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DISTRICT III

August 13, 2013

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

2012AP984-CRNM
2012AP985-CRNM
2012AP986-CRNM
2012AP987-CRNM
2012AP988-CRNM
2012AP989-CRNM
2012AP990-CRNM
2012AP991-CRNM
2012AP992-CRNM

State of Wisconsin v. Waylon T. Wayman
(L. C. ##2009CT38; 2009CM357; 2010CM20; 2010CM97; 2010CF120; 2010CF121; 2010CF126; 2011CM227; 2011CF58)

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

Counsel for Waylon Wayman has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Wayman's convictions for operating without a valid license; disorderly conduct; resisting an officer; misdemeanor bail jumping; two counts of misdemeanor battery; two counts of felony bail jumping; and one count of party to the crime of battery, as a hate crime. Wayman was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record 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 on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Wayman with the following twenty-six offenses, arising from nine circuit court cases: operating without a valid license, third offense within three years; two counts of criminal damage to property, one as party to a crime with a hate crime enhancer; party to the crime of operating a motor vehicle without the owner's consent; two counts of theft, as party to a crime; eleven counts of misdemeanor bail jumping; three counts of misdemeanor battery, two as party to a crime with a hate crime enhancer; domestic abuse strangulation/suffocation; domestic abuse substantial battery; three counts of felony bail jumping; and resisting an officer.

Under a global plea agreement, Wayman entered no contest pleas to operating without a valid license; disorderly conduct; resisting an officer; misdemeanor bail jumping; two counts of misdemeanor battery; two counts of felony bail jumping; and one count of party to the crime of battery, as a hate crime. In exchange for his no contest pleas, the State agreed to dismiss and

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

read in the other charges for restitution purposes and recommend a sentence "within the bounds" of recommendations made by the presentence investigation report. The court imposed consecutive and concurrent sentences totaling six and one-half years, consisting of three years' initial confinement followed by three and one-half years' extended supervision.

The record discloses no arguable basis for withdrawing Wayman's no contest pleas. The court's plea colloquy, supplemented by plea questionnaire and waiver of rights forms that Wayman completed, informed Wayman of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no contest pleas. The court confirmed Wayman's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also found that a sufficient factual basis existed in the criminal complaints to support Wayman's pleas. The record shows the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Upon our independent review of the record, this court discovered that the circuit court failed to personally advise Wayman of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). A potential issue would arise if Wayman could show that the pleas are likely to result in his "deportation, exclusion from admission to this court or denial of naturalization." *See* WIS. STAT. § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. The record reveals, however, that Wayman was born in Wisconsin and is, therefore, a citizen of the United States not subject to deportation. Any challenge to the pleas on this basis would therefore lack arguable merit.

The no-merit report indicates the circuit court may have lacked competency to accept Wayman's pleas in case Nos. 2010CF120 and 2010CF121 because nothing in the record established that a preliminary examination was held or waived in those matters. WISCONSIN STAT. § 970.03(1) provides: "A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed." Further, "a plea shall not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof." WIS. STAT. § 970.03(3). Although the underlying battery charges in both cases are Class A misdemeanors, the hate crime penalty enhancer changes the status of a Class A misdemeanor to a felony. *See* WIS. STAT. § 939.645(2)(b).

After the no-merit report was filed, the record was supplemented with a transcript of proceedings at which Wayman waived the preliminary examination in both cases. Any challenge to the court's competency to accept Wayman's pleas in those cases therefore lacks arguable merit. To the extent the no-merit report questions the sufficiency of the evidence to support bindover at the preliminary hearing for case No. 2011CF58, any claimed defect in that preliminary hearing is moot in light of Wayman's valid no contest pleas. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

The no-merit report addresses whether the State may have breached the plea agreement. At sentencing, the prosecutor recounted that his recommendation under the plea agreement was "to stay within the bounds of the presentence investigation report." Because the prosecutor noted there might be "different interpretations of that," the no-merit report questions whether "second-guessing his offer" constitutes a breach. The party asserting a breach of a plea

agreement must "show, by clear and convincing evidence, not only that a breach occurred, but also that it was material and substantial." ***State v. Jorgensen***, 137 Wis. 2d 163, 168, 404 N.W.2d 66 (Ct. App. 1987). Here, despite the prosecutor's "different interpretations" comment, he added that the State would "stay within the bounds" and the record establishes that the State's recommendations were consistent with those of the PSI. Any claim that the prosecutor's comment constituted a breach would lack arguable merit.

The record discloses no arguable basis for challenging the sentence imposed. After considering the seriousness of the offenses; Wayman's character, including his criminal history; the need to protect the public; and the mitigating factors Wayman raised, the court imposed a sentence authorized by law. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Wayman's sentence is so excessive as to shock public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975), or that the court erroneously exercised its sentencing discretion.

Finally, the no-merit report questions whether the judge should have disqualified himself based on a previous interaction with Wayman. The no-merit report recounts that at sentencing, the court stated "we had difficult times with you as a young person, I was worried about you as a young man, and how things would turn out." The court further recounted an incident in which Wayman "came in to help" his mother bring food to an event, and his mother "was beaming that day." The court recalled Wayman's stated plans at that time to focus on his future, noting that "it was so pleasurable, and hopeful to see the regard that you held for your own future." The court added: "And now so much of that has unraveled." That the court acknowledged this previous interaction with Wayman does not warrant disqualification, especially when the recounted

memory was favorable to Wayman. Because there is nothing in the record to suggest judicial bias or prejudice against Wayman, any claim that the judge should have disqualified himself lacks arguable merit.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney George S. Pappas, Jr. is relieved of further representing Wayman in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals