OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

July 16, 2013

To:

Hon. Dennis P. Moroney
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Rm. 114
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Randall E. Paulson
Asst. State Public Defender
735 N. Water St., #912
Milwaukee, WI 53202-4116

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Nicholas A. Jones 505038
Wisconsin Secure Program Facility
P.O. Box 9900
Boscobel, WI 53805-9900

Dan Barlich, Juvenile Clerk
Children's Court Center
10201 Watertown Plank Rd.
Milwaukee, WI 53226

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

2013AP134-CRNM State of Wisconsin v. Nicholas A. Jones (L.C. # 2012CF378)

Before Fine, Kessler and Brennan, JJ.

Nicholas A. Jones appeals from a judgment of conviction, entered upon his guilty pleas, on four counts of robbery. Appellate counsel, Randall E. Paulson, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2011-12).[1]

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

Jones was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. Subject to the correction of several scrivener's errors described herein, we summarily affirm the judgment.

Jones committed multiple car thefts and robberies, most during a week in December 2010. Jones was identified as a suspect through a combination of fingerprint matches, DNA evidence, and eyewitness testimony. His participation in the crimes was also linked by his use of the stolen vehicles in committing some of the new crimes. For instance, when Jones committed the first armed robbery charged, he used a red Dodge Caravan that had been stolen from a Wal-Mart parking lot. Surveillance tape of the parking lot showed that the person who stole the Caravan arrived in a tan Chrysler mini-van—also stolen.

Jones was originally charged with two counts of armed[2] robbery, two counts of robbery, two counts of taking and driving a motor vehicle without the owner's consent, two counts of operating a motor vehicle without the owner's consent, and one count of second-degree recklessly endangering safety, all as a repeat offender. The endangering-safety charge arose because Jones, driving a stolen Chrysler Town and Country van, rammed a police car with the officer still in it after the officer parked in front of Jones's garage to block him in while investigating and discovering the stolen van inside. An amended complaint later added another count of operating a motor vehicle without the owner's consent as a repeat offender.

[2] These were armed robbery charges because one victim believed Jones had a gun based on how he was holding his hands and one victim stated that Jones told her he had a gun.

Jones ultimately agreed to resolve this matter with a plea agreement. In exchange for his guilty pleas to four counts of robbery—two of them amended down from armed robbery—the State would dismiss and read in the remaining charges and dismiss all the repeater enhancers. The State would recommend prison, with the length of the sentence up to the circuit court, and Jones would be free to argue for any length of sentence. Jones also agreed that the State could seek restitution on all ten charges.

The circuit court accepted the plea. For each robbery conviction, it sentenced Jones to four years' initial confinement and four years' extended supervision, with the sentences to be served consecutively. The circuit court also made Jones eligible for the Challenge Incarceration Program. In addition, the circuit court imposed $1,145 in restitution, as requested on two of the charges, pursuant to the parties' stipulation.[3]

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Jones's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Jones's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses, and counsel had attached sheets detailing the

[3] The restitution amount comprises a $425 claim on one of the operating without consent charges and $720 on another; the $720 award is joint and several with a co-actor who had been sentenced before Jones. Claims for the other charges were either not submitted or not adequately documented.

elements of all the offenses with which Jones had been charged. The questionnaire form correctly acknowledged the maximum penalties Jones faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. We note that when the circuit court originally reviewed the robbery elements with Jones, the circuit court described an "armed" element for all four counts because the State had not fully amended the information in advance of the hearing to remove that element from the description of the amended-down armed robbery charges Later in the colloquy, though, this error was pointed out, and the circuit court clarified with Jones his understanding of the charges he was pleading to. Jones confirmed he understood what was happening. We also note that, as part of the colloquy, the circuit court reviewed the nature of read-in offenses, as recommended by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835, explaining that they could not be re-charged in the future but that the circuit court could consider them at sentencing.[4]

Ultimately, we are satisfied that the plea questionnaire and waiver of rights form and addendum, the supplemental documents counsel discussed with Jones, and the court's colloquy appropriately advised Jones of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea

[4] The circuit court did not expressly tell Jones that restitution could be ordered on read-in offenses, but we discern no error: Jones had previously acknowledged and agreed that the State could seek restitution on all ten counts.

is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

At the time of his offenses, Jones was nineteen years old and on probation for another operating without consent case. His record stretched back to age fourteen and involved, among other offenses, robbery and operating without consent charges, just as in the present case. Jones's record led the circuit court to characterize him as "basically almost a scourge on society." The circuit court noted that the only time the community was safe was when Jones was incarcerated. It determined it should consider punishment, deterrence, and rehabilitation because Jones clearly had not learned anything from his prior experience in the court system, and it was concerned that Jones might end up serving a life sentence "on the installment plan" if he did not change his ways. The circuit court did make note of some mitigating factors, like the fact that Jones' crimes might not have been the most severe and that Jones had finished high school.

However, the circuit court ultimately noted that Jones simply refuses to conform his behavior to what the law demands and that, with his past behavior as a predictor of his future behavior, the imposed sentence was warranted.

The maximum possible sentence Jones could have received was sixty years' imprisonment. The sentence totaling thirty-two years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit. There are, however, multiple scrivener's errors in the judgment of conviction. We direct these errors to be corrected upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

First, the State dismissed the repeater enhancers, so the references to WIS. STAT. § 939.62 and habitual criminality should be removed from the descriptions of counts 2, 5, 6, and 9. Second, the armed robbery counts were reduced to simple robbery, so the word "armed" should be removed from the descriptions of counts 2 and 9. Third, the severity for counts 2 and 9 should be changed to Felony E, to reflect the reduction in charges, rather than the Felony C as originally charged. Fourth, the judgment of conviction references both guilty pleas and a trial to

the court for all four counts of conviction. However, there was no trial to the court, so that reference should be removed.[5]

Upon the foregoing, therefore,

IT IS ORDERED that upon remittitur, the judgment of conviction shall be modified as described herein.

IT IS FURTHER ORDERED that the judgment, as modified, is summarily affirmed.

IT IS FURTHER ORDERED that Attorney Randall E. Paulson is relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] Counsel suggests that the judgment may not accurately reflect the circuit court's comments regarding the DNA surcharge. However, we conclude that the judgment satisfactorily reflects the conditional nature of the surcharge.