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

2014AP2077-CRNM State of Wisconsin v. Anthony L. Herd (L.C. #2011CF2417)
2014AP2078-CRNM State of Wisconsin v. Anthony L. Herd (L.C. #2012CF3688)

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

Anthony L. Herd pled no contest to one count of attempted second-degree sexual assault by use of force for an incident occurring in May 2011. During the same hearing, he pled guilty to one count of second-degree sexual assault by use of force for an incident occurring in July 2012. For the attempted crime, the trial 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. For the completed crime, the trial court imposed a twenty-five-year term of imprisonment, bifurcated as ten years of initial confinement and fifteen years of extended

supervision. The trial court ordered Herd to serve the two sentences consecutively to each other and consecutively to earlier-imposed sentences. Herd appeals both convictions.

The state public defender appointed Attorney Angela Conrad Kachelski to represent Herd in postconviction and appellate proceedings. Attorney Kachelski moved to consolidate these appeals and then filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] In the no-merit report, Attorney Kachelski discusses the sufficiency of Herd's pleas and whether the trial court properly exercised its sentencing discretion. Attorney Kachelski also filed supplemental no-merit reports discussing why she had concluded that Herd could not raise a claim that his second trial attorney had a conflict of interest and why Herd could not challenge the trial court's conclusion that he was competent to proceed. Herd did not file a response to any of counsel's no-merit reports. We have considered the no-merit reports, and we have independently reviewed the records. We conclude that no arguably meritorious issues exist for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint in case No. 2011CF2417, which underlies appeal No. 2014AP2077-CRNM, K.A.F. was jogging on a bike path on May 11, 2011, when Herd grabbed her from behind and forced her to the ground. She escaped and called police, who found Herd emerging from the bike path. He was breathing heavily, his pants zipper was down, and his penis was exposed. On May 31, 2011, the State charged Herd with attempted second-degree sexual assault by force or violence as a repeat serious sex crimes offender.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

According to the criminal complaint in case No. 2012CF3688, which underlies appeal No. 2014AP2078-CRNM, Herd was incarcerated in the Milwaukee County criminal justice facility on July 15, 2012, when he grabbed a female corrections officer, T.W., as she sat in a chair, wrapped his arms around her from behind, and fondled her breasts. T.W. eventually broke free and attempted to use her taser to subdue Herd, but it malfunctioned. Herd ran to his cell and locked himself in. On July 24, 2012, the State charged Herd with one count of second-degree sexual assault with use of force and one count of kidnapping, both as a repeat serious sex crimes offender.

Herd disputed the charges against him for some time. Eventually, however, he decided to resolve both cases with a plea bargain.

We first consider whether Herd could mount an arguably meritorious claim that he was not competent to proceed in these matters. "[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477.

Herd raised the question of his competency approximately six months after the State charged him in case No. 2011CF2417. Based on a psychologist's report, the trial court found that Herd was not competent but was likely to attain competency with treatment. The trial court therefore ordered him committed for treatment in December 2011.

A psychologist who examined Herd during his commitment for treatment filed a report in February 2012. The psychologist stated that Herd carries a diagnosis of schizophrenia and that his cognitive functioning is "well below average but ... above mild mental retardation." The

psychologist also noted that, when admitted to the treatment facility, Herd was taking his prescribed medication and was not demonstrating symptoms of mental illness. The psychologist then reported that Herd completed a competency examination and demonstrated familiarity with court procedures, the charges against him, and the legal consequences he faced. He also "display[ed] an ability to learn, retain, and use new information." According to the psychologist, "when compared to national norms, Mr. Herd['s] performance falls in the range of individuals *without* mental retardation who *are* competent." (Emphasis in original.) The psychologist concluded that Herd was competent. Neither the State nor Herd challenged the psychologist's conclusion. The trial court found Herd competent to proceed in case No. 2011CF2417.

A few weeks after the State filed the charges alleged in case in No. 2012CF3688, Herd suggested his mental health was in decline and again raised the question of his competency to proceed. Pursuant to court order, a psychiatrist with the Wisconsin Forensic Unit evaluated him and, on October 25, 2012, filed a report. The psychiatrist diagnosed Herd with schizoaffective disorder but found he was successfully managing his symptoms with medication. The psychiatrist also found that Herd understood the roles of the participants in the courtroom, was aware of the potential verdicts at trial, and recognized "the adversarial sides involved in a plea bargain as well as the purpose, procedures, and the benefits to both parties." The psychiatrist concluded that Herd was competent to proceed. Again, neither party contested the expert's findings, and the trial court found Herd competent.

This court will uphold a trial court's competency determination unless that determination is clearly erroneous. ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychological and psychiatric reports filed in these matters and the standard of review, any further proceedings in regard to Herd's competency would lack arguable merit.

We next consider whether Herd could pursue an arguably meritorious claim for relief on the ground that the attorney from the private bar who represented him through the plea proceedings had a conflict of interest. The attorney, Daniel Mitchell, was Herd's second appointed lawyer in these matters. Herd's first appointed lawyer, a staff attorney with the public defender's office, moved to withdraw on the ground that another attorney in that office represented a potential defense witness, Mannie Cooper, who would be examined at trial to show that he was the inmate who committed the sexual assault described in case No. 2012CF3688. Staff counsel explained that contemporaneous public defender representation of both Cooper and Herd created a conflict of interest.

When Attorney Mitchell made his first appearance as successor trial counsel in these cases, he disclosed that he too had a professional relationship with Cooper, but that it stemmed from a case unrelated to the charges against Herd. Attorney Mitchell explained that he and Cooper met "at the intake court level," had "a ten-minute discussion ... about the facts of his crime," and completed an indigency evaluation form together. Attorney Mitchell explained that he had no further contact with Cooper thereafter and never appeared with him in court.

The trial court found that Attorney Mitchell no longer represented Cooper and that the former representation involved a separate case from the allegations involving Herd. The trial court permitted Attorney Mitchell to continue as Herd's lawyer but asked him to file a "written waiver" from Herd, adding, "that's probably more than you need to do." Although Attorney Mitchell never filed the waiver, we are satisfied that Herd cannot pursue an arguably meritorious claim for relief based on an allegation that Attorney Mitchell had a conflict of interest.

A trial court '"possesses broad discretion in determining whether attorney disqualification is required in a particular case.'" ***Berg v Marine Trust Co.***, 141 Wis. 2d 878, 887, 416 N.W.2d 643 (Ct. App. 1987) (citation and brackets omitted). We review discretionary decisions under a deferential standard. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). We will uphold the trial court's exercise of discretion if the trial court had a proper legal basis for the decision, considered the relevant facts, and reached a conclusion that a reasonable judge could reach. *See* ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. We search the record for reasons to sustain a trial court's discretionary decision. *See* ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780.

Pursuant to SCR 20:1.9(a) (2014):

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

A comment to SCR:1.9 explains:

> [3] Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

ABA Comment, SCR 20:1.9 (2014). Here, Attorney Mitchell briefly represented Cooper in a matter unrelated to the charges against Herd, and nothing suggests that Attorney Mitchell received information from Cooper that might be used to his disadvantage in aid of Herd. Because the trial court reached a reasonable conclusion in permitting Attorney Mitchell to

continue representing Herd in light of the facts and the law, there is no arguable merit to further pursuit of this issue.

We next examine the plea hearing itself. At the outset of that proceeding, the State described the terms of the plea bargain on the record: Herd would plead no contest to the crime of attempted second-degree sexual assault charged in case No. 2011CF2417, and he would plead guilty to the crime of second-degree sexual assault charged in case No. 2012CF3688. The State would recommend a term of imprisonment without specifying the duration of a recommended term. Further, the State would move to dismiss but read in the kidnapping charge, and the State would move to dismiss all of the allegations that Herd was a habitual offender. Herd confirmed that the State had described the parties' plea bargain as he understood it.

The trial court noted that Herd had taken medication within twenty-four hours of the plea hearing. Herd told the trial court that the medication did not impede his ability to understand the court proceedings.

The trial court explained to Herd that he faced a twenty-year term of imprisonment and a $50,000 fine upon conviction of attempted second-degree sexual assault and that he faced a forty-year term of imprisonment and a $100,000 fine upon conviction of the completed crime of second-degree sexual assault. *See* WIS. STAT. §§ 940.225(2)(a), 939.50(3)(c), 939.32(1g). Herd said he understood. The trial court told Herd it was not bound by the terms of the plea bargain or by any sentencing recommendations and that the trial court was free to impose consecutive maximum sentences. Herd said he understood. He assured the trial court that, outside of the terms of the plea bargain, he had not been promised anything to induce his pleas of guilty and no contest and that he had not been threatened.

The record includes two signed plea questionnaire and waiver of rights forms. The forms reflect that Herd understood the charges he faced, the constitutional rights he waived by entering pleas other than not guilty, and the penalties that the trial court could impose. A signed addendum attached to each form reflects Herd's acknowledgment that, by entering either a guilty or a no-contest plea, he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of evidence against him. Herd confirmed that he reviewed the forms and the attachments with his trial counsel and that he understood them.

The trial court explained to Herd that his pleas of guilty and no contest entailed giving up the constitutional rights listed on the plea questionnaires, and the trial court reviewed each right. Herd said he understood. The trial court also explained that, by entering pleas of guilty and no contest, Herd would give up the potential defenses and challenges listed on the signed addenda to the plea questionnaires, and Herd again said he understood. The trial court reviewed the elements of each offense on the record. Herd confirmed that he understood the elements.

The trial court gave Herd the deportation warnings required by WIS. STAT. § 971.08(1)(c). Herd said he understood. Although the trial court's warning about the risk of deportation deviated in a minor way from the statutory language in § 971.08(1)(c), such a deviation does not undermine the validity of a plea.[2] *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

[2] We observe that, before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show "that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Herd could make such a showing.

A plea colloquy must include an inquiry sufficient to satisfy the trial court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, Herd told the trial court he did not have a very good recollection of the events underlying the charge in case No. 2011CF2417, but he said he did not contest the facts alleged in support of the charge. He told the trial court that the facts alleged in the complaint underlying case No. 2012CF3688 were substantially true and correct. Additionally, Herd's trial counsel agreed that the trial court could use the facts alleged in the criminal complaints as factual bases for the guilty and no-contest pleas. '"[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint."' ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted). The trial court properly found factual bases for Herd's pleas.

The record reflects that Herd entered his guilty and no-contest pleas 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 arguably meritorious basis for challenging the sufficiency of the plea colloquy.

Next, we consider whether Herd could pursue an arguably meritorious claim that he should be permitted to withdraw his pleas because he was medicated improperly at the time he entered them. Attorney Mitchell filed a motion making this claim on Herd's behalf, then withdrew from the case on the ground that he was a potential witness in support of Herd's motion. The public defender appointed a third attorney to represent Herd, Attorney Patrick Flanagan. When Herd appeared with Attorney Flanagan, however, Herd told the trial court that he did not want to withdraw his pleas but instead wanted to proceed with sentencing. A

defendant abandons a claim for plea withdrawal when the defendant knows about the claim prior to sentencing but nonetheless deliberately persists in pursuing a plea strategy and proceeds to sentencing. *See* ***State v. Damaske***, 212 Wis. 2d 169, 193, 567 N.W.2d 905 (Ct. App. 1997). A claim for plea withdrawal on the ground that Herd was medicated improperly at the time of his pleas would be frivolous within the meaning of ***Anders***.

We next consider whether Herd could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the trial court's discretion, and our review is limited to determining if the trial 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 trial court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The trial 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 trial court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The trial 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 trial 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 trial court indicated that punishment and rehabilitation were the primary sentencing goals and discussed the factors that the trial court deemed relevant to those goals. The trial court found that the offenses were serious and that Herd posed a danger to the community. The trial court noted that Herd committed the offense against K.A.F. while on extended supervision for another crime, and the court viewed the assault on the corrections officer, T.W., as an indication that Herd was becoming increasingly violent.

The trial court considered Herd's character, noting that the crime against K.A.F. "is almost identical in method to the facts in ... two older cases," including "running up and grabbing a female" who was on a bike path. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). The trial court acknowledged that Herd did not use a weapon or physically injure his victims, and the trial court also noted that Herd had graduated from high school and had a supportive family. In the trial court's view, however, the mitigating factors did not outweigh the risk Herd posed to the public. The trial court pointed out that Herd had received treatment and supervision in the community in the past, but he continued to reoffend. The trial court therefore found that the dispositions in these cases must provide for treatment in a structured and confined setting. Ultimately, the trial court found that Herd required a lengthy period of incarceration in light of his criminal history and his failure to control his behavior successfully with only treatment and therapy.

The trial court identified the factors it considered in fashioning sentences in these matters. The factors are proper and relevant. Moreover, the sentences are 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 sentences imposed here were well within the statutory maximum allowed by law. Such sentences are presumptively not unduly harsh. *See* ***id.***, ¶32. We cannot say that the sentences imposed in these cases are disproportionate or shocking.

We next conclude that Herd could not pursue an arguably meritorious challenge to the postconviction order vacating 651 days of presentence incarceration credit awarded at sentencing against the initial confinement imposed in case No. 2011CF2417. The record shows that Herd received credit for the same days against the reconfinement term imposed in an earlier case. Dual credit against consecutive sentences is not permitted. ***State v. Boettcher***, 144 Wis. 2d 86, 101, 423 N.W.2d 533 (1988).

Last, we note that the trial court conducted a restitution hearing after sentencing in case No. 2012CF3688, then entered an amended judgment of conviction setting restitution at zero. Herd cannot pursue a challenge to this favorable ruling. *See* WIS. STAT. RULE 809.10(4) (appeal from final judgment brings only adverse rulings before this court).

Based on an independent review of the records, we conclude that there are no additional potential issues warranting discussion. Any further proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Angela C. Kachelski is relieved of any further representation of Anthony L. Herd on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals