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March 26, 2013

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

2012AP1308-CRNM State of Wisconsin v. John Mack (L.C. #2011CF2089)

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

The State filed a complaint in May 2011 alleging that John Mack committed first-degree intentional homicide on January 18, 1999. Incident to a plea bargain, Mack pled guilty to one count of first-degree reckless homicide. *See* WIS. STAT. § 940.02(1) (1999-2000).[1] The circuit

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court imposed a twenty-year sentence consecutive to the life sentence that Mack was already serving when he entered his guilty plea.[2] Mack appeals.

Appellate counsel, David J. Lang, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32(1)(a).[3] Mack did not file a response. We have considered counsel's no-merit report, and we have independently reviewed the record. We conclude that there are no arguably meritorious issues, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

Appellate counsel advises in the no-merit report that Mack wishes to seek plea withdrawal. According to Mack, his guilty plea was not knowingly, intelligently, and voluntarily entered because, he alleges, his trial counsel told him that the circuit court would impose a more lenient sentence than the twenty-year consecutive term of imprisonment recommended by the State. We agree with appellate counsel's conclusion that Mack could not pursue a meritorious challenge to the validity of his guilty plea.

At the outset of the plea hearing, the parties described the terms of the plea bargain. The State would move to amend the original charge of first-degree intentional homicide to a charge of first-degree reckless homicide, and Mack would plead guilty to the amended charge. The parties explained that the State would recommend a consecutive twenty-year sentence. The

[2] Because Mack committed the offense underlying this appeal in January 1999, the circuit court did not impose a bifurcated sentence. *See* 1997 Wis. Act 283, § 419 (bifurcated sentences required for crimes committed in Wisconsin on or after December 31, 1999).

[3] Appellate counsel identifies Mack in the no-merit report as "John Derrick Mack." We refer to Mack by the name used on the charging documents in this case.

parties further explained that Mack was free to argue for a different disposition. Mack confirmed that he understood the terms of the plea bargain.

The circuit court explained to Mack that, upon conviction, he faced a maximum sentence of forty years in prison under the law in effect at the time of the offense. *See* WIS. STAT. § 940.02(1) (1997-98); WIS. STAT. § 939.50(3)(b) (1997-98); 1997 Wis. Act 283, §§ 322, 456. Mack said that he understood. The circuit court also explained that it was not bound by the terms of the plea bargain or by any recommendations. Further, the circuit court told Mack that it was free to impose the maximum sentence for the offense. Mack said that he understood.

The record thus provides no basis for Mack to pursue an arguably meritorious claim that he did not understand the circuit court's freedom to impose any sentence up to the maximum sentence available. The information that Mack received at the guilty plea hearing overrides any erroneous information that his trial counsel may have provided. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996).

We further conclude that the record provides no other arguably meritorious basis for Mack to pursue plea withdrawal. The record reflects a thorough guilty plea hearing demonstrating that Mack knowingly, intelligently, and voluntarily entered his plea.

We have considered that a defendant must understand the constitutional rights he or she waives upon entering a guilty plea. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Here, a signed guilty plea questionnaire and waiver of rights form is in the record. Mack confirmed that he reviewed the form with his trial counsel and that he understood it. The circuit court explained to Mack that by pleading guilty he would give up the

constitutional rights listed on the form, and the circuit court reviewed those rights. Mack told the circuit court that he understood.

Mack also told the circuit court that he had reviewed the Addendum to Plea Questionnaire and Waiver of Rights form, and that he understood the Addendum. The Addendum bears the signature of both Mack and his trial counsel and reflects Mack's acknowledgment that by pleading guilty he would give up his rights to raise defenses and to seek suppression of his statements and other evidence.

The circuit court must ensure that the defendant understands the nature of the charge that he or she faces. ***Id.*** Mack told the circuit court that he had reviewed the criminal complaint and the amended information with his trial counsel and that he understood those documents. The circuit court described the elements of the offense. Mack told the circuit court that he understood the elements.

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Here, Mack assured the circuit court that he was pleading guilty because he was guilty and that he had not been threatened or promised anything to induce his guilty plea. He told the circuit court that the facts in the criminal complaint were true and correct. The complaint reflects that, on January 18, 1999, Mack tried to rob Demetrius Harris in his home at gunpoint and that Mack shot and killed Harris during the incident. The circuit court found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363.

The plea colloquy shows that the circuit court complied with the requirements of WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also*

State v. Hoppe, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). A postconviction challenge to the validity of Mack's guilty plea would lack arguable merit.

We further conclude that Mack could not pursue an arguably meritorious challenge to the sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been 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 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 offense, and the community. *See* ***id***. The circuit court has discretion to determine the factors that are relevant to the imposition of sentence and to determine the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The sentencing court must also "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.

The record reflects an appropriate exercise of sentencing discretion here. The circuit court explained that taking a life is "of the utmost seriousness." The circuit court characterized

Mack as "heartless," finding that he "just do[es]n't have regard for human life." The circuit court considered the need to protect the public, observing that Mack committed a second murder in 2004 before he was identified as a suspect in Harris's death and concluding that Mack was "extremely dangerous to the community."

The circuit court acknowledged that Mack admitted his guilt in this case and that, but for his decision to confess, the identity of Harris's murderer would likely have remained unsolved. The circuit court found, however, that this positive factor was not sufficient to warrant the concurrent sentence that Mack requested. The circuit court explained that the goal of the sentence was punishment and that Mack must receive a separate and distinct punishment for committing the homicide in this case.

The record shows that the circuit court identified the factors that it considered in fashioning the sentence. The factors were proper and relevant. Moreover, the sentence imposed was not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Given the nature of Mack's crime, we cannot say that the circuit court's sentencing decision shocks the public sentiment or violates the judgment of reasonable people concerning what is right and proper. Moreover, the twenty-year sentence imposed is well below the maximum forty-year sentence that Mack faced upon conviction, and the sentence is thus neither disproportionate nor shocking. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Further proceedings to challenge Mack's sentence would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney David J. Lang is relieved of any further representation of John Mack on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals