OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 23, 2014

To:

Hon. Kathryn W. Foster
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Brad Schimel
District Attorney
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

Mark A. Schoenfeldt
Attorney at Law
135 W. Wells St., Ste. 604
Milwaukee, WI 53203

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Donald Ray Brown, #408287
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2014AP239-CRNM State of Wisconsin v. Donald Ray Brown (L.C. #2011CF1243)

Before Brown, C.J., Reilly and Gundrum, JJ.

Donald Ray Brown appeals from a judgment of conviction for conspiracy to deliver a controlled substance. Brown's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Brown received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

After a twenty-year-old woman died from a heroin overdose, Brown was charged with first-degree reckless homicide on the allegation that he had supplied the heroin the woman consumed. The information included a charge of delivery of a controlled substance. Pursuant to a plea agreement, Brown entered a guilty plea to the amended charge of conspiracy to deliver and the first-degree reckless homicide charge was dropped. The agreement also included the promise that Brown would not be prosecuted for two deliveries of a controlled substance in Milwaukee county. At sentencing, as permitted by the plea agreement, the prosecution recommended the maximum sentence of ten years' initial confinement and five years' extended supervision. The maximum sentence was imposed.

The no-merit report addresses the potential issues of whether Brown's plea was freely, voluntarily and knowingly entered, whether there was a sufficient factual basis to support the guilty plea, whether the sentence was the result of an erroneous exercise of discretion, and whether Brown was denied the effective assistance of counsel. Our review of the record persuades us that no issue of arguable merit could arise from the issues discussed by the no-merit report.

With one exception, the circuit court engaged in an appropriate colloquy with Brown and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court properly relied upon Brown's signed plea questionnaire by referencing certain sections of the questionnaire and an attachment to

ascertain Brown's understanding of the elements of the offense and waiver of his constitutional rights. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. During the plea colloquy the circuit court did not give Brown the deportation warning required by WIS. STAT. § 971.08(2). However, the failure to give the warning is not grounds for relief because the record establishes that Brown was born in the United States, and Brown could not show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1. A factual basis for the plea was established by the criminal complaint and Brown's admissions at the plea hearing.[2] No issue of arguable merit arises from the taking of the plea.

As the no-merit report sets forth, the basic objectives of the sentence include the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others, and the circuit court is to identify the general objective of most import. ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court adequately discussed the facts and factors relevant to imposing the sentence. It identified the need to protect the public from Brown's drug dealing as the objective of most import, although it also recognized that the objectives of deterrence and punishment would be served. Although the maximum sentence was imposed, the circuit court's rationale supports the maximum. The sentence does not "violate the judgment of reasonable people concerning what is right and proper under the circumstances" and cannot be deemed excessive. ***Ocanas v. State***, 70 Wis. 2d 179,

[2] Although Brown lived in Milwaukee county and made drug sales out of his home there, venue in Waukesha county was established by the fact that contact with Brown originated from Waukesha county. Thus, a part of the conspiracy occurred in Waukesha county. *See* ***State v. Cavallari***, 214 Wis. 2d 42, 55, 571 N.W.2d 176 (Ct. App. 1997).

185, 233 N.W.2d 457 (1975). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

While the absence of a hearing in the trial court on a claim of ineffective assistance of trial counsel precludes review by this court, ***State v. Krieger***, 163 Wis. 2d 241, 253, 471 N.W.2d 599 (Ct. App. 1991), the record gives no suggestion that trial counsel failed to fulfill the duty of representation with respect to the negotiated plea. Trial counsel filed appropriate pretrial motions,[3] obtained a favorable plea agreement, and made appropriate arguments at sentencing.

The no-merit report fails to discuss, but should have, the competency evaluation ordered after the taking of Brown's plea. At the plea hearing, the circuit court questioned Brown about his mental illness and medication he was taking and determined Brown's ability to enter a voluntary, knowing, and intelligent guilty plea was not effected. However, afterwards, Brown's trial attorney reported that a relative of Brown's suggested he might be over medicated and a competency evaluation was ordered. An initial medical evaluation opined that Brown was not competent to proceed to sentencing. Brown was treated for approximately a three-month period and a subsequent medical evaluation opined that he was competent to proceed. Brown chose not

[3] Trial counsel filed a motion to dismiss the prosecution on the grounds that the complaint failed to set forth probable cause because it included statements made in reckless disregard for the truth which should be excised or recklessly omitted certain facts. *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); ***State v. Mann***, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985). The motion was denied. A claim that the complaint lacks probable cause when untruthful statements are excised is a claim that the circuit court lacks personal jurisdiction over the defendant. *See* ***State v. Marshall***, 92 Wis. 2d 101, 110, 284 N.W.2d 592 (1979); ***State ex rel. Warrender v. Kenosha Cnty. Court, Branch 3***, 67 Wis. 2d 333, 341-42, 227 N.W.2d 450 (1975). By his guilty plea, Brown forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. A challenge to personal jurisdiction is forfeited by the guilty plea. ***State v. Higgs***, 230 Wis. 2d 1, 9, 601 N.W.2d 653 (Ct. App. 1999). Therefore, we need not address whether the motion was properly denied.

to contest his competency at that point and indicated he wanted to proceed to sentencing. His trial attorney indicated that he observed no difference in Brown's behavior or affect and that there had been no change in his medications since the plea hearing. This sequence of events gives pause as to whether Brown was competent when he entered his guilty plea.[4]

The record provides a basis to conclude that there is no arguable merit to a claim that Brown was incompetent when he entered his guilty plea. Although Brown was committed after entry of his plea for the purpose of regaining competency to proceed, his competency was never measured against the applicable legal standard. The prosecution chose not to challenge the request for a competency evaluation or the initial report that Brown was incompetent. When Brown was determined competent after three months of treatment, there was the suggestion that he had never been incompetent in the first place and that the initial report had simply been based on inadequate information and observation. Brown's behavior and affect had not changed, and it was conceded that he could not meet the legal standard for incompetency. Brown himself acknowledged that he was able to understand the proceedings, communicate with his attorney, and was in agreement with the things his attorney stated during the hearing at which he chose not to challenge his competency.[5] If Brown could not claim he was incompetent after three months

[4] A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***McCoy v. Court of Appeals of Wis., Dist. 1***, 486 U.S. 429, 438 (1988). It is also important to enumerate issues considered and determined to lack merit to demonstrate that the no-merit procedure has been complied with. *See* ***State v Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124. Therefore, the no-merit report should have demonstrated that appointed counsel considered whether there was arguable merit to a claim that Brown was incompetent when he entered his plea.

[5] At the beginning of the hearing, Brown's trial attorney indicated that Brown had no interest in withdrawing his plea. Brown's later expression that he agreed with his attorney's statements was an affirmation that he had no interest in plea withdrawal.

of treatment with the same medications he was taking at the time of the plea hearing, he could not claim he was incompetent when the plea was taken.

Our 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 Brown further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved from further representing Donald Ray Brown in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals