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DISTRICT I

April 11, 2023

To:

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Circuit Court Judge
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Hon. Janet C. Protasiewicz
Circuit Court Judge
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David Malkus
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Dexter Gardner 473964
Waupun Correctional Inst.
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1101-CRNM State of Wisconsin v. Dexter Gardner (L.C. # 2016CF5259)

Before Brash, C.J., Dugan and White, JJ.

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).

Dexter Gardner appeals from a judgment of conviction entered after he pled no contest to first-degree intentional homicide and first-degree recklessly endangering safety, and the order denying his postconviction motion. His appellate counsel, Attorney David Malkus, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32

(2021-22).¹ Gardner was advised of his right to file a response, but did not do so. Upon this court's independent review of the record as mandated by *Anders*, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm.

In November 2016, Gardner shot and killed his wife, K.T., in front of their children during an argument. He also shot K.T.'s friend, C.L., multiple times in both legs, severely wounding her.

Gardner was arrested and charged with first-degree intentional homicide, first-degree recklessly endangering safety, being a felon in possession of a firearm, and misdemeanor bail-jumping. He initially plead not guilty by reason of mental disease or defect (NGI), as he claimed to have no memory of the shooting due to head trauma he had endured as a semi-professional football player. However, after two mental health evaluations failed to provide support for that plea, it was withdrawn.

Gardner subsequently entered into a plea agreement, where he agreed to plead no contest to the first-degree intentional homicide and first-degree recklessly endangering safety charges, with the other two charges to be dismissed and read in. In exchange, the State agreed to recommend life in prison with extended supervision eligibility to be left to the discretion of the trial court on the homicide count, and to recommend five years of initial confinement followed by five years of extended supervision on the recklessly endangering safety count, to be served concurrently to the life sentence.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The trial court accepted Gardner's plea, and sentenced him to life imprisonment for the first-degree intentional homicide count, as required. However, the court denied Gardner eligibility for release to extended supervision, noting the aggravated nature of the crimes—in particular, that they took place in front of their children, and the fact that there was a history of domestic violence between Gardner and K.T.² The sentence imposed for the recklessly endangering safety count was seven years of initial confinement followed by three years of extended supervision, to be served consecutively to the life sentence.

Gardner filed a postconviction motion seeking plea withdrawal and an NGI trial on the grounds that his trial counsel was ineffective because he misadvised Gardner regarding the need for expert testimony to proceed with an NGI defense. In the alternative, Gardner sought a new sentencing hearing, asserting that the trial court had given too much weight to the punishment factor in denying Gardner eligibility for extended supervision. An evidentiary hearing was held, during which Gardner testified that his trial counsel had not properly advised him regarding the law surrounding NGI pleas, and his trial counsel testified that he knew the law and would have advised Gardner accordingly. The postconviction court found counsel's testimony credible and Gardner's testimony incredible. It therefore determined that trial counsel was not ineffective, and denied Gardner's postconviction motion in its entirety. This no-merit appeal follows.

Appellate counsel addresses three issues in the no-merit report: whether there would be any arguable merit to appealing the validity of Gardner's pleas; whether there would be arguable

² Gardner's plea and sentencing were before the Honorable Carolina Stark; we refer to her as the trial court. Gardner's subsequent postconviction motion and evidentiary hearing on that motion were heard by the Honorable Janet Protasiewicz; we refer to her as the postconviction court.

merit to a claim that the trial court erroneously exercised its discretion in sentencing Gardner; and whether there would be arguable merit to appealing the court's denial of Gardner's postconviction motion.

We agree with appellate counsel's analysis that there would be no arguable merit to an appeal of any of these issues. The thorough plea colloquy by the trial court complied with all of the requirements set forth in WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record also reflects that with regard to sentencing, the court considered relevant sentencing objectives and factors. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Additionally, the court discussed the requirement for imposing a life sentence for the first-degree intentional homicide charge, *see* WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a) (2015-16), and explained its reasoning for denying Gardner eligibility for extended supervision. Furthermore, the ten-year sentence imposed for the first-degree recklessly endangering safety charge is within the maximum twelve and one-half year sentence authorized by law. *See* WIS. STAT. §§ 941.30(1), 939.50(3)(f) (2015-16). Therefore, there would be no arguable merit to a claim that Gardner's sentence is unduly harsh or unconscionable. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

With regard to Gardner's postconviction motion, the postconviction court addressed his ineffective assistance of trial counsel claim, making credibility determinations for both Gardner and his trial counsel after the evidentiary hearing. This court will not disturb such findings unless they are clearly erroneous. *See State v. Shata*, 2015 WI 74, ¶31, 364 Wis. 2d 63, 868 N.W.2d 93. The record here supports those findings, so there would be no arguable merit to challenging those findings on appeal.

The no-merit report points out, however, that the postconviction court did not specifically address Gardner’s argument for a new sentencing hearing, in which he asserted that the trial court had weighed the punishment factor too heavily. Although it may be deemed an erroneous exercise of discretion if the trial court gives “too much weight ... to one factor on the face of other contravening considerations,” *see State v. Hall*, 2002 WI App 108, ¶9, 255 Wis. 2d 662, 648 N.W.2d 41, here, as noted above, the trial court provided a thorough sentencing analysis, discussing the primary objectives and relevant factors. Therefore, we agree with appellate counsel there is no meritorious argument for a new sentencing hearing on the grounds that the trial court erroneously exercised its discretion in denying Gardner eligibility for extended supervision with his life sentence. *See Gallion*, 270 Wis. 2d 535, ¶17; *Ziegler*, 289 Wis. 2d 594, ¶23.

Our independent review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Gardner further in this appeal.

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 David Malkus is relieved of further representation of Gardner 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