

which Zabala has not responded.² DePeters also filed a supplemental no-merit report in response to an order from this court. We have independently reviewed the Record, the no-merit report, and the supplemental no-merit report as mandated by *Anders*, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Police officers executed a search warrant at Zabala's home and found ten firearms and marijuana in a hallway closet. The officers also searched the kitchen and discovered plastic bags of cocaine and crack cocaine in a box of ice cream cones. Zabala was arrested.

At the police station, two police detectives interrogated Zabala for between ten and seventeen minutes; the interrogation was recorded. Zabala told them that he lived at the home where the drugs and firearms were found. He said that the marijuana and cocaine were for his personal use. Zabala also told the detectives that he found the firearms in his yard a few days prior to their discovery by police. According to one of the detectives, after the interrogation was completed and the detective was walking Zabala down a hallway, Zabala told him that he planned to sell some of the guns to purchase more cocaine.

Zabala was charged with the twelve aforementioned crimes. Zabala moved to suppress his statements to the detectives on grounds that he is an insulin-dependent diabetic and "he believes his lack of sugar control made any waiver of his rights obtained by the police not knowingly, intelligently, and voluntarily made." He also filed a motion to compel disclosure of

² On September 7, 2012, Zabala moved for a sixty-day extension of time to file a response to the no-merit report, which we granted. Zabala did not subsequently file any response or any additional motions to extend the time for him to respond.

the identity of the confidential informant whose representations formed the basis for the issuance of the search warrant. The trial court denied both motions.

The case proceeded to trial. Zabala did not testify in his own defense. Zabala's lawyer argued that although Zabala told police that he had used cocaine the day of the search, he never admitted that he knew there were drugs in his home. Zabala's lawyer also called into question Zabala's alleged statement to the detective that he planned to sell the guns to buy cocaine, noting that the statement was allegedly made in the hallway, after the recording device was turned off. Finally, Zabala's lawyer argued that there were other people with access to the home and that Zabala's fingerprints were not found on any of the firearms. Zabala's lawyer told the jury that "there's a reasonable doubt as to the knowing possession" of both the firearms and the drugs. The jury found Zabala guilty of all twelve counts.

At sentencing, the State recommended a global sentence of ten years of initial confinement and ten years of extended supervision. Zabala's trial lawyer argued that while Zabala had shown "very bad judgment" by not calling the police when he found the guns in his yard, he did not deserve such a long sentence. Zabala's trial lawyer recommended a sentence of one year of initial confinement and one year of extended supervision on one count, an imposed and stayed sentence on the other counts, and a lengthy period of probation. The trial court followed the State's recommendation and imposed a global sentence of ten years of initial confinement and ten years of extended supervision.

After sentencing, Zabala's lawyer filed a motion seeking 254 days of sentence credit. The trial court granted Zabala 253 days of credit, explaining that Zabala was "not entitled to

presentence credit for the sentencing date because the sentence is deemed to commence on the sentence date.”³ *See* WIS. STAT. § 973.15(1).

The no-merit report addresses whether there would be any arguable merit to an appeal on three issues: (1) the trial court’s denial of the motions to suppress Zabala’s statement and to disclose the identity of the confidential informant; (2) the sufficiency of the evidence introduced at trial; and (3) the trial court’s exercise of sentencing discretion. For reasons explained below, we agree with the no-merit report’s discussion of those issues and its conclusion that there would be no arguable merit to pursuing those issues on appeal.

First, the no-merit report summarized the testimony at the suppression hearing, which featured the testimony of a single witness: one of the detectives who interviewed Zabala. Based on that testimony, the trial court found that Zabala’s statements were voluntary. The trial court noted that Zabala was not handcuffed, the interrogation was short, Zabala did not appear to be in distress, Zabala did not ask for an insulin shot or medical treatment, and “there was no threat ... that if he didn’t talk he wouldn’t get his insulin.” We agree with the no-merit report that there would be no basis to challenge the trial court’s factual findings or its conclusion that Zabala’s statement was voluntary.

³ The trial court’s order partially granting the motion for sentence credit was not in the appellate Record. We directed Zabala’s appellate lawyer to arrange for the order to be made part of the Record and to file a supplemental no-merit report discussing whether there are any potential issues of merit associated with the postsentencing motion. The Record now contains a written order partially granting the motion for sentence credit and Zabala’s appellate lawyer has indicated that the trial court’s determination as to the correct amount of sentence credit was accurate. We agree.

Second, the no-merit report analyzed the trial court's conclusion that Zabala's motion to disclose the identity of the confidential informant "fails to meet even the basic requirements of [WIS. STAT. §] 971.30, [and] is perfunctory at best." The no-merit report explained:

Pursuant to [WIS. STAT.] § 905.10(3)(b) the defendant must make an initial showing that testimony from the informant is necessary for "a fair determination of the issue of guilt or innocence in a criminal case." In the present case, trial counsel was unable to make such a showing because testimony from the informant would have done nothing to rebut the fact that Mr. Zabala was found in possession of firearms and admitt[ed] to possessing the firearms. There was no evidence that the informant was with Mr. Zabala when he moved the guns or was part of Mr. Zabala's plan to sell the guns. Consequently, the trial court did not abuse its discretion in denying Mr. Zabala's motion to disclose the identity of the informant.

We agree with this analysis. The motion did not demonstrate that the testimony from the informant was necessary and we have not identified any reason why it was necessary. There would be no merit to a challenge to the trial court's ruling on the motion.

Next, the no-merit report discussed the sufficiency of the evidence. We agree with the report's summation of the evidence and that it was sufficient for the jury to find Zabala guilty. It is undisputed that the guns and drugs were found in Zabala's home. The detective testified that Zabala admitted that he found the guns, that he put them in his home, and that he uses drugs.⁴ Although Zabala did not admit that the drugs found in the home were his, the jury could have made that finding based on the evidence presented. There would be no merit to challenging the sufficiency of the evidence.

⁴ In addition to hearing the detective's testimony about what Zabala said in his interrogation, the jury also listened to a portion of Zabala's recorded interrogation and read a partial transcript of that interrogation. We have reviewed those as well.

The final issue the no-merit report discusses is the trial court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203, or that the sentence was excessive, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

At sentencing, the trial 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, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, *Gallion*, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the trial 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, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the trial court's discretion. *Gallion*, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The trial court discussed the nature of the crimes, including the fact that when Zabala found the guns in his yard, he had alternatives to taking them into his home, such as having someone call the police. It also observed that some of the firearms had been taken in a burglary that occurred at the home of Zabala's cousin's girlfriend's parents, which "raise[d] a serious question of where those guns came from." The trial court also said that the existence of so many firearms and ammunition were aggravating factors.

Considering Zabala's character, the trial court noted that Zabala was "no stranger" to the danger of firearms, referencing the fact that Zabala had previously served eight years in prison for second-degree reckless homicide while armed. It noted that Zabala had some mental health and diabetes treatment needs, and it recognized that those unmet needs may have impacted Zabala's behavior. The trial court also considered the need to protect society, noting that probation would not provide "sufficient supervision." It said that Zabala needed to be punished for retaining possession of the firearms despite being a convicted felon and having the firearms in the house "with the presence of drugs." The trial court's comments demonstrate a proper exercise of discretion.

With respect to the severity of the sentence, we note that Zabala could have been sentenced to more than fifty years of initial confinement and fifty years of extended supervision. The sentence of about twenty percent of the maximum possible in this case does not shock the public's sentiment. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Given the number of firearms, the presence of both firearms and drugs, and Zabala's criminal history, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See Ocanas*, 70 Wis. 2d at 185, 233 N.W.2d at 461. For these reasons, we conclude that there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentence.

Our independent review of the Record reveals no other potential issues of arguable merit. For example, there do not appear to be any issues of merit associated with the jury selection; the parties and the trial court all agreed to excuse two particular jurors and no other challenges were

raised. We have also not identified any potential issues associated with the jury instructions or presentation of testimony at trial. Finally, the trial court did not require Zabala to pay the DNA surcharge, so there is no basis to raise a challenge pursuant to *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Marcella DePeters, Esq., is relieved of further representation of Zabala in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals