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DISTRICT I

November 22, 2022

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Derek D. Merriweather 641750
Gordon Correctional Center
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1969-CRNM State of Wisconsin v. Derek D. Merriweather
(L.C. # 2016CF5323)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Derek D. Merriweather appeals from a judgment of conviction, following a guilty plea, of one count of second-degree reckless injury with the use of a dangerous weapon. He also appeals from the order denying his postconviction motion for sentence modification. Merriweather's appellate counsel, Scott A. Szabrowicz, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Merriweather received

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

a copy of the report, was advised of his right to file a response, but did not do so. We have independently reviewed the record and the no-merit report as mandated by *Anders*. We conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm.

On November 29, 2016, the State charged Merriweather with one count of first-degree reckless injury, with the use of a dangerous weapon. The charges stemmed from the shooting of J.F., following an apparent drug deal gone wrong. According to the complaint, Milwaukee police responded to a 911 call reporting a shooting. Police found J.F. in the front seat of his car, bleeding from a gunshot wound to the head. Witnesses told police that the shooter—later identified as Merriweather—fired shots from “the drug dealer’s car” into J.F.’s car. The complaint states that J.F. was able to drive away from the scene before losing consciousness.

Merriweather ultimately pled guilty to one count of second-degree reckless injury with the use of a dangerous weapon. The circuit court held a plea hearing, conducted a colloquy, and accepted Merriweather’s guilty plea. The circuit court sentenced Merriweather to ten years of initial confinement, followed by five years of extended supervision. The circuit court also granted Merriweather eligibility for the Wisconsin Substance Abuse Program. Merriweather later filed a postconviction motion for sentence modification, arguing that the circuit court’s sentence was unduly harsh and that a new factor warranted sentence modification. The circuit court denied the motion without a hearing. This appeal follows.

Appellate counsel’s no-merit report addresses two issues: (1) whether Merriweather’s pleas were valid, and (2) whether the circuit court properly exercised its sentencing discretion.

As to the first issue, we conclude that the plea colloquy, together with the plea questionnaire/waiver of rights form and the addendum, demonstrate Merriweather's understanding of the information to which he was entitled and that his plea was knowing, voluntary, and intelligent. *See State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Thus, there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Merriweather's pleas were anything other than knowing, intelligent, and voluntary.

With regard to the circuit court's sentencing decision, we note that sentencing is a matter for the circuit court's 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. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It must also determine which objective or objectives are of greatest importance. *See Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, as well as additional factors it may wish to consider. *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 id.* The record reveals that the circuit court considered and applied the relevant sentencing factors, focusing specifically on the gravity of the offense. The resulting sentence was within the potential maximum 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). Therefore, there would be no arguable merit to a challenge to the court's sentencing discretion.

Any claim that the circuit court erred by denying Merriweather's postconviction motion for sentence modification would also lack arguable merit. We have already established that the circuit court did not erroneously exercise its sentencing discretion. Merriweather's "new factor" claim also lacks arguable merit. Merriweather's postconviction motion argued that while the circuit court found him eligible for the Wisconsin Substance Abuse Program, the Department of Corrections (DOC) found him ineligible for the program and the DOC's determination constituted a new factor warranting sentence modification.

A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law for our *de novo* review. See *id.*, ¶33.

A circuit court exercises its discretion in determining whether to find a defendant eligible for the challenge incarceration program and the Wisconsin substance abuse program. See *State v. Owens*, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; see also WIS. STAT. §§ 973.01(3g)-(3m). After the circuit court makes its eligibility finding, however, the DOC decides whether to place the inmate in the programs. See *State v. Schladweiler*, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114, *overruled on other grounds by Harbor*, 333 Wis. 2d 53, ¶¶47 & n.11, 52. The sentencing transcript here reflects that the circuit court was aware of the DOC's authority to determine an inmate's suitability for participation. Indeed, the circuit

court explicitly recognized that, notwithstanding its eligibility finding, Merriweather's participation in the program was ultimately a determination for the DOC. Merriweather's disqualification is therefore not a new factor. Further pursuit of this issue would lack arguable merit.

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

Upon the foregoing therefore,

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

IT IS FURTHER ORDERED that Attorney Scott A. Szabrowicz is relieved of further representation of Derek D. Merriweather in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals