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April 17, 2013

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

2012AP1931-CRNM State of Wisconsin v. Antonio Henry Gray (L.C. #2011CF4918)

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

Antonio Henry Gray pled guilty to one count of armed robbery with threat of force. The circuit court imposed a twelve-year term of imprisonment, bifurcated as seven years of initial confinement and five years of extended supervision. Gray appeals.

Appellate counsel, Attorney Mark S. Rosen, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] At our direction, Attorney Rosen filed a supplemental no-merit report, and we granted Gray's request to file a late response. Upon our review of the no-merit reports, Gray's response, and 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, Gray approached two men on a Milwaukee street and displayed an object that appeared to be a handgun. In count one of the complaint, the State alleged that Gray took approximately $70 from one of the men. In count two of the complaint, the State alleged that Gray took car keys and jewelry from the second man. When police arrested Gray at the scene, he had a toy gun and property belonging to the two men. The State charged Gray with two counts of armed robbery with threat of force.

Gray disputed the charges against him and demanded a jury trial. On the second day of trial, however, Gray told the circuit court that he wanted to accept a plea bargain and plead guilty to one of the two armed robberies. The circuit court conducted a plea colloquy and accepted Gray's guilty plea.

In the response to the no-merit reports, Gray contends that he has an arguably meritorious basis for plea withdrawal because, he says, the plea hearing did not satisfy the requirements imposed by WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). A defendant may move to withdraw a guilty plea based on a deficient guilty plea colloquy by:

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

(1) showing that the colloquy did not fulfill the requirements of WIS. STAT. § 971.08 or of other procedures mandated during a plea hearing; and (2) alleging that the defendant did not know or understand the information that should have been provided at the hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. Upon our independent review of the record, we conclude that Gray could not satisfy the two-prong showing.

At the outset of the plea proceeding, the State described the terms of the plea bargain. Gray would plead guilty to count two of the complaint and information, and the State would move to dismiss and read in the other count. The State agreed to recommend that the circuit court impose at least five years but no more than seven years of initial confinement followed by at least two years but no more than three years of extended supervision. Gray confirmed that the State correctly recited the terms of the plea bargain.

The record includes a signed guilty plea questionnaire and waiver of rights form with two signed attachments: (1) an addendum that, *inter alia*, describes the defenses surrendered upon pleading guilty; and (2) a document describing the elements of the offense. Gray confirmed that he reviewed the guilty plea questionnaire with his trial counsel and that he understood it. "A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties." ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. The use may include "'incorporat[ing] into the plea colloquy the information contained in the plea questionnaire, relying substantially on that questionnaire to establish the defendant's understanding.'" ***Id.*** (one set of brackets added; footnote and one set of brackets omitted).

The circuit court explained to Gray that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire, and the circuit court reviewed each right listed on the form. Gray said that he understood. The circuit court also explained that by pleading guilty Gray would give up the defenses and challenges that are listed on the signed addendum to the guilty plea questionnaire, and the circuit court reviewed those defenses and potential challenges with Gray on the record. Gray said that he understood.

"[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. The circuit court may determine the defendant's understanding in a variety of ways, including by "refer[ring] to a document signed by the defendant that includes the elements." ***Id.***, ¶56. Here, Gray signed and filed a document describing the elements of the crime and stating that he understood them, and the circuit court confirmed that he reviewed those elements with his counsel.

During a guilty plea colloquy, the circuit court must "[e]stablish the defendant's understanding of ... the range of punishments" he or she faces upon entering a guilty plea, and the circuit court must establish personally that the defendant understands that the circuit court is not bound by the plea bargain or by the State's recommendations. *See* ***id.***, ¶35. We asked appellate counsel to discuss in a supplemental no-merit report whether the circuit court adequately ensured Gray's understanding that the range of punishments included a potential $100,000 fine. We agree with appellate counsel's conclusion that the plea colloquy and guilty plea questionnaire were sufficient in this regard. The guilty plea questionnaire reflects Gray's understanding that the circuit court was not required to follow the terms of the plea bargain and instead could impose the maximum penalties of a forty-year term of imprisonment and a

$100,000 fine. Further, the circuit court explained to Gray that it was not bound by the State's recommendation or his trial counsel's recommendation, and the circuit court emphasized that it was free to impose up to forty years of imprisonment, bifurcated as twenty-five years of initial confinement and fifteen years of extended supervision. Gray said that he understood.

In his response to the no-merit reports, Gray asserts that he lacked an understanding that extended supervision "can become incarceration time." The circuit court, however, must explain only the maximum term of imprisonment and has no obligation to further dissect that information for the defendant by explaining the amount of time that he or she might serve in confinement and how much time he or she might serve on extended supervision. *See* ***State v. Sutton***, 2006 WI App 118, ¶¶13-15, 294 Wis. 2d 330, 718 N.W.2d 146. Thus, Gray's claimed misunderstanding does not provide an arguably meritorious basis for further postconviction proceedings. To earn a postconviction hearing for plea withdrawal based on a violation of the duties imposed by ***Bangert***, a defendant must show both a lack of understanding and an unfulfilled circuit court duty to provide the information that the defendant claims not to have known or understood. *See* ***Hampton***, 274 Wis. 2d 379, ¶46.

Gray further asserts that he did not understand the effect of reading in an offense and believed that "the dismissed count would have no effect on his sentence." The assertion does not provide a basis for arguably meritorious postconviction litigation. The guilty plea questionnaire describes the effect of reading in a charge, and the circuit court explicitly advised Gray that it could consider the facts and circumstances of the read-in count at sentencing. Gray said that he understood. The information that he received during the plea proceeding overrode any earlier misunderstanding Gray may have had about the effect of reading in a dismissed charge. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996).

Before accepting a guilty plea, the circuit court must "'make such inquiry as satisfies it that the defendant in fact committed the crime charged.'" *See* ***State v. Black***, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (citation and one set of brackets omitted). Here, Gray's trial counsel stipulated to the facts in the criminal complaint and information. '"[A] factual basis is established when counsel stipulate[s] on the record to facts in the criminal complaint.'" ***Id.***, ¶13 (citation omitted). Gray asserts that he did not "authorize counsel to stipulate to the use of the criminal charges and information." This assertion does not provide an arguably meritorious basis for seeking plea withdrawal. The circuit court reviewed the allegations in count two of the complaint with Gray on the record, and Gray then told the circuit court that he pled guilty to the allegations. Moreover, Gray assured the circuit court that he had decided to plead guilty because he was guilty. The record reflects a sufficient circuit court inquiry to establish a factual basis for Gray's plea and to demonstrate that Gray approved his counsel's stipulation to the facts in the complaint. *See* ***State v. Thomas***, 2000 WI 13, ¶¶25-27, 232 Wis. 2d 714, 605 N.W.2d 836 (factual basis properly established where defendant conceded that he understood elements of the offense, defense counsel stipulated to the facts in the complaint, and defendant ratified the stipulated facts).

Gray asserts that, because he often responded to the circuit court's inquiries during the plea colloquy by stating "correct," or "correct your honor," his responses should be discounted. We cannot agree. The record reflects that Gray gave appropriate answers to the questions posed throughout the plea hearing. Nothing in the record constitutes a basis for Gray to disavow his answers.

The guilty plea colloquy, coupled with the plea questionnaire and attachments, reflect that Gray entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08, and ***Bangert***, 131 Wis. 2d at 266-72; *see also* ***Hoppe***, 317 Wis. 2d 161, ¶32 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). Gray's allegations that he entered his plea without an adequate understanding of necessary information are insufficient to support an arguably meritorious claim for plea withdrawal. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433 (conclusory allegations will not support a claim for postconviction relief). We are satisfied that the record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider whether an appellate 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. Additionally, 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 here reflects an appropriate exercise of sentencing discretion. The circuit court discussed the seriousness of armed robbery, noting particularly the traumatic effect on the victims. The circuit court emphasized Gray's lengthy criminal record, which includes three prior felony convictions for possessing controlled substances with intent to deliver them, two prior misdemeanor convictions for possessing controlled substances, and additional convictions for escape, obstructing an officer, and throwing bodily substances as a prisoner. *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 described Gray as "a cocaine addict who's out of control," and the circuit court determined that he exhibited "strong rehabilitative needs." The circuit court considered the protection of the public, observing that Gray was thirty-two years old and had neither "grown out of [his] criminal activity" nor taken steps to alter his conduct in a way that would change his behavior in the foreseeable future.

The circuit court identified deterrence and punishment as the primary sentencing goals. The circuit court explained that it intended to "send a message out that [if] you commit crimes like this, you go to prison," and the circuit court emphasized that it wanted to give Gray an incentive not to commit future crimes. Additionally, the circuit court observed that Gray "has to be punished for committing crimes such as this."

The record shows that the circuit court identified the various 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). Here, the twelve-year term of imprisonment imposed was well within the limit allowed by law, and thus is neither disproportionate nor shocking. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

Last, we address the circuit court's order that Gray pay a DNA surcharge if he did not previously pay one in connection with an earlier conviction.[2] We agree with appellate counsel that Gray could not mount an arguably meritorious challenge to the order. Appellate counsel submitted with the supplemental no-merit report a copy of a judgment of conviction entered in case No. 2003CF4769, requiring Gray to pay a DNA surcharge. *See* WIS. STAT. RULE 809.32(1)(f) (appellate counsel may submit material from outside the record to resolve whether arguably meritorious grounds exist for pursuing postconviction relief). Appellate counsel further submitted a copy of Gray's prison trust account statement reflecting that Gray has paid the DNA surcharge imposed in case No. 2003CF4769. Because the circuit court's order in the instant case

[2] After the circuit court imposed a DNA surcharge, trial counsel inquired: "Judge, I believe he's already submitted the DNA and I think he might have paid. Would you make it not assess the charge [sic] if it's found that he has paid?" The circuit court responded: "[a]bsolutely."

does not require Gray to pay a DNA surcharge if he has already paid one, a motion for relief from the order would lack arguable merit.

The corrected judgment of conviction in the instant case, however, inaccurately shows that Gray must "provide DNA sample if one has not been previously provided, pay surcharge."[3] Appellate counsel points out that the department of corrections is not presently collecting a DNA surcharge from Gray for this case, notwithstanding the erroneous language on the judgment of conviction mandating that Gray pay a surcharge without regard to whether he has previously paid one. Appellate counsel believes that the error in the judgment of conviction therefore can be ignored without risk to Gray. We conclude, however, that the judgment of conviction must be amended to reflect the circuit court's order. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (clerical error may be corrected at any time). Upon remittitur, the circuit court shall oversee the entry of an amended judgment of conviction reflecting the circuit court's order that Gray pay a DNA surcharge only if he has not previously paid one. *See* ***id.***, ¶5 (circuit court may correct clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

IT IS ORDERED that, upon remittitur, the circuit court shall amend the judgment of conviction or direct the circuit court clerk to amend the judgment of conviction to reflect the circuit court's order that Gray pay a DNA surcharge only if he has not previously paid one.

[3] The circuit court entered a corrected judgment of conviction in this case to rectify a clerical error of omission in the original judgment of conviction.

IT IS FURTHER ORDERED that the judgment of conviction, amended as required by this opinion and order, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved of any further representation of Antonio Henry Gray, effective on the date that an amended judgment of conviction is entered in this matter as required by this order. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals