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DISTRICT I

November 19, 2024

To:

Hon. Michelle A. Havas
Circuit Court Judge
Electronic Notice

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

Douglas C. McIntosh
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Arrix Al Smith 702042
John C. Burke Correctional Center
P.O. Box 900
Waupun, WI 53963-0900

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

2023AP1066-CRNM State of Wisconsin v. Arrix Al Smith (L.C. #2019CF3618)

Before Donald, P.J., Geenen and Colón, 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).

Arrix Al Smith appeals from a judgment, entered on his guilty plea, convicting him on one count of homicide by intoxicated use of a motor vehicle, contrary to WIS. STAT. § 940.09(1)(am) (2019-20).[1] He also appeals from that part of an order denying his motion for sentence modification. Appellate counsel, Douglas C. McIntosh, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Smith was advised of his right to file a response, but he has not responded. Upon this court's independent

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

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.

On August 14, 2019, Smith, who did not have a valid driver's license, was driving an Acura MDX and exiting a parking lot with a right turn. He needed to make a left turn at the next intersection, so Smith crossed through three lanes of traffic as he completed the right turn. As he was turning, a motorcycle he had not seen struck the side of his vehicle. The motorcyclist was seriously injured and taken to a hospital. Smith was charged with knowingly operating a motor vehicle without a valid license causing great bodily harm. When the motorcyclist died from his injuries four days later, the State amended the criminal complaint to charge Smith with knowingly operating a motor vehicle without a valid license causing death.

When he was arrested after the accident, Smith voluntarily provided a blood sample, although there was no indication at the time that his driving was impaired. When the sample was processed by the State Crime Laboratory, it was positive for cocaine metabolites. Thus, in August 2020, the State filed an amended information to add a charge of homicide by intoxicated use of a vehicle (detectable amount of controlled substance)[2] to the existing charge.

Smith ultimately agreed to resolve this case with a plea. In exchange for his guilty plea to the homicide charge, the State would move to dismiss and read in the operating without a license offense and would not request Smith be remanded to custody before sentencing. The

[2] The applicable definition of "restricted controlled substance" includes "[c]ocaine or any of its metabolites." WIS. STAT. § 939.22(33)(c) (2019-20).

State also agreed to limit its sentence recommendation to prison time without specifying a certain length. The circuit court accepted Smith's plea and sentenced him to four years of initial confinement and four years of extended supervision. The circuit court also deemed Smith eligible for the substance abuse program (SAP) after serving two years of initial confinement, and Smith stipulated to $4,745 in restitution.

After sentencing, Smith learned that he is statutorily ineligible for the SAP. He filed a postconviction motion to modify his sentence, claiming his ineligibility was a new factor that warranted modification.[3] The circuit court denied the motion, explaining that it had not set the length of Smith's sentence based on an assumption he would actually be admitted to the program; thus, his eligibility, or lack thereof, was not highly relevant and did not warrant sentence modification. Smith appeals.

The first potential issue discussed in the no-merit report is whether there would be any merit to "appealing the validity of Mr. Smith's guilty plea." To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). To that end, a number of requirements have been established for circuit courts accepting guilty pleas as a way to help ensure such pleas are properly entered by the defendant. *See, e.g.*, WIS. STAT. § 971.08; ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (listing circuit court duties). Our review of the record—including the plea questionnaire and waiver of rights form and addendum, and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to § 971.08, ***Bangert***, and

[3] The motion also asked for additional sentence credit, which the circuit court granted.

Brown. There is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Smith's plea was anything other than knowing, intelligent, and voluntary.

The second issue discussed in the no-merit report is whether there is any merit "to appealing Mr. Smith's sentence." Sentencing is committed to the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. ***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.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The eight-year sentence imposed is well within the twenty-five-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). There is no arguable merit to a challenge to the court's sentencing discretion.

As noted, the circuit court made Smith eligible for the SAP after he completed two years of initial confinement. However, Smith is excluded by statute from participating in that program

because he was convicted of an offense in WIS. STAT. ch. 940. *See* WIS. STAT. § 302.05(3)(a)1. Thus, Smith 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 (quoting ***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.

Smith argued his program ineligibility was a new factor because "the court intended to provide Mr. Smith with the opportunity to serve substantially less than four years of initial confinement" and "his history of substance abuse and the focus on his rehabilitative needs were central themes at sentencing." The circuit court rejected those arguments, explaining that Smith's sentence "was not conditioned upon [his] ability to access treatment specifically by participation in SAP." In other words, the sentence was not "based on the assumption that the defendant would successfully enter and complete the program; rather, the court attempted to give the defendant the opportunity to participate in SAP because it thought he might benefit from that program."

The circuit court further explained that it "was fully aware that [Smith's] participation in SAP was far from guaranteed," that SAP "is not the DOC's only rehabilitative offering," and "importantly, rehabilitation was neither the primary nor sole motivation of the sentence." In

short, the circuit court determined that Smith's statutory ineligibility for SAP was not a new factor, but, even if it were, it nevertheless did not justify sentence modification. We agree with the circuit court's conclusion that there is no new factor. Even if there were, the record reflects a proper exercise of discretion by the circuit court in concluding that sentence modification was not warranted. ***Harbor***, 333 Wis. 2d 53, ¶37. There is no arguable merit to challenging the denial of the motion for sentence modification.

Although not raised in the no-merit report, there is one final issue that this court believes warrants discussion. In March 2023, Smith filed a *pro se* motion seeking the return or refund of $2,500 cash bail that had been paid on his behalf, arguing that the funds were improperly applied towards his restitution obligation. The circuit court did not address this motion, presumably because Smith was represented by counsel at the time, and the statutes do not authorize hybrid representation. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996).

Smith posted $2,500 bail twice. The first payment was forfeited due to Smith's non-appearance at a hearing. After sentencing, the other $2,500 was applied toward Smith's restitution obligations. In his *pro se* motion, Smith asserted that, under ***State v. Cetnarowski***, 166 Wis. 2d 700, 480 N.W.2d 790 (Ct. App. 1992), "bail money was not authorized to be used as payment towards restitution," and he asked that the funds be returned to his sister who had posted them. He also asserted that the funds could not be applied towards restitution because the circuit court had not ordered them to be used for that purpose.

WISCONSIN STAT. § 969.03 describes rules under which defendants charged with felonies may be released prior to trial. When ***Cetnarowski*** was decided, § 969.03(4) (1991-92) provided that "[i]f a judgment for a fine or costs or both is entered in a prosecution in which a [bail]

deposit had been made … the balance of the deposit, after deduction of the bond costs, shall be applied to the payment of the judgment." ***Cetnarowski*** reviewed that statute and did indeed hold that "[n]o statute or rule of case law … makes bail applicable to restitution." ***Id.***, 166 Wis. 2d at 713..

Subsequent to ***Cetnarowski***, however, the legislature revised WIS. STAT. § 969.03(4). *See* 2005 Wis. Act 447, § 9. Effective June 6, 2006, § 969.03(4) says, in relevant part: "If a judgment of conviction is entered in a prosecution in which a [bail] deposit had been made … the balance of the deposit, after deduction of the bond costs, *shall be applied first to the payment of any restitution ordered* under [WIS. STAT. §] 973.20[.]" *See* § 969.03(4) (2005-06) (emphasis added). Under the revised statute, any refundable bail amounts posted on a convicted defendant's behalf not only can but must be applied towards restitution. Moreover, that application is automatic; there is no requirement that the circuit court specifically order the bail be used to satisfy a restitution obligation. Thus, there is no arguable merit to a claim that the circuit court failed to return Smith's bail money.

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 Douglas C. McIntosh is relieved of further representation of Smith in this matter. *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