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December 21, 2016

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

2016AP787-CRNM State of Wisconsin v. Isaiah A. Gilmore (L.C. # 2013CF1971)

Before Kessler, Brennan and Brash, JJ.

Isaiah A. Gilmore pled guilty to first-degree reckless injury and to possessing a firearm while a felon. *See* WIS. STAT. §§ 940.23(1)(a), 941.29(2) (2013-14).[1] For the crime of reckless injury, the circuit court imposed a ten-year term of imprisonment comprised of six years of initial confinement and four years of extended supervision. For possessing a firearm while a felon, the

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

circuit court imposed a consecutive five-year term of imprisonment comprised of three years of initial confinement and two years of extended supervision.[2]

In an earlier proceeding, Gilmore's appellate counsel, Attorney Michael S. Holzman, filed a notice of no-merit appeal and a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). We rejected the no-merit report and dismissed the appeal to permit Gilmore to pursue an arguably meritorious challenge to the multiple DNA surcharges that the circuit court imposed. *See* ***State v. Gilmore***, No. 2015AP1053-CRNM, unpublished op. and order (WI App Jan. 26, 2016). In response to Gilmore's subsequent postconviction motion, the circuit court entered an order vacating one of the two surcharges.[3] Attorney Holzman again filed a notice of no-merit appeal, then filed and served the no-merit report now before us. Gilmore did not respond, but Attorney Holzman's no-merit report describes the ways Gilmore believes his trial counsel was ineffective and the reasons Attorney Holzman has concluded that Gilmore's concerns do not provide a basis for further meritorious litigation. Upon our review of the no-merit report and the record, we agree with Attorney Holzman and conclude that no arguably meritorious issues exist for an appeal. We summarily affirm. *See* WIS. STAT. RULE 809.21.

[2] The Honorable Jonathan D. Watts presided over the plea and sentencing and entered the judgment of conviction in this matter.

[3] The Honorable Frederick C. Rosa presided over the postconviction proceedings and entered the postconviction order granting in part and denying in part the motion to vacate DNA surcharges.

According to the criminal complaint, an argument broke out during a party early in the morning of April 14, 2013, in the 3000 block of North Teutonia Avenue, Milwaukee, Wisconsin. Gilmore produced a gun and began shooting. C.N. sustained multiple gunshot wounds, including wounds to his chest and abdomen that ultimately required installation of a colostomy bag. P.A.N. suffered a graze wound. On April 25, 2013, police located Gilmore hiding in a Milwaukee residence on West Wisconsin Avenue. He resisted arrest and battered the arresting officer. The complaint went on to allege that Gilmore had previously been convicted of a felony in Sheboygan County, Wisconsin, and that the conviction remained of record and unreversed. The State charged Gilmore with one count of first-degree reckless injury by use of a dangerous weapon, one count of first-degree recklessly endangering safety by use of a dangerous weapon, one count of possessing a firearm while a felon, and one count of battery to a law enforcement officer, all as a repeat offender. Gilmore pled not guilty to the crimes, but, as the trial date neared, he decided to resolve the charges with a plea bargain.

We first consider whether Gilmore could pursue an arguably meritorious challenge to his guilty pleas. At the start of the plea proceeding, the State described the terms of the parties' plea bargain. Gilmore would plead guilty to first-degree reckless injury and to possessing a firearm while a felon. The State would move to dismiss the allegations that Gilmore used a dangerous weapon and that he committed his crimes as a repeat offender, and the State would move to dismiss and read in the remaining crimes. As a disposition, the State would request incarceration in prison without also recommending a specific period of imprisonment. Gilmore confirmed that he had discussed the terms of the agreement with his lawyer and that he understood them.

The circuit court explained to Gilmore that upon conviction of first-degree reckless injury, he faced twenty-five years of imprisonment and a $100,000 fine, and upon conviction of

possessing a firearm while a felon, he faced ten years of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 940.23(1)(a), 941.29(2), 939.50(3)(d), 939.50(3)(g). The circuit court told Gilmore it could impose the maximum statutory penalties if it chose to do so and that it was not bound by the terms of the plea bargain or by any sentencing recommendations. Gilmore said he understood.

The circuit court warned Gilmore that if he was not a citizen of the United States, his guilty pleas exposed him to the risk of deportation, exclusion from admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Gilmore said he understood. Although the circuit court did not caution Gilmore about the risks described in § 971.08(1)(c) using the precise words required by the statute, minor deviations from the statutory language do not undermine the validity of a plea.[4] *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

The record contains a signed plea questionnaire and waiver of rights form with attachments. Gilmore confirmed that he reviewed the form and attachments with his trial counsel and that his answers on the form were true. The plea questionnaire reflects that Gilmore was twenty-one years old and had a high school equivalency diploma. The questionnaire further reflects that Gilmore understood the charges he faced, the rights he waived by pleading guilty,

[4] We observe that, before a defendant may seek plea withdrawal based on the circuit court's 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 Gilmore could make such a showing.

and the penalties that the circuit court could impose. A signed addendum reflects Gilmore's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of the evidence against him.

In response to the circuit court's inquiry, Gilmore said he could read well enough to understand the rights and defenses on the form and attachments. The circuit court told Gilmore that by pleading guilty he would give up the constitutional rights listed on the form, and the circuit court reviewed those rights on the record. Gilmore said he understood. The circuit court explained that by pleading guilty, Gilmore would give up his available defenses to the charges, any challenges to the complaint, and any challenges to the evidence against him. Gilmore said he understood. He assured the circuit court that he had not been threatened or promised anything to give up his rights and defenses and plead guilty.

Copies of the jury instructions describing the elements of the offenses were attached to the plea questionnaire. Gilmore told the circuit court that he had discussed the jury instructions with his lawyer and that he understood them. The circuit court then reviewed the elements of the offenses on the record. Gilmore said he understood.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). The circuit court questioned Gilmore about the allegations in the criminal complaint, and Gilmore admitted that

the facts alleged in the criminal complaint were true.[5] Additionally, his trial counsel agreed that that the circuit court could rely on the facts alleged in the criminal complaint. The circuit court properly found a factual basis for the guilty pleas. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Gilmore entered his guilty 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 basis for an arguably meritorious challenge to the validity of the pleas.

We next consider whether Gilmore could pursue an arguably meritorious challenge to his sentences. 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

[5] Although the record unambiguously shows that Gilmore committed the crimes underlying his convictions on April 14, 2013, the judgment of conviction erroneously states that Gilmore committed the crimes on April 4, 2013. Our order rejecting the earlier no-merit report in this case directed appellate counsel to seek correction of the error. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (a court may correct clerical errors at any time). It appears that no corrective action was taken. We therefore direct that, upon remittitur, the circuit court shall oversee the entry of an amended judgment of conviction reflecting that the crimes of conviction occurred on April 14, 2013. *See* ***id.***, ¶5.

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 "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. In seeking to fulfill the sentencing objectives, 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 the factors that are relevant in fashioning the sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court discussed the gravity of the offenses, observing that C.N. suffered serious injuries. The circuit court went on to explain that the crimes were aggravated because Gilmore not only defied the law barring him from possessing a gun but also fired the gun multiple times when he was intoxicated and not thinking clearly. In considering Gilmore's character, the circuit court noted that Gilmore was young, that he had a history of substance abuse, and that he had a juvenile record of property crimes as well as a felony conviction for maintaining a drug trafficking place. *Cf.* ***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 considered the need to protect the

public, stating that Gilmore had not benefitted from prior interventions as a juvenile or as an adult and that he was "remarkably dangerous" on April 14, 2013.

The circuit court identified protection of the community as the primary sentencing goal, explaining that Gilmore's antisocial acts were becoming more violent and that he had put numerous people in jeopardy when he opened fire at a party attended by more than twenty people. Accordingly, the circuit court rejected the option of a probationary disposition. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). Instead, the circuit court concluded that the gravity of these offenses and the risk Gilmore posed required imprisonment.

The circuit court identified the factors that it considered in choosing sentences in this matter. 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). Here, the penalties imposed are far less than the law allows. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Id.*** (citation omitted). Accordingly, Gilmore's sentences are not unduly harsh or excessive. We conclude that a further challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

We also conclude that Gilmore could not challenge the circuit court's conclusion that he was ineligible to participate in the challenge incarceration program, *see* WIS. STAT. § 302.045, and the Wisconsin substance abuse program, *see* WIS. STAT. § 302.05.[6] A person convicted of any crime specified in WIS. STAT. CH. 940 is statutorily ineligible to participate in either program. *See* §§ 302.045(2)(c); 302.05(3)(a). Gilmore's conviction for first-degree reckless injury in violation of WIS. STAT. § 940.23(1)(a) is a disqualifying offense.[7]

We next address Gilmore's concerns, described in appellate counsel's no-merit report, that trial counsel was ineffective. A defendant who alleges ineffective assistance of trial counsel must make a two-prong showing that counsel performed deficiently and that the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for

[6] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

[7] Assuming that Gilmore could make a colorable argument that he is statutorily eligible for the challenge incarceration and substance abuse programs, we are nonetheless satisfied that Gilmore could not mount an arguably meritorious challenge to the circuit court's decision barring him from participation. The circuit court told Gilmore that, even were he statutorily eligible for these prison programs, it would not permit him to participate because participation would reduce Gilmore's confinement time to less than the court believed necessary. When sentencing a person who is statutorily eligible to participate in the programs, the circuit court must make a discretionary decision as to whether the person may participate, and we will sustain the circuit court's decision if it is supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m). Because successful completion of either program permits an inmate to convert his or her remaining initial confinement time to extended supervision time, *see* WIS. STAT. §§ 302.045(1) & (3m)(b), 302.05(1)(am) & (3)(c)2., the circuit court here properly exercised discretion and reached an appropriate conclusion supported by the sentencing rationale.

counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Gilmore believes his trial counsel should have moved to suppress his identification by a witness who viewed him in a photographic line up. Gilmore asserts that, because the witness who identified him as the shooter had been drinking before the shooting took place, the witness's identification was suggestive and tainted. "Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). The condition of the witness at the time of the crime is not a factor. This issue lacks arguable merit.

Gilmore also believes his trial counsel should have moved to sever the charge of battery to a law enforcement officer from the other charges because the battery occurred after the other crimes and in a different location. Appellate counsel advises, however, and the criminal complaint shows, that Gilmore committed the battery on April 25, 2013, while trying to evade the officer attempting to take Gilmore into custody for the crimes he committed on April 14, 2013. A defendant prejudiced by joinder may move for severance, *see* WIS. STAT. § 971.12(3), but "when evidence of the counts sought to be severed is admissible in separate trials, 'the risk of prejudice arising due to a joinder of offenses is generally not significant[,]'" *see* ***State v. Hall***, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981) (citation omitted). Gilmore's attempt to escape from the officer on April 25, 2013, would have been admissible as evidence of his consciousness of guilt at a trial for the crimes he committed on April 14, 2013. *See* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710. Further pursuit of this issue would lack arguable merit.

Gilmore believes that trial counsel should have interviewed witnesses against him "to see if they would 'change their mind.'" We are unable to agree that this allegation reveals any prejudicial deficiency because nothing suggests that the potential witnesses against Gilmore had changed their minds. *Cf.* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (allegation of failure to investigate must show what the investigation would have revealed and how it would have affected the outcome of the proceeding).[8] This issue lacks arguable merit.

Gilmore further believes that his trial counsel was ineffective because Gilmore "was not informed of and improperly pled guilty to the crime of first-degree reckless injury." The record shows that the circuit court carefully explained the elements of first-degree reckless injury to Gilmore at the time of his plea and discussed how the facts alleged in the criminal complaint satisfied those elements. The record made at the plea hearing overrides any lack of information about the crime of first-degree reckless injury Gilmore may have had before he entered his plea. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996). Moreover, Gilmore told the circuit court at the time of the plea that he understood the elements of first-degree reckless injury and that he had reviewed the elements with his trial counsel. Further pursuit of this issue would lack arguable merit.

Gilmore also believes he had "a valid self[-]defense claim that was not pursued by counsel." At the plea hearing, however, trial counsel explained on the record that he and Gilmore in fact had discussed a potential claim of self defense but concluded Gilmore could not

[8] We observe that in anticipation of trial, Gilmore's trial counsel filed a witness list that identified an investigator. Accordingly, the record offers no reason to doubt that trial counsel conducted an appropriate investigation.

raise the claim successfully because he fired a gun at an unarmed victim. The circuit court then asked Gilmore if he understood and agreed with his lawyer's comments about why a self-defense claim lacked viability. Gilmore responded, "[y]es, sir." Because the record conclusively refutes Gilmore's allegation, further pursuit of this issue would lack arguable merit. *See* ***id.*** at 309-10.

Finally, we turn to Gilmore's obligation to pay a DNA surcharge. The law in effect when Gilmore committed his crimes in 2013 allowed a circuit court to impose a DNA surcharge as a discretionary matter when imposing a sentence for most felonies, including those at issue here. *See* WIS. STAT. § 973.046(1g) (2011-12); *see also* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.[9] Effective January 1, 2014, the legislature amended the law to require a mandatory DNA surcharge of $250 per felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55, 9426(1)(am); *see also* WIS. STAT. § 973.046(1r). The circuit court sentenced Gilmore on January 7, 2014, and imposed two DNA surcharges under § 973.046(1r).

In postconviction proceedings here, Gilmore challenged the two DNA surcharges. The circuit court vacated one of them, relying on ***State v. Radaj***, 2015 WI App 50, ¶¶1, 4-5, 35, 363 Wis. 2d 633, 866 N.W.2d 758, which holds that multiple mandatory DNA surcharges amount to unconstitutional *ex post facto* punishment when applied to a defendant sentenced after January 1, 2014, for crimes committed before that date. The circuit court concluded, however, that Gilmore must pay one DNA surcharge pursuant to ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR). ***Scruggs*** holds that

[9] When we decided ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, the governing version of WIS. STAT. § 973.046(1g) was identical to the version in effect when Gilmore committed the crimes at issue here.

a single mandatory DNA surcharge imposed at sentencing after January 1, 2014, for a crime committed before that date is not an unconstitutional *ex post facto* punishment.[10] ***Id.***, ¶¶3, 19.

The supreme court has accepted ***Scruggs*** for review, but published opinions of this court are precedential and controlling unless their language is modified, overruled, or withdrawn by the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Moreover, appellate counsel advises us that Gilmore does not wish to delay resolution of this appeal to await the outcome of ***Scruggs*** and instead "wishes to waive and not to pursue" any challenge to the remaining DNA surcharge. In light of the foregoing, further consideration of the DNA surcharge would lack arguable merit.

Based on an independent review of the record, we conclude 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 judgment of conviction, amended as required by footnote five, and the postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of any further representation of Isaiah A. Gilmore on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[10] We add that the discussion in ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (2014AP2981-CR), assumes the defendant did not previously pay a DNA surcharge in connection with a prior conviction. The record here includes a certified copy of the judgment of conviction entered after Gilmore's single prior felony conviction. The judgment shows Gilmore was not ordered to pay a DNA surcharge in connection with the conviction.