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DISTRICT I

September 6, 2023

To:

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Circuit Court Judge
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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2022AP617-CRNM State of Wisconsin v. Taidell D. Torres (L.C. # 2020CF3327)

Before White, 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).

Taidell D. Torres appeals the judgment, entered on his guilty pleas, convicting him of two counts of felony bail jumping and one count of disorderly conduct.[1] His appellate counsel, David Malkus, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22) and ***Anders v. California***, 386 U.S. 738 (1967).[2] Torres filed a response. Upon consideration of the

[1] Torres filed a postconviction motion for additional sentence credit that was granted. Because Torres was successful in gaining relief, there are no issues of arguable merit that pertain to that order.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

report, Torres's response, and an independent review of the record as mandated by ***Anders***, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The criminal complaint charged Torres with two counts of felony bail jumping and one count of disorderly conduct. The disorderly conduct was charged as an act of domestic abuse and with the domestic abuse assessment. According to the complaint, police responded to the scene of a 911 call and found J.M.T. unresponsive due to an apparent head wound. The complaint further alleged that, as of the date of the filing of the complaint, J.M.T. was in the hospital, intubated and in critical condition. Additionally, the complaint alleged that Torres admitted to police that he had argued with J.M.T., the mother of his children, and that he had slammed a door causing J.M.T. to fall down the stairs of her home. The complaint noted that at the time of the incident, Torres was on bond in Milwaukee County Circuit Court Case No. 2020CF2622 with conditions to not commit crimes and to not have contact with J.M.T.

Torres pled guilty to all of the charges, without any plea agreement. The circuit court accepted the pleas and ordered Torres to serve the maximum time allowed on each count and ordered the sentences to run consecutively. The sentences totaled twelve years and three months of imprisonment. Initially, the circuit court gave Torres sentence credit for eighty-nine days. Torres subsequently filed a successful postconviction motion arguing that he was entitled to 229 days of presentence credit. This no-merit appeal follows.

The no-merit report addresses the potential issues of whether Torres's pleas were valid and whether the circuit court properly exercised its discretion during sentencing. The plea colloquy, when augmented by the plea questionnaire and waiver of rights form, the addendum,

and the applicable jury instructions, demonstrate Torres's understanding of the information he was entitled to and that his pleas were knowingly, voluntarily, and intelligently entered. *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). Additionally, the record reveals that the circuit court considered and applied the relevant sentencing factors. This court is satisfied that the no-merit report properly concludes the issues it raises are without merit.

In his response, Torres raises a number of issues related to sentencing, which we will briefly address.[3] He argues: (1) the circuit court erred at sentencing when it failed to consider his eligibility for the Challenge Incarceration Program (CIP); (2) the circuit court failed to give him credit for accepting responsibility and showing remorse; (3) the circuit court erred in not considering the aggregate effect of the consecutive sentences it imposed; and (4) trial counsel was ineffective for failing to ask for a concurrent sentence, which was warranted under the "same criminal episode" standard.

Regarding Torres's first claim, the sentencing transcript reflects the circuit court found that Torres was "not eligible for *any* Earned Release programming … given the nature and the gravity of the offense." (Emphasis added.) Under ***State v. Owens***, 2006 WI App 75, 291 Wis. 2d 229, 713 N.W.2d 187, the court need not make separate findings specific to eligibility for CIP. Rather, all that is required is that the court's overall sentencing rationale reasonably

[3] During his remarks at sentencing, Torres told the circuit court: "Whatever sentence you give me, I—I'll take it. I'm okay with that. I'm fine, and I just ask that you allow me to speak to my children."

justifies its determination as to such programs. *See* ***id.***, ¶9. Here, the court articulated sufficient legitimate reasons for determining that Torres was not eligible.

Torres's second and third claims also fail. In his response, Torres acknowledges that the circuit court, on several occasions, praised him for accepting responsibility for his actions and for expressing remorse, especially since it was done outside of any plea negotiations. Torres suggests that the circuit court's reference to giving him "credit" should have translated to a lesser sentence.[4] Torres additionally claims that the circuit court erroneously exercised its discretion when it imposed consecutive sentences without an adequate explanation of why that was the minimum amount of time necessary.

In its sentencing remarks, the circuit court deemed Torres's offenses to be "the most extreme bail jumping and disorderly conduct that has crossed my desk" and reflected on the significant impact that domestic violence has on the community. Insofar as the circuit court did not give things the same weight or consideration that Torres would have, this does not constitute an erroneous exercise of discretion. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 ("The weight to be given to each [sentencing] factor is within the discretion of the sentencing court."). There would be no arguable merit to further pursuit of these claims.

[4] During the sentencing hearing, the circuit court stated:

> Your lawyer states this is an absolute tragedy, and I completely agree. [Your lawyer i]ndicates that from the beginning of her representation with you, that you've wanted to take responsibility, and indeed you did plead guilty outside of any negotiations as charged in this matter. Your lawyer asks for you to get credit for that, and I will. That is acceptance of responsibility for pleading guilty outside negotiations as charged in this case.

As for Torres's fourth claim, a defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's performance "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697.

Torres, relying on ***Ruff v. State***, 65 Wis. 2d 713, 223 N.W.2d 446 (1974), argues that trial counsel was ineffective for failing to argue during sentencing that concurrent sentences were warranted under the "criminal episode" standard, which he contends was mitigating information highly relevant to sentencing. *See* ***id.*** at 728 (referencing a criminal episode as one that "relate[s] to the situation where a defendant is charged with multiple crimes for just one act, and not to where different acts have resulted in multiple charges, one for each act"). According to Torres, the facts were clear in that he was charged with two counts bail jumping and disorderly conduct, stemming from a single incident: He had contact with J.M.T. and slammed a door, which gave rise to the disorderly conduct charge.

During the plea hearing, trial counsel clarified the facts underlying the two separate bail jumping counts: one count was based on the violation of the no contact order that was in place in Milwaukee County Circuit Court Case No. 2020CF2622; and one count was based on Torres's commission of a new crime, i.e., disorderly conduct. The disorderly conduct was itself its own act stemming from Torres slamming a door causing J.M.T. to fall down the stairs of her home. Torres was convicted and sentenced for three acts. As in ***Ruff***, a contention to the contrary

would "not hold water." ***Id.*** Counsel is not constitutionally deficient for failing to raise a meritless argument. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Taidell D. Torres in these matters. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals