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March 4, 2016

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

2015AP1538-CRNM State of Wisconsin v. Deangelis J. Mack
(L.C. #2012CF4452)

Before Kessler, Brennan and Brash, JJ.

Deangelis J. Mack appeals from convictions for two felonies: one count of child neglect (nutritional neglect) causing great bodily harm and one count of child neglect (medical neglect) causing bodily harm, both as a party to a crime, contrary to WIS. STAT. §§ 948.21(1)(c), 948.21(1)(b), and 939.05 (2011-12).[1] Mack also appeals from an order partially denying his postconviction motion. Mack's postconviction/appellate counsel, Carl W. Chessir, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE

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

809.32. Mack filed a response.[2] We have independently reviewed the record, the no-merit report, and Mack's response, 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 amended judgment and the postconviction order.

The criminal complaint charged Mack with two counts of child neglect resulting in great bodily harm. The complaint alleged that Mack and the child's mother denied the child—who was less than a year old—adequate nutrition and medical care over a nine-month period. The complaint stated that the child's mother took the child to the hospital when the child became unresponsive and had shallow breathing. Medical professionals concluded that the child was suffering from serious malnourishment, open sores, and other health problems that threatened the child's survival. The child's mother told police that Mack was the primary caregiver for the child when the mother worked outside the home. Mack invoked his right to remain silent, although the complaint indicates that he later asked an officer why he was being arrested and, when told it was for child neglect, Mack "responded that he makes smoothies for his children and feeds them."

While Mack and the child's mother were charged in the same complaint, the cases were later severed. Mack's case was delayed so that he could be examined for both competency and a potential plea of not guilty by reason of mental disease or defect ("NGI plea"), as detailed in the no-merit report. Ultimately, the examining doctor concluded that Mack was competent and that

[2] In his response, Mack spells his first name D'Angelis. For purposes of this appeal, we have used the spelling Deangelis, which appears on the amended judgment of conviction and in the no-merit report.

an NGI plea would not be supported. Mack and his trial counsel did not contest these determinations.

Days before the scheduled jury trial, Mack reached a plea agreement with the State. Pursuant to that agreement, the State moved to amend the medical neglect count to neglect resulting in "bodily harm" rather than "great bodily harm," which lowered Mack's total exposure from twenty-five years of imprisonment to eighteen and one-half years of imprisonment. The plea agreement further provided that both sides were free to argue for an appropriate sentence.

The trial court conducted a plea colloquy with Mack, accepted Mack's guilty pleas, and found him guilty.[3] A presentence investigation ("PSI") was ordered. When Mack spoke with the PSI writer, he denied that he was the child's primary caretaker and claimed that he had only seen the child twice in the nine months leading up to the child's hospitalization. After trial counsel suggested that Mack may move to withdraw his guilty pleas prior to sentencing, new counsel was appointed for Mack.

With the assistance of that new attorney, Mack moved to withdraw his guilty pleas on grounds that his pleas were not freely, voluntarily, and intelligently entered, in part due to the alleged ineffective assistance of Mack's first trial counsel. The trial court conducted an evidentiary hearing at which both trial counsel and Mack testified.[4] Mack testified that he lied to the trial court at the plea hearing when he indicated that he had reviewed the guilty plea

[3] The Honorable Mary Triggiano presided over the pretrial proceedings and accepted Mack's guilty pleas.

[4] The Honorable Lindsey Grady conducted the evidentiary hearing and ultimately sentenced Mack.

questionnaire with his trial counsel. Mack said that he was in a "deep state of depression" and "highly disorientated" at the plea hearing, although he did not raise those issues during the plea colloquy. One reason for feeling depressed, Mack said, was that some of his relatives had health issues and one had died. In post-hearing briefing, Mack asserted three "fair and just reasons" why he should be allowed to withdraw his guilty pleas: (1) trial counsel failed to properly represent him by not meeting with him more often and by not giving him "a written explanation of the charges, the potential penalties and the plea offer"; (2) Mack may not have been competent at the plea hearing, given that his mental stability had been previously questioned and he was in a physical fight at the House of Correction four days before the plea hearing; and (3) Mack's pleas were involuntary because the trial court did not adequately "ascertain Mack's understanding of his rights at the time of the plea hearing."

The trial court denied Mack's motion. In its oral ruling, the trial court found that Mack's testimony lacked "credibility" and "veracity." The trial court stated:

> I'm not convinced that the concerns … [with] some family health issues, while they are serious, would rise to the level of so scrambling his decision or judgment that it would negate the voluntariness or knowingness of his plea.
>
> I'm also not satisfied that all the trouble and all the questions … that [the plea hearing judge] went through, and all the dotting of the I's and crossing of the T's [the judge] did, somehow went unnoticed by Mr. Mack. I don't believe that either.
>
> ….
>
> Each year there's more appellate cases that tell us to ask more questions and find out more stuff…. [I]t's good for the defendants because it's one more check and balance to ensure that if you're going to give up these very serious rights, that you do so freely, knowingly and voluntarily. I'm satisfied that was done. I'm satisfied there is not good cause to have [the pleas] withdrawn.

At the subsequent sentencing hearing, the trial court imposed two consecutive sentences that totaled eight-and-one-half years of initial confinement and six-and-one-half years of extended supervision. The trial court ordered Mack, a first-time felon, to provide a DNA sample and also ordered him to pay the mandatory $250 DNA surcharge for each conviction, consistent with a new law that took effect on January 1, 2014.

Postconviction/appellate counsel filed a no-merit report. This court directed counsel to file a supplemental no-merit report addressing the imposition of the mandatory DNA surcharge for two crimes committed prior to January 1, 2014, *see* ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, as well as the imposition of the domestic violence surcharge on each count. In response, counsel moved to dismiss the no-merit appeal so that he could file a postconviction motion in the trial court. The trial court partially granted the postconviction motion. It vacated the domestic violence surcharges, and it also vacated one of the DNA surcharges after finding that imposition of a single DNA surcharge was appropriate under ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, because the State would incur a cost for collecting Mack's sample, having it analyzed, and putting it into the DNA database. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12.

Postconviction/appellate counsel subsequently filed the no-merit report that is now before the court. The report addresses four issues: (1) whether Mack's guilty pleas were knowingly, intelligently, and voluntarily entered; (2) whether the trial court erroneously exercised its discretion when it denied Mack's motion to withdraw his guilty pleas prior to sentencing; (3) whether the trial court erroneously exercised its sentencing discretion; and (4) whether the trial court erroneously exercised its discretion when it ordered Mack to pay a single DNA surcharge. This court agrees with postconviction/appellate counsel's conclusion that there would

be no arguable merit to pursue those issues. We will briefly address those issues, as well as seven issues that Mack raises in his response to the no-merit report.

We begin with Mack's guilty pleas. There is no arguable basis to allege that Mack's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the printed jury instructions for the crimes. The trial court conducted a plea colloquy that addressed Mack's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. At no time during the plea hearing did Mack raise any concerns about his decision to plead guilty to both charges.

The trial court referenced the guilty plea questionnaire that Mack completed with his trial counsel, and the trial court discussed the elements of the crimes. The trial court reiterated the maximum sentences and fines that could be imposed. The trial court also discussed with Mack the constitutional rights Mack was waiving, such as his right to a jury trial. In addition, the trial court confirmed with Mack that he understood the trial court was not bound by the parties' plea agreement. The trial court also found there was a factual basis for the pleas, and Mack personally confirmed that the facts in the criminal complaint were accurate.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form and attached jury instructions, Mack's conversations with his trial counsel, and the

trial court's colloquy appropriately advised Mack of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary.

In his response to the no-merit report, Mack raises concerns about whether the original charges were multiplicitous and, if so, whether he could be properly convicted of the greater and lesser-included version of the same crime. We have examined this issue and we conclude Mack has not identified an issue of arguable merit.

"Multiplicity occurs when the state charges more than one count for a single criminal offense." ***State v. Carol M.D.***, 198 Wis. 2d 162, 169, 542 N.W.2d 476 (Ct. App. 1995). ***Carol M.D.*** explained:

> We apply a two-part test to determine whether a charge is multiplicitous. First, we inquire whether the charged offenses are identical in law and fact. If so, the charges are multiplicitous. Second, if the charges are different in law or fact, they are still multiplicitous if the legislature intended them to be brought as a single count.

Id. (citations omitted). In this case, Mack was originally charged with two counts of the same crime, but the facts were not identical. The criminal complaint outlined specific actions and inactions by Mack and the child's mother that formed the basis for two counts of child neglect. First, as a basis for alleging there was nutritional neglect, the complaint alleged that the parents stopped giving the child formula and milk when he was eight months old because they believed the child "was lactose intolerant." This resulted in his failure to gain weight; he weighed about the same at eleven months as he had at two months. Second, the complaint alleged that the parents also failed to provide the child with medical care by not taking him to a doctor since he was two months old and by ignoring significant, obvious health issues like ulcerated sores all

over his body. In addition to the charges being different in fact, there is no indication that the legislature intended that only a single count of neglect could be brought where a parent engaged in discrete actions and inactions over a period of time. For these reasons, we conclude that there would be no arguable merit to allege either that the original charges were multiplicitous or that it was improper to allow Mack to plead guilty to two separate charges (one alleging nutritional neglect resulting in great bodily harm and one alleging medical neglect resulting in bodily harm).

Next, we consider whether the trial court erroneously exercised its discretion when it denied Mack's motion to withdraw his pleas prior to sentencing. "In general 'a [trial] court should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.'" ***State v. Lopez***, 2014 WI 11, ¶2, 353 Wis. 2d 1, 843 N.W.2d 390 (citations and one set of quotation marks omitted; second set of brackets in original). On appeal, we review a trial court's decision on the motion to withdraw a guilty plea for an erroneous exercise of discretion. ***Id.***, ¶60.

In this case, Mack offered three reasons for wanting to withdraw his pleas: (1) ineffective assistance of counsel; (2) incompetence; and (3) the trial court's failure to adequately conduct the plea hearing. As noted above, the trial court heard testimony on these issues, found that Mack's testimony lacked credibility, and found that Mack had not established a fair and just reason to withdraw his pleas. The trial court's findings of fact are supported by the record, as well as the transcript of the plea hearing, which we have already discussed. Trial counsel testified that he met with Mack numerous times and he described at length their discussions and trial counsel's assessment of Mack's comprehension. Some of those issues were also addressed on the day of the plea hearing, when trial counsel noted that Mack had been in a fight the week before and assured the trial court that trial counsel had "no concerns about his

ability to proceed" with the pleas. We conclude there would be no arguable merit to challenge the trial court's factual findings—which were based on its credibility determinations—or its ultimate finding that Mack had not established a fair and just reason to withdraw his pleas.

In his response to the no-merit report, Mack raises several issues related to his motion to withdraw his pleas. He argues that he lied to the trial court that accepted his pleas when he said that he had reviewed the guilty plea questionnaire with his trial counsel. He also argues that he was "very depressed, hopeless, [and] disoriented at his plea hearing." He further suggests that his claim of incompetency is bolstered by a doctor's report that, while finding Mack competent to proceed, nonetheless suggested that the trial court should watch for changes in Mack's functioning. Mack also claims that the trial court's plea colloquy was perfunctory and failed to properly ascertain Mack's understanding of his rights. Finally, Mack claims that his trial counsel coerced him to accept the plea agreement.

Mack has not identified an issue of arguable merit. The trial court rejected Mack's testimony that he was disoriented and failed to understand the proceedings. It found that Mack had freely and voluntarily entered his pleas. There would be no arguable merit to challenge the trial court's credibility determinations or findings of fact. Further, the plea colloquy was very thorough. The trial court was made aware that Mack had been in a fight and gave Mack many chances to raise concerns and confirm his understanding of his pleas. We are not persuaded that there would be merit to an appeal based on the plea withdrawal issues Mack raises in his response to the no-merit report.

Next, we turn to the sentencing. We conclude 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, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (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, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. 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, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

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 severity of the neglect the child suffered, the child's continuing medical needs, and Mack's role in harming the child. The trial court expressed significant concern that despite pleading guilty, Mack did not otherwise express remorse or admit responsibility, instead telling the PSI writer and the trial court at sentencing that he was not a caregiver for the child.[5] The trial court noted that Mack did not have an adult criminal record, but it found that Mack was

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[5] The State countered this claim with information that one of the mother's relatives who helped Mack take care of the couple's children expressed concern about Mack's interactions with the children, which included striking one with a stick for soiling a diaper. The State also noted that before the child at issue in this case was born, Mack was criminally charged after a domestic violence incident involving the same mother. The State said Mack and the mother argued about whether she could take their other child, who was ill, to the hospital. The PSI report indicates the case was later dismissed due to the mother's lack of cooperation.

"a threat and a danger." It said that a prison sentence totaling fifteen years was necessary in order to adequately protect the public.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed a total of ten-and-a-half years of initial confinement and eight years of extended supervision. Its imposition of a total of eight-and-one-half years of initial confinement and six-and-one-half years of extended supervision was well within the maximum sentence and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Further, we note that Mack had already received the benefit of a reduced charge on one count that lowered his total exposure by six-and-one-half years.

In his response to the no-merit report, Mack offers several challenges to his sentence. He argues that the trial court erroneously exercised its discretion by not adequately explaining why a "near maximum consecutive sentence" was imposed, especially where the child's mother was given an imposed-and-stayed sentence and placed on probation. (Capitalization and bolding omitted.) These arguments do not raise an issue of arguable merit. First, as we have concluded, the trial court explained at length the basis for the sentence it was imposing, including its belief that Mack was a significant threat.

Second, "[a] mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." ***State***

v. Toliver, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (1994). Here, the trial court was well aware of the sentence it previously imposed in the child's mother's case, and Mack's counsel argued that a similar sentence would be appropriate. However, the trial court recognized the facts that made Mack's case different: he refused to show remorse or accept any responsibility (other than pleading guilty), and he blamed the mother for the child's neglect. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23 (At sentencing, a trial court properly takes into account the extent to which the defendant displays "'remorse, repentance and cooperativeness.'") (citation omitted). The trial court observed: "Part of the underlying issue in this case has to do with the manipulation of [the child's mother], the ongoing domestic violence, and the concern that the Court has that so much of this could have been prevented if there wasn't the coercive control in the household." The trial court also said that Mack needed "close, rehabilitative control." The trial court's recognition of the different levels of culpability and remorse, as well as Mack's rehabilitation needs, explained the difference in sentences.

Mack also argues that the trial court erroneously exercised its sentencing discretion by failing to determine whether Mack was eligible for the Earned Release Program ("ERP"). What Mack fails to recognize is that effective August 3, 2011, the legislature changed the name of the ERP to the Wisconsin Substance Abuse Program. *See* WIS. STAT. § 991.11 (2011-12); 2011 Wis. Act 38, § 19. The trial court explicitly considered whether Mack should be declared eligible for this program or the Challenge Incarceration Program and concluded that he should not be allowed to participate in either, based on "the violent nature of these offenses." We also note that no one disputed Mack's statements to the PSI writer that he does not use drugs or alcohol and does not have a substance abuse problem. We discern no issue of arguable merit related to the trial court's consideration of these special programs.

The final issue addressed in the no-merit report is whether there would be any merit to challenging the trial court's decision to impose a single DNA surcharge after dismissing the second DNA surcharge. We agree with postconviction/appellate counsel's analysis. Once the postconviction motion brought to the trial court's attention our decision in ***Radaj***, the trial court's subsequent decision to require Mack, a first-time felon, to pay a single DNA surcharge was consistent with ***Radaj***, ***Cherry***, and ***Long***.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the amended judgment and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chessir is relieved of further representation of Mack in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals