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April 2, 2013

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

2012AP1799-CRNM State of Wisconsin v. Ronald Javan Groce (L.C. #2011CF5674)

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

Ronald Javan Groce pled guilty to one count of possessing with intent to deliver more than one gram of cocaine but less than five grams of cocaine contrary to WIS. STAT. § 961.41(1m)(cm)1r.[1] The circuit court imposed a fifty-four-month term of imprisonment, bifurcated as eighteen months of initial confinement and thirty-six months of extended supervision. Groce appeals.

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

Appellate counsel, Michael J. Backes, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12). At our request, Attorney Backes also filed a supplemental no-merit report discussing the DNA surcharge imposed at sentencing. Groce did not file any response. This court has considered the no-merit reports, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Groce was in a car that was parked too far from the curb with the motor running and with no one in the driver's seat. He told the police that he intended to sell the cocaine observed on his seat. The State charged Groce with one count of possessing with intent to deliver more than one gram of cocaine but less than five grams of cocaine as a second or subsequent offense.

We first consider whether Groce could bring a meritorious challenge to the validity of his guilty plea. We conclude that he could not do so.

At the outset of the plea hearing, the State described the terms of the plea bargain. Groce would plead guilty to one count of possessing with intent to deliver more than one gram of cocaine but less than five grams of cocaine, and the State would move to dismiss the allegation that Groce committed the crime as a second or subsequent offense. Additionally, the State would recommend a twelve-month sentence consecutive to any sentence previously imposed. Groce confirmed that he understood the terms of the plea bargain.

The circuit court explained to Groce that it was not bound by the terms of the plea bargain or the recommendations of the parties. The circuit court described the maximum penalties that it could impose upon conviction of the amended charge, and the circuit court told

Groce that it was free to impose the penalties that it deemed appropriate. Groce said he understood.

A signed guilty plea questionnaire and waiver of rights form is in the record. Groce said that he had reviewed the form with his attorney and that he understood it. The form reflects that Groce had not been promised anything outside of the terms of the plea agreement to induce his guilty plea and that he had not been threatened. Groce confirmed that he was entering his plea freely and voluntarily and that he did so because he was guilty of the offense.

The circuit court told Groce that, by pleading guilty, he would waive the constitutional rights listed on the guilty plea questionnaire and waiver of rights form, and the circuit court reviewed each right. Groce said he understood. He also confirmed his understanding that, by pleading guilty, he would give up his rights to raise defenses and to seek suppression of his statements and other evidence.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, Groce filed a copy of WIS JI—CRIMINAL 6035, the jury instruction for possession of a controlled substance with intent to deliver that substance. Groce's initials appear on the instruction next to the elements that the State must prove before a jury may return a guilty verdict. Further, the circuit court reviewed the elements with Groce on the record. Groce assured the circuit court that he understood the elements of the offense.

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). In this case, Groce

told the circuit court that the facts in the complaint were true. The circuit court accepted Groce's guilty plea.

The record reflects that Groce entered his guilty plea knowingly, intelligently, and voluntarily. *See* 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 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider whether a challenge to the sentence would have arguable merit. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***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 both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

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.

The record reflects an appropriate exercise of sentencing discretion here. The circuit court discussed at length why drug trafficking is a serious offense and how it adversely affects individuals and families. The circuit court considered Groce's character, pointing out that his criminal history included prior convictions for delivery of cocaine and for possession with intent to deliver cocaine, and the circuit court emphasized that he had a criminal record dating back to 1991. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court discussed the need to protect the public, explaining the ways in which drug offenses bring violence and instability to the community.

The circuit court identified the sentencing goal, explaining that "there's a need to protect the community from [Groce] because [Groce] continue[s] to engage in this drug dealing." The circuit court appropriately considered whether probation was sufficient to meet the sentencing objective. *See* ***Gallion***, 270 Wis. 2d 535, ¶25 (probation should be considered as the first sentencing alternative). The circuit court found, however, that probation was not appropriate because Groce was on probation for a drug trafficking offense when he committed the crime in this case. The circuit court concluded that Groce must address his rehabilitative needs in a secure setting.

The circuit court explained the factors that it considered when imposing 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). The penalty selected here was well below the maximum penalties of twelve years and six months of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 961.41(1m)(cm)1r., 939.50(3)(f). A sentence well within the maximum sentence permitted by statute is presumptively not unduly harsh. *See* ***Grindemann***, 255 Wis. 2d 632, ¶32. We cannot say that the sentence imposed in this case is disproportionate or shocking. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

The circuit court's sentencing decision included an order that Groce pay a DNA surcharge unless he had previously paid a surcharge in connection with another case. *See* WIS. STAT. § 973.046(1g) (permitting the circuit court to impose a DNA surcharge upon conviction of a crime such as the one to which Groce pled guilty). When imposing a DNA surcharge pursuant to § 973.046(1g), the circuit court must exercise its discretion. *See* ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. We directed appellate counsel to file a supplemental no-merit report that either identified the way in which the circuit court properly exercised its discretion when imposing the DNA surcharge here or showed that Groce previously paid a DNA surcharge. In the supplemental no-merit report, appellate counsel states that prison records confirm Groce's payment of a DNA surcharge in connection with a prior conviction. Because the circuit court's sentencing decision imposes no obligation on Groce to pay a DNA

surcharge under these circumstances, we agree with appellate counsel's conclusion that postconviction litigation on this issue would lack arguable merit.

Last, we note that Groce filed a *pro se* motion for eighty-six days of credit against his sentence. Appellate counsel does not discuss Groce's *pro se* effort or its outcome. Our independent review of the record discloses that Groce sought sentence credit for the period from November 22, 2011, when he was arrested in the instant case, until February 16, 2012, when he was sentenced for a separate offense in another county after revocation of probation. The circuit court granted Groce's *pro se* motion in part and entered an amended judgment of conviction awarding him sixty-four days of credit for the period from his arrest on November 22, 2011, until his sentencing in the instant case on January 25, 2012. Thus, Groce has received credit for each day he spent in custody in connection with this case. *See* WIS. STAT. § 973.155(1) (requiring that a convicted offender receive credit for all days spent in custody in connection with the course of conduct for which the offender is sentenced). Nothing in the record supports a conclusion that Groce could pursue an arguably meritorious claim for additional sentence credit in this matter. *See* WIS. STAT. § 973.15(1) (sentence normally begins at noon on the day sentence is pronounced).

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 amended judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved of any further representation of Ronald Javan Groce on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals