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February 8, 2013

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

2012AP695-CRNM State of Wisconsin v. Darius Enell Woodley
(L.C. #2009CF6049)

Before Curley, P.J., Kessler and Brennan, JJ.

Darius Enell Woodley appeals from a judgment convicting him of one count of child neglect (resulting in death) as a party to a crime. *See* WIS. STAT. §§ 948.21(1)(d), 939.05 (2009-10).[1] Appellate counsel, Urszula Tempska, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Despite receiving an extension to do so, Woodley did not respond. After independently reviewing the record and the no-merit

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

report as mandated by ***Anders***, this court concludes that further proceedings would lack arguable merit. We therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

A criminal complaint was filed that charged Woodley with one count of first-degree reckless homicide. The charge stemmed from a series of events culminating in the death of six-month-old Dekia M. on December 26, 2009.

The following background is set forth in the complaint. On December 24, 2009, fifteen-year-old Diamond M. left her daughter, Dekia, in the care of Diamond's aunt, Sharon Coleman.[2] Diamond did not return for Dekia until December 26, 2009, when she was informed that something had happened to her child.

Willie McElroy, Coleman's boyfriend, told police that he lived with Coleman and their granddaughter, Dekia. McElroy stated that Woodley and another individual came over to his residence on December 25, 2009, and that the three left with the intent to go "boosting," which he described as committing retail thefts and selling the items to buy drugs and clothes. During the course of the day, the three used heroin, marijuana, and cocaine. They also drank beer. At approximately 9:30 p.m., McElroy and Woodley were dropped off at McElroy's residence. Around midnight, Coleman left Dekia with McElroy and Woodley. According to McElroy, Coleman left with an individual named "James" and indicated that she would be right back.

McElroy told police that hours passed and Coleman did not return. Dekia started to cry, and when McElroy could not get in touch with Coleman, he went out to look for her, leaving

[2] Coleman told police that she considered Diamond her daughter.

Dekia with Woodley. Not finding Coleman, McElroy returned to the residence and observed that Dekia was sleeping and that Woodley was sitting up and watching television.

Around 2:30 a.m., McElroy again left the residence in an attempt to find Coleman. After walking the streets for what he believed was a short period of time, he and another individual returned to the residence where McElroy observed Woodley sleeping on a bed. McElroy began frantically searching for Dekia and ultimately found her lying under the mattress where Woodley had been sleeping. She was not breathing. According to McElroy, he gave Dekia to Woodley and told Woodley to try to revive her. Woodley tried to do so, but failed. An autopsy of Dekia revealed that she died as a result of a closed head injury.

Woodley's case proceeded to trial. On the second day, Woodley pled no-contest to the amended charge of second-degree reckless homicide. The circuit court accepted his plea.

Prior to his sentencing, Woodley filed a motion to withdraw his no-contest plea, asserting that it was made as a result of threats from other inmates. Woodley's counsel was allowed to withdraw, due to the fact that he was a potential witness, and new counsel was appointed. The circuit court found that Woodley's plea was not voluntarily entered and granted his motion. Although the case was returned to the trial calendar, plea negotiations continued.

The State subsequently filed an amended information, this time charging Woodley with one count of child neglect (resulting in death) as a party to a crime. Woodley pled no-contest, and the circuit court accepted his plea.

During Woodley's sentencing hearing, defense counsel explained that Woodley had stayed in the Coleman-McElroy household for a period of time during the summer prior to

Dekia's death. Defense counsel relayed that Woodley was familiar with Dekia when she was first born and had interactions with her then, as well as with the rest of the household. Defense counsel further advised that after Woodley had moved out, there were reports that Dekia was being handled roughly and that there was drug use in the home. The circuit court ultimately sentenced Woodley to fifteen years of imprisonment comprised of ten years of initial confinement and five years of extended supervision.

The no-merit report addresses whether there is any basis for withdrawing Woodley's plea and whether the circuit court properly exercised its sentencing discretion. We address each issue in turn and also discuss whether there would be any merit to an appeal of the order denying Woodley's motion to suppress.

I. Whether there is any basis for withdrawing Woodley's plea.

We agree with counsel that there is no arguable basis for challenging Woodley's no-contest plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Woodley completed a plea questionnaire and waiver of rights form and an addendum, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the circuit court conducted a thorough plea colloquy addressing Woodley's understanding of the charges against him, the penalties he faced, and the constitutional rights he was waiving by entering pleas, *see*

WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72. In response to the circuit court's inquiry, Woodley said he understood what was written on the plea questionnaire.[3]

The circuit court noted that defense counsel had attached the relevant jury instructions to the plea questionnaire and waiver of rights form and had "extensively personalized exactly what the instructions would be in [Woodley's] case." In discussing the elements, the circuit court made sure that Woodley understood that if he proceeded to trial, the State would have had to prove that he and McElroy were persons responsible for the welfare of Dekia, *see* WIS JI—CRIMINAL 2150A:

> THE COURT: And [defense counsel] goes into detail what it means to say that you are responsible for the welfare of the child. So you wouldn't have to be the parent or a guardian. It could be even as a babysitter or an unpaid volunteer.[4] In such a situation under the law, you could have been possibly found to be a person responsible for the welfare of the child. That's something the State would have had to have proven if you had gone to trial. Did you go over that with your lawyer?
>
> THE DEFENDANT: Yes.

The circuit court went on to establish that there was a sufficient factual basis for Woodley's plea, *see* ***State v. Lackershire***, 2007 WI 74, ¶33, 301 Wis. 2d 418, 734 N.W.2d 23:

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[3] The plea questionnaire and waiver of rights form indicates that Woodley graduated from high school. During sentencing, however, it was determined that Woodley had only completed ninth grade and part of tenth grade during his placement at Ethan Allen. Despite this discrepancy, the colloquy makes clear that Woodley had the capacity to understand the plea proceedings.

[4] On the jury instruction where this element is discussed, defense counsel handwrote a citation to ***State v. Ward***, 228 Wis. 2d 301, 596 N.W.2d 301 (Ct. App. 1999), *superseded by statute on other grounds as stated in* ***State v. Jones***, 2004 WI App 212, ¶9, 277 Wis. 2d 234, 689 N.W.2d 917. In ***Ward***, the court held that the "'person responsible for the welfare of the child'" language applied to an unpaid, volunteer babysitter whose husband sexually assaulted children of a neighbor. ***Id.***, 228 Wis. 2d at 306-07 (citation omitted).

THE COURT: And are you stipulating to there being a factual basis for his no-contest plea to the charge as reflected in the amended Information?

[DEFENSE COUNSEL]: Yes.

THE COURT: All right. State have any questions of the defendant?

[PROSECUTOR]: Judge, I guess not any questions. What I would do is put on the record that my theory as now charged in this amended Information, and either counsel or Mr. Woodley can correct me if I am wrong, is that on December 26 of 2009, the defendant along with Willie McElroy were [sic] responsible for the welfare of Dekia M[.], who was a child born to Diamond M[.], and who was also under the care of Sharon Coleman; and at the time of this incident on December 26, 2009, Diamond M[.] was not in the home. Sharon Coleman was[,] but left the home, and she at that time was in care of Dekia M[.] She turned over the care of that child to both the defendant Mr. Woodley and to Mr. McElroy and then left the residence leaving the child with those two men.

Subsequently, while Ms. Coleman was gone and while the child was in the care of both Mr. Woodley and Mr. McElroy, the child did die as a result of head trauma to the child, a closed head injury, in which that child suffered subdural, subarachnoid and epidural hemorrhages to the head. I believe it's Mr. Woodley's contention as part of his plea and his acceptance of responsibility as part of this plea that he was responsible for the welfare of Dekia M[.] during this time and that through his failure to take action as a party to a crime along with Mr. McElroy, he did then intentionally contribute to the neglect of this child which resulted in the child's death. That's my understanding of his plea to this charge, and I do accept his acceptance of that responsibility as a party to a crime to this amended charge.

[DEFENSE COUNSEL]: I think that that's a fair statement of facts upon which the Court should find a factual basis maybe instead of the time frames and everything that are laid out in the Criminal Complaint because we don't agree necessarily or at all with some of the claims of some of the witnesses. Mr. Woodley—And you can certainly correct me if I am misstating, okay? My understanding and in discussing this plea negotiation with him, that in addition to the facts that [the State] … has just indicated is that Mr. Woodley's use of drugs with Mr. McElroy, both of them, compromised their ability to take care of a baby, made them less able to take care of a baby, and they became out of their minds, and it got to the point where the baby was not being cared for; and while in his care and the care of Mr. McElroy during that period of time before some other third adult surfaced, the baby's demise

> happened, and it was due to their neglecting her because they were high. So it's a very cloudy case in terms of specifically what moment in time this baby got hurt or who hurt her, but together they neglected her because they were high; and had they not been high, had they not been in care of her, maybe she would have still been around.
>
> Is that fair, Mr. Woodley?
>
> [THE DEFENDANT]: Correct.

This court notes that Woodley could argue that the circuit court failed to personally advise him that it was not bound by the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14 ("reaffirm[ing] the rule that a circuit court must advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and, concomitantly, ascertain whether the defendant understands this information"). However, "'[w]hen a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in manifest injustice.'" ***State v. Johnson***, 2012 WI App 21, ¶8, 339 Wis. 2d 421, 811 N.W.2d 441 (one set of internal quotations and citation omitted). Here, given that the circuit court accepted the plea agreement, we conclude that Woodley cannot make the requisite showing. *Cf.* ***id.***, ¶12 (Defendant was not affected by the defect in his plea colloquy where he received the benefit of the agreement. As such, "the circuit court's failure to inform him that it was not bound by the plea agreement was an 'insubstantial defect[].'") (citation omitted; brackets in ***Johnson***).

In addition, counsel points out that the circuit court failed to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). However, to be entitled to plea withdrawal on this basis, Woodley would have to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Woodley can make such a showing.

We conclude that there would be no arguable merit to a challenge to the plea's validity and the record discloses no other basis to seek plea withdrawal.[5]

[5] As detailed, we perceive no defect in the no-contest plea on the record before us. Thus, Woodley's plea was valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Notwithstanding the waiver rule, we note that counsel discusses whether Woodley was properly charged as party to a crime given that McElroy was not charged. Counsel identifies the relevant case law, which makes clear that under the party-to-a-crime statute, the State is not required to charge all persons concerned with the commission of the crime. *See* ***State v. Tronca***, 84 Wis. 2d 68, 84, 267 N.W.2d 216 (1978) ("'This section [i.e., WIS. STAT. § 939.05] does not require that all persons concerned in the crime be charged with the commission of it, but it provides that they may be.'") (citation omitted); *see also* ***State v. Shears***, 68 Wis. 2d 217, 240, 229 N.W.2d 103 (1975) ("'All that the prosecution need prove is that the offense has been committed. It is not even necessary that the identity of the principal be established, much less that he be convicted.'") (citation omitted). We agree with counsel's analysis and conclusion.

II. Whether the circuit court properly exercised its sentencing discretion.

There would be no arguable basis to assert that the circuit court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). At sentencing, the circuit 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***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* ***Gallion***, 270 Wis. 2d 535, ¶41.

In fashioning its sentence, the circuit court took into account the remorse Woodley felt and his "rough start." It also detailed the bad choices Woodley had made during the hours preceding Dekia's death and throughout his life. The circuit court concluded that punishment was necessary and that the community needed to know that heroin use resulting in the type of behavior at issue would not be tolerated.

The no-merit report explains in detail how the circuit court applied the standard sentencing factors. We agree with this analysis and also with appellate counsel's conclusion that a challenge based on the harshness of the sentence would not be meritorious. There would be no arguable merit to contesting the length of the sentence.

III. Whether Woodley's statements should have been suppressed.

Prior to the start of his trial, Woodley filed a motion to suppress in-custody statements he made to police. At issue was whether Woodley was under the influence of drugs or alcohol when he made the statements. The circuit court, after listening to testimony from two detectives and the recorded statements, concluded that the State had carried its burden and demonstrated that Woodley understood his rights and freely and intelligently waived them at the time of his statements.[6] The circuit court explained that it did not think the inconsistencies in Woodley's statements were the result of being incoherent or not understanding the question or due to the effects of drugs. There would be no arguable merit to asserting that the circuit court erred by not suppressing Woodley's statements. *See* ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347 ("When we review a [circuit] court's ruling on a motion to suppress, we uphold the [circuit] court's factual findings unless those findings are clearly erroneous.").

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[6] The Honorable Richard J. Sankovitz denied Woodley's suppression motion.

IT IS FURTHER ORDERED that Attorney Urszula Tempska is relieved of further representation of Woodley in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals