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July 30, 2013

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

2012AP2221-CRNM State v. Andrae Tyrell Valentine
2012AP2222-CRNM (L. C. Nos. 2010CF3294 and 2010CF3626)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Andrae Valentine has filed a no-merit report concluding there is no basis to challenge Valentine's convictions for substantial battery with intent to cause bodily harm, domestic abuse; misdemeanor battery; and criminal damage to property. Valentine was advised of his right to respond and has not responded. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

A criminal complaint in case No. 2012AP2222 alleged Valentine hit his live-in girlfriend twelve times with an open hand and closed fist, resulting in six stiches and a black eye. He was charged with one count of substantial battery with intent to cause bodily harm, domestic abuse.

While that case was pending, Valentine was charged with four additional counts: battery to a law enforcement officer, criminal trespass to a dwelling, criminal damage to property, and obstructing an officer. Those charges arose from an incident where Valentine allegedly broke into his live-in girlfriend's son's residence through a window, took a set of golf clubs and smashed the son's car. When a police officer attempted to arrest Valentine, he put his hands up as if preparing to fight the officer. Valentine attempted to run away after being pepper-sprayed, and then tackled the officer and punched him multiple times before being arrested.

The cases were scheduled for trial on October 5, 2010, and the circuit court began voir dire on that date. Voir dire continued the next day, at which point one of the prospective jurors advised the court that he had "seen the defendant's picture once before on the news channel" in connection with another offense. Another prospective juror had been generally disruptive during voir dire, and the court and parties agreed to dismiss the jury panel and start over.

Valentine decided to change his pleas before a new jury could be impaneled. He pled no contest to substantial battery, misdemeanor battery and criminal damage to property. The remaining charges were dismissed and read in.

Prior to sentencing, Valentine moved to withdraw his pleas, alleging they were entered hastily and in confusion, were coerced by trial counsel, and that he had always maintained his innocence. Valentine also filed a number of handwritten letters with the court alleging, among other things, that he did not understand that he was pleading to felony substantial battery. At the

motion hearing, Valentine and the attorney who represented him during the plea hearing testified. The attorney who was subsequently appointed to represent Valentine then sought to withdraw at Valentine's request, and Valentine represented himself for the remainder of the proceedings. The court concluded Valentine failed to present a "fair and just" reason warranting plea withdrawal and denied the motion.

The circuit court imposed a sentence consisting of twelve months in jail for substantial battery, and nine months in jail each for misdemeanor battery and criminal damage to property. The court stayed each sentence and placed Valentine on probation for two years.

There is no basis to challenge the court's decision to deny plea withdrawal. The decision to grant or deny a motion to withdraw a plea rests within the sound discretion of the circuit court. *See* ***State v. Jenkins***, 2007 WI 96, ¶29, 303 Wis. 2d 157, 736 N.W.2d 24. We will affirm if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.***, ¶30.

The plea withdrawal hearing began on April 29, 2011.[1] Counsel who represented Valentine during his pleas testified the State had previously offered an agreement whereby Valentine would plead to only three misdemeanors, but Valentine specifically rejected that plea offer, and the prosecutor withdrew the offer the day before trial. Counsel also testified Valentine understood that he was pleading to a felony. He testified they discussed the specific charges to which Valentine would plead, and the elements of the offenses. Counsel testified Valentine was

[1] The hearing was adjourned at the end of the day and rescheduled for further testimony.

clearly concerned by the prospective juror's comment about seeing him in the media, but counsel assured him that the jury had been stricken and a new jury would be brought in. Nonetheless, Valentine unilaterally indicated he was interested in reopening plea negotiations rather than bring in a new jury and go through voir dire again.

After trial counsel and Valentine testified, the circuit court concluded Valentine had failed to articulate a fair and just reason for plea withdrawal. The court's ruling was ultimately based upon a finding that Valentine was not credible. Credibility determinations are in the province of the fact-finder, and we apply a deferential, clearly erroneous standard to a court's credibility determinations. *See* ***id.***, ¶33.

Here, the circuit court specifically stated it did not believe Valentine entered the plea hastily, or in confusion. The court also found Valentine was not coerced by counsel. The court found incredible Valentine's testimony that he believed he was pleading only to three misdemeanors. The court concluded Valentine knowingly rejected that offer. The court stated:

> The issue which I see here, which goes to your credibility and makes [trial counsel]'s credibility look, should I say, better than yours or he's more credible than you, is the fact that you – this is how I phrased it in my head this morning – threw a lot of things out there, I think, in an attempt to make something stick, which made you more incredible in your arguments. Okay?
>
> ....
>
> And I think what you do, Mr. Valentine, is you get into that jail cell and start writing things down because that's your thought-process without thinking about what each one of them means. But I think you were thinking very clear on the day of the trial.

The court characterized Valentine as a "highly intelligent person," whose demonstrated intelligence undercut any claim that he did not understand the plea. The court also found counsel was not ineffective for failing to hire an investigator, primarily because Valentine did not tell

him who needed to be investigated. The court's findings are not clearly erroneous and, in fact, were supported by Valentine's own testimony, which demonstrated that his pleas were based on a rational concern about the strength of the State's evidence.

Quite simply, the record shows the pleas were knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). The circuit court engaged Valentine in a lengthy plea colloquy, buttressed by the plea questionnaire and waiver of rights forms, and the applicable jury instructions. Valentine advised the court that he signed the plea forms, and understood the constitutional rights he waived by pleading no contest, the elements of the offenses and the potential penalties.[2] The court specifically advised Valentine that it was not bound by the parties' agreement and could impose the maximum penalties. An adequate factual basis supported the convictions. Entry of a valid no contest plea constitutes a waiver of non-jurisdictional defects and defenses. ***Id.*** at 265-66.

There is also no basis to argue Valentine did not knowingly, voluntarily and intelligently waive his right to counsel. After the April 29, 2011 hearing, Valentine sought to dismiss his attorney so that he could represent himself for the remainder of the case. Valentine was dissatisfied with counsel's representation at the April 29 hearing.[3]

The circuit court engaged Valentine in the required colloquy, and Valentine indicated on numerous occasions that he wished to proceed pro se. The court addressed Valentine's ability to

[2] When asked if he needed more time to discuss with his attorney how the elements of the offenses related to the facts of his case, Valentine responded that he did not need more time and that he had no questions about the elements.

[3] The court stated, "You've now had five attorneys. Each one of them you have said, 'You're not doing what I want you to do.'"

represent himself, and Valentine stated that he was thirty-six years old, had a college degree in business, and had taken legal classes toward an associate's degree as a paralegal. He had no history of mental illness or substance abuse. The court advised Valentine that he had a constitutional right to be represented by an attorney, and Valentine stated he understood there would be disadvantages, but that was a risk he was willing to take.

Valentine advised the court that he may be interested in attempting to retain another attorney. The court allowed counsel to withdraw and gave Valentine three weeks to retain a lawyer. The court concluded Valentine was competent to represent himself pro se, and if he were unable to retain an attorney, he would represent himself.

At a subsequent status conference, Valentine told the court that he had been unable to hire an attorney. As a result, the court reconfirmed Valentine's competence to proceed pro se, and ruled Valentine was competent to represent himself. Although the court failed to discuss the seriousness of the charges and the potential penalties at that status hearing, the court discussed the charges Valentine faced and the potential penalties at the plea hearing, and Valentine confirmed that he understood that information.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the proper factors, including Valentine's character, the seriousness of the offenses and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted that Valentine treated the substantial battery victim as if she were a "punching bag." The cases were aggravated by the fact that only shortly after the substantial battery, he went back and committed a series of other offenses, also violent in nature. Nevertheless, for substantial battery, the court imposed and stayed a sentence of twelve months

in jail and placed Valentine on probation for two years. For the misdemeanor battery and criminal damage to property convictions, the court imposed and stayed a sentence of nine months in jail on each count and also imposed two years' concurrent probation. These sentences were far less than the maximum allowable by law and therefore presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Dustin Haskell is relieved of further representing Valentine in these matters.

Diane M. Fremgen
Clerk of Court of Appeals