includes an admonition that the circuit court is not bound by the plea agreement. Further, during the plea colloquy, Garden hesitated because he felt he did not have full information from trial counsel pertaining to discovery and other evidence. The circuit court gave Garden additional time to talk to counsel, but the sufficiency of counsel's review of the plea questionnaire with Garden was not one of Garden's concerns.

While the record does not support a claim of deficient performance by trial counsel, the circuit court "cannot satisfy its duty by inferring from the plea questionnaire … that the

defendant understands that the court is not bound by the plea agreement." ***State v. Hampton***, 2004 WI 107, ¶69, 274 Wis. 2d 379, 683 N.W.2d 14. The questionnaire may be used to aid the circuit court's explanation, but "the court must ask the question that ascertains that the defendant understands what he has been told." ***Id.*** That is, the circuit court "must make certain through dialogue that the defendant understands that the court is not bound by other people's promises." ***Id.***

Here, the record reflects that the circuit court did engage Garden, albeit obliquely, in such a dialogue. The circuit court said to Garden, "[Y]ou are an habitual offender, and if that is established, that sentence could actually be as long as 14 years. Do you understand that?" Garden answered, "Yes." The circuit court then asked, "Has anyone promised you that would not happen in this case?" Garden answered, "No." This conversation thus reflects Garden's understanding that the plea agreement did not guarantee any specific sentence and that he could receive up to the maximum of fourteen years' imprisonment.

Based on the foregoing, there is no arguably meritorious basis on which Garden could seek plea withdrawal.

The no-merit report also does not discuss whether the circuit court properly exercised its sentencing discretion in the first instance. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. However, the test on appeal is only whether discretion was exercised, not whether this court would have imposed the same sentence, *see* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695, and our review of the record satisfies us that the court appropriately considered relevant sentencing objectives and factors. The eight years and four months of imprisonment imposed are well within the fourteen-year range authorized by law, *see*

State v. Scaccio, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and the sentence 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, there is no arguable merit to challenging the circuit court's exercise of sentencing discretion.

As noted, Garden filed a postconviction motion seeking sentence modification based on a new factor. A new factor is a fact, or a set of facts, "'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.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citing ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts is a "new factor" is a question of law. ***Harbor***, 333 Wis. 2d 53, ¶36. If a new factor exists, the circuit court then exercises its discretion to determine whether that new factor justifies sentence modification. *See* ***id.***, ¶37.

In his postconviction motion, Garden alleged that his "substance abuse treatment needs qualify as a new factor" that was overlooked at sentencing when "the parties made no reference to [his] treatment needs for his problematic substance use" despite multiple mentions of that drug use in the presentence investigation report. Garden further contends that his treatments needs were a highly relevant factor because the circuit court "emphasized his need for personal development and accountability" and expressed concern that Garden "had not 'shown any effort to change,'" but he was now "expressly contend[ing] he wants to complete treatment—he wants change." The circuit court denied the motion, and the no-merit report addresses whether "the appeal of Mr. Garden's sentence modification [is] an arguable issue."

A defendant's willingness to accept and benefit from treatment is not a new factor. *See* ***State v. Prince***, 147 Wis. 2d 134, 136-37, 432 N.W.2d 676 (Ct. App. 1988); ***State v. Krueger***, 119 Wis. 2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984). Moreover, the circuit court, in denying the postconviction motion, explained that it had been "fully aware of [Garden's] drug use at the time of sentenc[ing]" but it "did not mention the extensive drug discussion" from the presentence investigation report because the court did not consider that drug use to be a mitigating sentencing factor. The circuit court's explanatory memorandum reflects a proper exercise of discretion; thus, there is no arguable merit to challenging the denial of the postconviction motion.

Our independent review of the record reveals no other potential issues of arguable merit.[3]

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 Jonathan D. Gunderson is relieved of further representation of Christopher D. Garden in this matter. *See* WIS. STAT. RULE 809.32(3).

[3] In the no-merit report, appellate counsel also addresses whether "any additional new factor arguments exist to justify sentence modification." Counsel reports that based on conversations with Garden, he "gathered [Garden] did not have any concerns about facts (potential new factors) the court did not consider but should have considered in its sentence other than his concern that the circuit court did not make him eligible for any early release treatment programs," and that counsel himself "did not identify any additional new factors that were not considered by the circuit court at sentencing."

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

Samuel A. Christensen
Clerk of Court of Appeals