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DISTRICT I

January 30, 2024

To:

Hon. J. D. Watts
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Christopher P. August
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Darryl Clarence Agnew
5688 N. 43rd St.
Milwaukee, WI 53209

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

2023AP452-CRNM State of Wisconsin v. Darryl Clarence Agnew
(L.C. # 2017CF4369)

Before Donald, P.J., Geenen and Colón, 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).

Darryl Clarence Agnew appeals a judgment convicting him of two counts of manufacturing/delivering between one and five grams of cocaine, one count of manufacturing/delivering between five and fifteen grams of cocaine, and one count of felony bail jumping. His appellate counsel, Christopher P. August, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),¹ and *Anders v. California*, 386 U.S. 738 (1967). Agnew received a copy of the report and was advised of his right to file a response but did not do so.

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

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.

The State initially charged Agnew with one count of manufacturing/delivering between one and five grams of cocaine, two counts of manufacturing/delivering between five and fifteen grams of cocaine, all as second or subsequent offenses, and three counts of felony bail jumping. Agnew ultimately entered into a plea agreement with the State, whereby Agnew would plead guilty to the three drug charges and one count of felony bail jumping. The State would dismiss the penalty enhancers on each drug count, as well as two felony bail jumping charges.

At the plea hearing, the State clarified that with respect to count three in the complaint—manufacturing/delivering between five and fifteen grams of cocaine—the drugs in question had been re-weighed and were determined to weigh less than five grams. Accordingly, Agnew’s conduct was a Class F felony, not a Class E felony. The State informed the circuit court that it filed an amended information amending the charge in count three to one count of manufacturing/delivering between one and five grams of cocaine. The plea was orally amended to reflect the change in penalty structure. The circuit court conducted a colloquy with Agnew, confirmed that Agnew’s plea to count three was to the amended charge, and accepted his guilty pleas. The matter proceeded to sentencing, where the circuit court imposed a global sentence of three years of initial confinement followed by three years of extended supervision.

Agnew filed a postconviction motion seeking plea withdrawal, resentencing, and sentence modification. The motion alleged that following the plea hearing, the circuit court clerk failed to make the change in the CCAP record reflecting the amendment to count three at the

plea hearing. Agnew alleged that the error carried over into sentencing, where the circuit court incorrectly relied on the original charge. The postconviction court denied the motion as to plea withdrawal, stating that the plea colloquy reflected the accurate charges and that Agnew voluntarily, knowingly, and intelligently entered the pleas. However, the postconviction court granted Agnew's motion for resentencing.

At the resentencing hearing, the circuit court followed the defense's recommendation and re-imposed the prior global sentence of three years of initial confinement followed by three years of extended supervision. This no-merit report follows.

Appellate counsel's no-merit report addresses three issues: (1) whether Agnew's pleas were knowing, intelligent, and voluntary; (2) whether the circuit court erroneously exercised its discretion in resentencing Agnew; and (3) whether the circuit court erred in denying the remaining claims in Agnew's postconviction motion.

Our review of the record—including the plea questionnaire/waiver of rights form, the jury instructions, and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. See *Bangert*, 131 Wis. 2d at 266-72; see also *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The circuit court also clearly confirmed that Agnew was pleading guilty to an amended count three prior to accepting his pleas. Any challenge to Agnew's pleas would lack arguable merit.

With regard to the circuit court's sentencing decision, we note that the circuit court appropriately granted Agnew's motion for resentencing. However, before the resentencing

hearing occurred, Agnew filed a *pro se* petition for sentence adjustment on the grounds that his conduct in prison supported his request. After reviewing the conduct at the resentencing hearing, Agnew's counsel acknowledged that Agnew's conduct in prison was actually poor and did not warrant a reduced sentence. Counsel therefore asked the circuit court to re-impose its original sentence.

Sentencing is a matter for the circuit court's discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court should consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It should also determine which objective or objectives are of greatest importance. *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court must 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. *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. *Id.* The record reveals that the court considered and applied the relevant sentencing factors, focusing specifically on Agnew's character. 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, a challenge to the court's sentencing discretion would lack arguable merit.

Appellate counsel's no-merit report also addresses whether Agnew could raise any additional challenges with regard to his postconviction motion. Our independent review of the

record confirms that counsel's no-merit report properly addresses this issue and that there would be no merit to any additional challenges to Agnew's postconviction motion.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Christopher P. August is relieved of further representation of Darryl Clarence Agnew in this case pursuant to 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