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DISTRICT I

August 9, 2013

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

2012AP2381-CRNM State of Wisconsin v. Jamone C. Hegwood (L.C. #2011CF3308)

Before Curley, P.J., Kessler and Brennan, JJ.

Jamone C. Hegwood appeals from an amended judgment of conviction, entered upon his guilty plea, for felony intimidation of a witness (by a person charged with a felony), domestic abuse. *See* WIS. STAT. §§ 940.43(7), 968.075(1)(a) (2011-12).[1] He also appeals the order

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

denying his postconviction motion for resentencing.[2] Appellate counsel, Tonya N. Turchik, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Hegwood responded to the report. Counsel then filed a supplemental no-merit report addressing the issues raised in Hegwood's response.[3] After reviewing the submissions by counsel and Hegwood, and after conducting an independent review of the record, we conclude that there are no arguably meritorious appellate issues.

BACKGROUND

The following background is set forth in the complaint, which served as a factual basis for Hegwood's plea. The complaint alleged that on March 28, 2011, Hegwood was charged in Milwaukee County Case No. 2011CF1366 with one felony count of strangulation, contrary to WIS. STAT. § 940.235(1), and one misdemeanor count of battery, contrary to WIS. STAT. § 940.19(1).[4] As a condition of Hegwood's release in that case, he was ordered to have no contact with the alleged victim in both counts. A preliminary hearing was scheduled for April 5, 2011.

An investigator subsequently monitored Hegwood's jail calls to determine whether any contact had occurred between Hegwood and the victim. The investigator listened to four telephone calls made by Hegwood prior to the preliminary hearing date, specifically between the dates of April 2, 2011, and April 4, 2011. The telephone calls, which were transcribed and set

[2] The Honorable Ellen R. Brostrom presided over the plea procedings and sentenced Hegwood. The Honorable Rebecca F. Dallet issued the order denying Hegwood's postconviction motion.

[3] According to counsel, Hegwood never informed her of the issues he raised in his response.

[4] Although not reflected in the complaint in this case (Milwaukee County Case No. 2011CF3308), both charges in Milwaukee County Case No. 2011CF1366 included repeater enhancers.

forth in the complaint, gave rise to the charge of felony intimidation of a witness (by a person charged with a felony) in Milwaukee County Case No. 2011CF3308, which underlies this appeal.

A consolidated plea hearing was held regarding the two cases. Negotiations culminated with Hegwood pleading guilty to two counts of misdemeanor battery, domestic violence, in Case No. 2011CF1366 and one count of felony intimidation of a witness (by a person charged with a felony), domestic abuse, as charged in Case No. 2011CF3308. The circuit court accepted Hegwood's pleas, ordered a presentence investigation (PSI) report, and set the matter over for sentencing.

In Case No. 2011CF1366, Hegwood received the maximum available sentences of nine months on both counts of misdemeanor battery, to run consecutive to each other and any other sentence. Additionally, in Case No. 2011CF3308, the circuit court sentenced Hegwood to the maximum available sentence on the count of felony intimidation of a witness: ten years of imprisonment. The circuit court's sentence on this charge was bifurcated as four years of initial confinement and six years of extended supervision. Upon being notified by the Department of Corrections that the extended supervision portion of the sentence exceeded the maximum time allowed under WIS. STAT. § 973.01(2)(d)4., the circuit court commuted the extended supervision term to five years and entered an amended judgment of conviction.

Hegwood then filed a postconviction motion seeking resentencing.[5] He argued that the circuit court erroneously exercised its sentencing discretion "by considering amended charges in another case, relying on inaccurate information provided in the [PSI], overemphasizing an irrelevant and improper factor, and for ordering a harsh and excessive sentence." The State filed an informal letter responding to the motion. After reviewing the submissions, the circuit court issued a written decision and denied Hegwood's motion. This appeal follows.

Counsel identifies one potential issue for appeal: whether the circuit court appropriately exercised its sentencing discretion. In his response, Hegwood claims the plea colloquy was defective based on the circuit court's failure to comply with the requirements of WIS. STAT. § 971.08(1)(a). *See* ***id.*** ("Before the court accepts a plea of guilty … it shall … [a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted."). Additionally, Hegwood argues that his trial counsel was ineffective for failing to understand the elements of felony intimidation of a witness (by a person charged with a felony), domestic abuse, and for allowing Hegwood to plead guilty.

[5] The same date his counsel filed the postconviction motion for resentencing on his behalf, Hegwood filed a *pro se* motion to vacate the DNA surcharge on grounds that he had previously paid the surcharge in connection with another case. The circuit court granted Hegwood's request.

GUILTY PLEA

A. Plea Withdrawal Based on the Colloquy

In his response, Hegwood argues that we should direct counsel to file a postconviction motion for plea withdrawal based on the circuit court's alleged failure to comply with WIS. STAT. § 971.08(1)(a). He asserts:

> [I]t's debatable whether the circuit court fully fulfilled all the essentials of determining if Mr. Hegwood actually and clearly understood everything; we say this because reviewing the colloquy, Mr. Hegwood was only asked questions that demanded nothing more than "yes" and "no" answers. The circuit court even failed to tell Mr. Hegwood—or ask did he understand—he was giving up the right to a 12-person jury trial and that in order to find guilt, all 12 must unanimously agree. The circuit [court] leaned on the plea questionnaire in concluding that Mr. Hegwood fully understood every and all constitutional rights he was giving up….

Hegwood further claims that he "did not know—nor was he told—that he would be waiving mistakes and errors of police and [the district attorney] when entering a plea."

Having reviewed the record, we conclude that it belies Hegwood's claims and that there is no arguable basis for challenging Hegwood's guilty plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Hegwood completed a plea questionnaire and waiver of rights form and an addendum, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the circuit court conducted a thorough plea colloquy addressing Hegwood's understanding of the charge against him, the penalties he faced, and the constitutional rights he was waiving by entering a plea, *see* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72. The circuit court also explicitly told Hegwood that he could be sentenced to the maximum time available on each of the three charges to run consecutively, and Hegwood

indicated that he understood.[6] *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

The plea questionnaire reveals that at the time of his plea, Hegwood was twenty-five and had completed thirteen years of schooling. The form set forth the constitutional rights Hegwood was giving up by entering his plea. Additionally, the addendum made clear that by pleading, Hegwood was giving up his right to challenge the constitutionality of any police action, his right to challenge the sufficiency of the complaint, and his right to pursue defenses such as alibi, intoxication, self-defense, and insanity. The circuit court referenced the plea questionnaire during its colloquy, asking if Hegwood had reviewed each of the constitutional rights set forth with counsel; Hegwood answered affirmatively.[7] *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794 ("A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties."). During the

[6] In his response, Hegwood directs our attention to the circuit court's statement that it was "bound" by the plea negotiations, and asserts that he does not know if it was a mere mistake by the circuit court or if it was actually what the circuit court intended to say. The transcript in the record reads as follows: "THE COURT: Do you understand that as the judge I am bound by any plea negotiations, and I am free to impose each of these three maximums one after the other; do you understand that?" When reviewed in context—with the circuit court making clear that it could sentence Hegwood to the maximum time available—the court's statement that it was "bound" was either an error by the court reporter or an inadvertent mistake. Moreover, the plea agreement left the parties free to argue as to the length of Hegwood's sentence; so, in terms of the length of Hegwood's sentence, there were no terms for the circuit court to be bound by.

We further note that with her supplemental response, counsel provides "an updated and revised transcript," with the misstatement corrected. Counsel does not, however, provide an affidavit, or any explanation, as to how the revised transcript came to be. *See* WIS. STAT. RULE 809.32(1)(f) ("*Supplemental no-merit report*. If the attorney is aware of facts outside the record that rebut allegations made in the person's response, the attorney may file … a supplemental no-merit report and an affidavit or affidavits, including matters outside the record.").

[7] One of the rights specified on the form reads: "I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty."

colloquy, the circuit court gave Hegwood the opportunity to express any concerns or questions he had about his trial counsel's representation or about the plea proceedings. Hegwood did not voice any such concerns or ask questions.

We conclude that the plea questionnaire and waiver of rights form, the addendum, and the circuit court's colloquy appropriately advised Hegwood of the elements of his offense and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent and voluntary. There would be no arguable merit to a challenge to the colloquy.

B. Plea Withdrawal Based on the Ineffective Assistance of Trial Counsel

Hegwood next submits that he did not act maliciously, which was an element of the crime of intimidation of a witness. *See* WIS JI—CRIMINAL 1292 (setting forth the third element of the crime of intimidation of a witness under WIS. STAT. § 940.43: "The defendant acted knowingly and maliciously. This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying)."). He points to Comment 5 to WIS JI—CRIMINAL 1292, referencing the definition of "maliciously" found at WIS. STAT. § 940.41(1r): "'Malice' or 'maliciously' means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice."

According to Hegwood, "If we review the phone conversations between Mr. Hegwood and [the victim] from April 2-4, 2011[,] we find no malicious … acts on behalf of Mr. Hegwood, only his pleading with [the victim] not to show up to court to testify on him and explaining to her that he loved her and that he made a mistake." This leads Hegwood to conclude: "[H]ad trial

counsel understood the law and facts and legal claims of this case-at-bar, trial counsel would not have allowed and/or induced Mr. Hegwood to enter a guilty plea to the crime of § 940.43 because the elements of the law w[ere] not satisfied beyond a reasonable doubt." Because it was based on his trial counsel's faulty legal advice, Hegwood contends that his guilty plea cannot be said to have been entered knowingly and voluntarily.

Interestingly, Hegwood overlooks the remainder of the comment to which he directs our attention. Comment 5 to WIS JI—CRIMINAL 1292 goes on to state:

> This instruction *reduces the mental purpose to that of preventing the witness from testifying* because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

Id. (emphasis added). Hegwood's conduct, as he himself describes it—"his pleading with [the victim] not to show up to court to testify on him"—satisfies the third element. There is nothing in the record to indicate that further consideration of Hegwood's claim of ineffective assistance of trial counsel is warranted.

SENTENCING

Counsel addresses whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The primary objectives of a sentence include protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A sentencing court should identify the objectives of greatest importance and explain how a particular sentence advances those objectives. ***Id.*** The

necessary amount of explanation "'will vary from case to case.'" ***State v. Brown***, 2006 WI 131, ¶39, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted).

In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *See* ***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 court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

Counsel submits that Hegwood could argue that the circuit court's decision was based on "irrelevant and improper factors." Counsel's argument in this regard appears to be premised on the circuit court's comment during the sentencing hearing that Hegwood had "already been given a tremendous benefit on that case [i.e., Case No. 2011CF1366] as a result of the plea bargaining. As originally charged, you were looking at 12 years of potential total incarceration, and you are now looking at 18 months. I take that into consideration." We agree with the circuit court's assessment in its decision denying Hegwood's motion for resentencing that "the reduction of a substantial felony charge to a nine[-]month misdemeanor offense was fair game for the sentencing court to consider in imposing sentence." *Cf.* ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990) (circuit courts are permitted to consider even uncharged conduct when sentencing), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

Counsel also asserts that Hegwood could argue the circuit court "relied on inaccurate PSI information when imposing its sentence." Counsel contends that the PSI misrepresented Hegwood's supervision history, which prompted the circuit court to conclude that he had been

revoked five times on three criminal convictions. Counsel directs our attention to the following remarks made by the circuit court during the sentencing hearing:

> THE COURT: … First off, I have to look at your past record of criminal offenses and how you did in response to those. You don't have a long criminal history, although, the history that you have is fairly significant…. I think the thing that is quite striking, however, about your criminal history is the number of times you were revoked from supervision. That, obviously gives the Court concern about how you will do on supervision on this case, and indicates to the Court that certainly some period of incarceration for safety of the community is necessary.
>
> ….
>
> I have to consider whether there is a history of undesirable behavioral patterns, and, certainly, there is based on the number of times that you have been revoked. *For the record, I count five times revoked for just three criminal convictions.*
>
> In addition, the description of those supervisions indicates that you never really got off the ground. You never really took advantage of the opportunities for drug and alcohol counseling, batterer's intervention, and other kinds of therapeutic interventions that were being offered to you. That is also certainly an undesirable behavior pattern.

(Emphasis added.)

The circuit court pointed out in its decision denying Hegwood's postconviction motion:

> The defendant also contends that the presentence writer misrepresented the number of times the defendant was revoked. Page four of the presentence report has set forth specific revocation dates as to each of the defendant's cases. Although he was revoked on one of those dates on all three cases, the fact remains that he repeatedly performed abysmally on supervision and was on extended supervision for an armed robbery offense when the offense in this case was committed. Therefore, even though the total number of revocations for his three cases was three, and not five as [the circuit court] counted, the bottom line is that he presents a poor risk on supervision "with a history of undesirable behavioral patterns," as the [circuit] court indicated.

(Footnote and record citation omitted.) Moreover, we note that no corrections were made to the PSI prior to Hegwood's sentencing. *See* ***State v. Mosley***, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996) (A defendant forfeits a challenge to the accuracy of information in a presentence investigation report by failing to raise the challenge during the sentencing proceeding.).[8] As such, there would be no arguable merit to pursuing this issue further.

Reflecting on the seriousness of the intimidation charge, the circuit court pointed out the criminal justice system's difficulty with effectively addressing domestic violence because the victims do not want to come forward. The circuit court described intimidation as "victimization put on top of victimization." The circuit court accounted for the fact that the circumstances could have been more serious—Hegwood could have threatened to kill the victim or he could have "sent a buddy to her house to intimidate her. There w[ere] all sorts of additional things that could have made it more serious, but it is nonetheless a serious offense." The circuit court went on to describe the brutal nature of the underlying strangulation, which resulted in the victim's loss of consciousness, blood vessels bursting in her eyes, and her loss of control of bodily functions.

The record demonstrates that the circuit court followed the dictates of ***Gallion*** at the sentencing hearing. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

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

[8] As the circuit court points out in its decision denying Hegwood's motion for resentencing, the circuit court's reasoning applied whether Hegwood was revoked five times or three. Consequently, we (continued)

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 Tonya N. Turchik is relieved of further representation of Jamone C. Hegwood in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

see no cognizable claim of ineffective assistance in this argument insofar as Hegwood would not be able to satisfy the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).