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May 22, 2013

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

2012AP2517-CRNM State of Wisconsin v. Anthony Lathon Washington
(L.C. #2011CF954)

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

Anthony Lathon Washington appeals a judgment of conviction entered upon his guilty plea to one count of attempted armed robbery. *See* WIS. STAT. §§ 943.32(2), 939.32. The circuit court imposed a sentence of seventeen years and six months, bifurcated as ten years of initial confinement and seven years and six months of extended supervision, and the circuit court ordered Washington to serve the sentence consecutively to any sentence previously imposed. Additionally, the circuit court ordered Washington to pay restitution of $4,380.57, and to pay a

$250 deoxyribonucleic acid surcharge unless he had previously paid such a surcharge in connection with a prior conviction.

The state public defender appointed Michael S. Holzman, Esq., to represent Washington in postconviction and appellate proceedings. Holzman filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). At our request, Holzman filed a supplemental no-merit report discussing the DNA surcharge. Washington did not file a response. This court has considered the no-merit report and supplement, and we have independently reviewed the Record. We conclude that no arguably meritorious issues exist for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

In February 2011, the State filed a criminal complaint charging Washington with felony murder and with possessing a firearm while a felon, all as a repeat offender. According to the criminal complaint, Washington shot and killed Sidney Beamon during an attempted armed robbery in July 2010. Washington became a suspect five months later when police questioned his brother, Justin Nunely, in connection with another crime, and Nunely offered information that he was present when Washington killed someone. Washington disputed the allegations and demanded a trial. Ultimately, however, he and the State resolved the charges with a plea bargain.

We first consider whether Washington could mount an arguably meritorious challenge to his guilty plea. At the outset of the plea proceeding, the State filed an amended information and described the terms of the parties' plea bargain. Washington would plead guilty to the single count of attempted armed robbery alleged in the amended information, and the State would recommend ten years of initial confinement and seven-and-one-half years of extended

supervision. Washington's trial lawyer confirmed that the State correctly recited the terms of the plea bargain.

The circuit court told Washington that he faced a twenty-year term of imprisonment and a $50,000 fine upon conviction of the amended charge. Washington said that he understood. The circuit court explained that, although the State was not recommending a maximum sentence, the circuit court was free to impose the maximum penalties at sentencing. Washington again confirmed that he understood. The circuit court told Washington that his sentence could be consecutive to a sentence previously imposed, and Washington said that he understood.

A signed guilty plea questionnaire and waiver of rights form is in the Record. Washington said that he reviewed the form with his trial lawyer. "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, 179, 765 N.W.2d 794, 803. Use of the form 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.'" ***Ibid.*** (one set of brackets added; citation, footnote and one set of brackets omitted).

The circuit court explained to Washington that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire and waiver of rights form, and the circuit court reviewed each right on the Record. Washington told the circuit court that he understood his rights and had discussed them with his lawyer. He said that he had not been promised anything to induce his guilty plea and that he had not been threatened. He said that he was pleading guilty because he was guilty.

"[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, 627, 716 N.W.2d 906, 922. 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.***, 2006 WI 100, ¶56, 293 Wis. 2d at 626, 716 N.W.2d at 922. In this case, the signed guilty plea questionnaire and waiver of rights form describes the elements of the offense, and the circuit court confirmed that Washington reviewed those elements with his trial lawyer and that he understood them.

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, the circuit court asked Washington to describe the crime that he committed, and Washington said that he "tried to rob a guy for cash and things went wrong." Additionally, Washington's trial lawyer stipulated to the facts alleged in the criminal complaint. The circuit court found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 138, 624 N.W.2d 363, 369 (lawyer's stipulation on the Record to facts in the criminal complaint establishes factual basis for guilty plea).

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, 266–272, 389 N.W.2d 12, 23–25 (1986); *see also* ***Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d at 180, 765 N.W.2d at 803 (a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). Washington could not mount an arguably meritorious challenge to the validity of his guilty plea.

We next consider whether Washington could pursue an arguably meritorious challenge to his sentence. 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, 549, 678 N.W.2d 197, 203. "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, 231, 688 N.W.2d 20, 23. 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, 606, 712 N.W.2d 76, 82. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606–607, 712 N.W.2d at 82. 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***, 2004 WI App 181, ¶16, 276 Wis. 2d at 237, 688 N.W.2d at 26.

The sentencing court must also "specify the objectives of the sentence on the [R]ecord. 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***, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207.

The Record here reflects an appropriate exercise of sentencing discretion.[1] The circuit court discussed the gravity of the offense, describing the crime as a "tragedy" and a disgrace. The circuit court discussed Washington's character. The circuit court observed that Washington had a criminal record "dating back over ten years" and that his crimes included "battery, manufacture and delivery of THC, armed robbery, [and] burglary." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 449, 702 N.W.2d 56, 64 (substantial criminal record is evidence of character). The circuit court discussed the need to protect the public, explaining that Washington was "a danger to society" who "every few years ... commit[s] a new offense."

The circuit court recognized several mitigating factors. It credited Washington for expressing remorse and accepting responsibility, and the circuit court acknowledged that he was "brought up in a chaotic household [with] drugs, violence, far less than appropriate caregiving and parenting." The circuit court concluded, however, that the most significant consideration was the risk that Washington posed to the community. The circuit court explained that "this community needs to be protected from [Washington]," and that he "frankly just needs to be punished, needs to be deterred." The circuit court therefore followed the State's sentencing recommendation, explaining that Washington must "be removed from society for the protection of everyone else."

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

[1] The circuit court pronounced sentence in June 2012 and correctly stated: "this is not a risk reduction sentence." *See* 2011 Wis. Act 38, § 92; WIS. STAT. § 991.11 (repealing the law permitting risk reduction sentences, effective August 3, 2011).

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, 651, 648 N.W.2d 507, 517 (citation omitted). The penalty selected here was far less than the maximum penalties of twenty years of imprisonment and a $50,000 fine. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c), 939.32(1g)(a). A sentence well within the maximum sentence permitted by statute is presumptively not unduly harsh. *See* ***Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d at 651, 648 N.W.2d at 517. 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, 417–418 (Ct. App. 1983).

In assessing the sentence imposed, we have considered that the circuit court denied Washington's request to serve the sentence in this case concurrently with another sentence that Washington was serving for a prior conviction. We have also considered that the circuit court declined to find Washington eligible to participate in either the challenge incarceration program, described in WIS. STAT. § 302.045, or the Wisconsin substance abuse program, described in WIS. STAT. § 302.05.[2] These decisions rest in the circuit court's discretion. *See* ***State v. Ramuta***, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 799, 661 N.W.2d 483, 490 (circuit court has discretion to determine whether sentence should be served consecutively or concurrently); WIS. STAT.

[2] During the sentencing proceeding, the circuit court referred to the Wisconsin substance abuse program by its former name, the "earned release program." We note that the legislature renamed the program effective August 3, 2011. *See* 2011 Wis. Act 38, §19; WIS. STAT. § 991.11. We also note that not every provision of the current Wisconsin statutes governing this program reflects the new program name. *See, e.g.*, WIS. STAT. § 973.01(3g) (2011–12).

§ 973.01(3m) (circuit court has discretion to determine eligibility for participation in program under § 302.045); § 973.01(3g) (circuit court has discretion to determine eligibility for participation in program under § 302.05). The Record shows that Washington could not mount an arguably meritorious challenge to the circuit court's exercise of discretion in regard to these sentencing decisions.

Concurrent sentences may reduce the total amount of time that an inmate serves. ***State v. Howard***, 2001 WI App 137, ¶18, 246 Wis. 2d 475, 489, 630 N.W.2d 244, 250. Similarly, eligibility for participation in the challenge incarceration program and Wisconsin substance abuse program may lead to a reduction in the length of time that a convicted person is confined. *See* WIS. STAT. §§ 302.045(3m)(b)1. & 302.05(3)(c)2.a.[3] Here, however, the circuit court determined that Washington, who was twenty-seven years old at the time of sentencing, must be incarcerated until he "matured enough to end his criminal track record." The circuit court thus reasonably explained its decisions to impose a consecutive sentence and to deny Washington eligibility for either the challenge incarceration program or the Wisconsin substance abuse program. A challenge to these decisions would lack arguable merit.

A challenge to the restitution order would also lack arguable merit. Washington conceded the propriety of the restitution sought, and he is bound by his concession. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 739, 616 N.W.2d 126, 143–144. Therefore,

[3] Upon successful completion of either the challenge incarceration program or the Wisconsin substance abuse program, an inmate serving a bifurcated sentence may serve his or her remaining initial confinement time as extended supervision time. *See* WIS. STAT. §§ 302.045(3m)(b)1. & 302.05(3)(c)2.a.

he could not mount an arguably meritorious challenge to the order imposing the amount of restitution that the State requested.

Last, we address the circuit court's order that Washington pay a DNA surcharge if he had not previously paid one in connection with any prior conviction.[4] *See* WIS. STAT. § 973.046(1g). Holzman submitted a supplemental no-merit report with supporting documents demonstrating that Washington could not pursue an arguably meritorious challenge to the DNA surcharge. *See* WIS. STAT. RULE 809.32(1)(f) (permitting appellate lawyer to submit material from outside the Record to resolve whether arguably meritorious grounds exist for pursuing postconviction relief). The materials submitted with the supplemental no-merit report show that Washington was previously ordered to pay a DNA surcharge in connection with an earlier conviction. Holzman also submitted a letter from the deputy warden at Jackson Correctional Institution, where Washington is confined, confirming that Washington in fact paid the surcharge previously ordered. Because the circuit court's order in the instant case does not require Washington to pay a DNA surcharge if he has previously paid one, a motion for relief from the order would lack arguable merit.[5]

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.

[4] After the circuit court imposed a DNA surcharge, Washington advised the circuit court that he had previously paid such a surcharge. The circuit court responded: "[i]f it's been paid previously, I'll waive it."

[5] We note for the sake of completeness that the deputy warden's letter shows that no DNA surcharge will be collected from Washington in connection with this case.

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

IT IS FURTHER ORDERED that Michael S. Holzman, Esq., is relieved of any further representation of Anthony Lathon Washington on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals