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September 24, 2013

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

2011AP2269-CRNM State of Wisconsin v. Edward Bernard Burgess
(L.C. # 2009CF792)

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

Counsel for Edward Burgess has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ concluding no grounds exist to challenge Burgess's convictions for first-degree reckless homicide while using a dangerous weapon and possessing a firearm as a felon. Burgess has filed a response challenging his sentence and claiming he was denied the effective assistance of counsel. Counsel has filed a supplemental no-merit report addressing Burgess's

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

concerns and this court ordered a record supplement. 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 judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Burgess with first-degree intentional homicide while using a dangerous weapon and possession of a firearm by a felon. According to the complaint, Burgess and his cousin, Tommy Mamon, were feuding for an unknown reason when Mamon hit Burgess in the head with an axe. After Mamon returned to his home, Burgess followed and shot his cousin at least three times in the thigh and groin area. Mamon died from his wounds.

Burgess initially pleaded not guilty by reason of mental disease or defect. After a court-ordered psychological evaluation did not support the NGI pleas, Burgess withdrew them. During plea negotiations, counsel questioned Burgess's competency to proceed. The court suspended the proceedings and ordered a competency evaluation. Consistent with the psychologist's opinion, the court found Burgess competent to proceed. In exchange for his guilty pleas to possession of a firearm by a felon and an amended charge of first-degree reckless homicide, the State agreed to recommend a "substantial period of imprisonment with the exact length left to the wisdom and discretion of the court." Out of a maximum possible seventy-five-year sentence, the court imposed consecutive sentences totaling thirty-five years, consisting of twenty years' initial confinement and fifteen years' extended supervision.

There is no arguable merit to challenge the circuit court's determination that Burgess was competent. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an

offense so long as the incapacity endures.” *State v. Byrge*, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant’s present mental capacity to understand and assist at the time of the proceedings. *Id.*, ¶31. A trial court’s competency determination should be reversed only when clearly erroneous. *Id.*, ¶45.

Here, the evaluating psychologist, Deborah Collins, submitted a report opining that Burgess was competent to proceed. Collins noted that Burgess displayed the “capacity to grasp factually and rationally the pending charges” and retained factual knowledge regarding a range of legal terms and concepts. Collins further noted that Burgess “displayed the capacity and motivation to assume a legally self-serving posture in his case” and was “reasonably articulate and organized in his comments.” At the competency hearing, neither the State nor Burgess challenged the doctor’s report. Consistent with the psychologist’s opinion, the court found Burgess competent to proceed. The record supports the circuit court’s determination.

The record discloses no arguable basis for withdrawing Burgess’s guilty pleas. The court’s plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Burgess completed, informed Burgess of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas. The court verified that medication Burgess had taken for a head injury did not interfere with his ability to understand the proceedings. The court advised Burgess of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c), and confirmed Burgess’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. The court also found that a sufficient factual basis existed in the criminal complaint to support Burgess’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).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Burgess's character, including his criminal history; the need to protect the public; and the mitigating factors Burgess raised. 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 Burgess'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).

In his response to the no-merit report, Burgess claims the circuit court erroneously exercised its discretion by failing to explain why it imposed consecutive sentences and why a risk reduction sentence was inappropriate. The circuit court, however, is not required to articulate an independent rationale for every aspect of a sentencing decision. See *State v. Matke*, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 692 N.W.2d 265; see also *State v. Lehman*, 2004 WI App 59, ¶18, 270 Wis. 2d 695, 677 N.W.2d 644. As noted above, the court considered proper sentencing factors, specifically noting: "There's a need to protect the public, and the only way to do that is with significant punishment." Based on a need to protect the public, the court, in the proper exercise of its discretion, imposed a consecutive sentence and determined Burgess would not be eligible for the risk reduction program. Any challenge to the sentence on these grounds lacks arguable merit.

Burgess also claims the court erred by failing to consider the sentence recommendation made in the presentence investigation report and deviating from that recommendation. The court was not bound to adopt the PSI's sentencing recommendation. See *State v. Hall*, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41. Further, the record shows the court had before it the

information the PSI provided, regardless whether the court said it read the PSI. Any challenge to the court's sentencing discretion on this ground would lack arguable merit.

Next, Burgess contends the court erred by construing a mitigating factor—specifically, the victim hitting Burgess in the head with an axe—as an aggravating factor. There is no arguable merit to this claim. Burgess cites the following comments made by the sentencing court: “There are a couple of aggravating factors. First of all, I understand that both of you were drunk, that you were arguing, you were acting stupid, that knives came out and eventually you were hit in the head by an axe. I think that that is pretty well established.” The court continued, however:

It's even the contention of the State that that was the case. So this is not one of those situations where you just come upon somebody, get into a verbal argument, pull out a gun and shoot them.

The problem I have is that after you had been injured, you left and came back with the intention of shooting him. You may not have been intending to kill him, but you came back with a gun to get even, and that's an aggravating part of this case. It would be one thing if there was a big argument going on, you had a gun and it accidentally went off during the course of an argument. That's not the case. You left and came back with a gun and shot him.

Obviously the other complicating factor here is that this is an interfamily situation. This is a situation which involves you killing your cousin. ... So as far as reckless homicide is concerned, it is an aggravated case. There's no question about it.

In context, it was not that Burgess was hit in the head with an axe but, rather, that Burgess got a gun and shot his cousin that the court deemed to be an aggravating factor.

Burgess also claims he was sentenced on the basis of inaccurate information in the PSI. A defendant may seek resentencing if the court imposed a sentence on the basis of inaccurate information. *State v. Tippleman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To secure

resentencing, however, the defendant must prove both that the court was presented with inaccurate information and that the court actually relied on that misinformation in reaching the sentence imposed. *Id.*, ¶26. If actual reliance on inaccurate information is shown, “the burden then shifts to the state to prove the error was harmless.” *Id.* Here, defense counsel disputed several items recounted in the PSI, and Burgess personally confirmed for the court that he had no other corrections. Burgess now identifies four additional challenges to information in the PSI. Any challenge to his sentence based on the alleged errors he now identifies would lack arguable merit because the failure to make a contemporaneous objection to allegedly inaccurate information at sentencing constitutes waiver. See *State v. Leitner*, 2001 WI App 172, ¶41, 247 Wis.2d 195, 633 N.W.2d 207. To the extent Burgess challenges the sentencing court’s consideration of uncharged offenses noted in the PSI, the sentencing court may consider “uncharged and unproven offenses” when assessing a defendant’s character. *State v. Frey*, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436.

With respect to the PSI items disputed at the sentencing hearing, Burgess asserts that his counsel was ineffective by failing to request a hearing to determine the accuracy of the disputed items. To establish ineffective assistance of counsel, Burgess must show both that his counsel’s performance was deficient and that the deficient performance was prejudicial to the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel’s performance fell below objective standards of reasonableness, and we apply a presumption that counsel’s performance was satisfactory. See *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. See *id.*

Here, counsel notified the court that Burgess disputed the following items in the PSI. First, counsel noted a September 17, 1986 incident in which the PSI indicated Burgess and his brother were engaged in a physical altercation with a cousin. Counsel clarified that Burgess, his brother and their cousin were involved in a confrontation with “others.” Second, Burgess disputed a May 1993 incident in which he was arrested for second-degree recklessly endangering safety, but later convicted of theft and fleeing an officer. The PSI recounted that according to police reports, Burgess attempted to run over a police officer, but Burgess claimed he did not realize how close the vehicle was to the officer because he was drunk and high. Third, counsel noted that Burgess disputed a 1996 conviction for endangering safety by use of a dangerous weapon and denied any involvement in the crime to the PSI author. Fourth, Burgess denied making a verbal threat to his probation agent. Finally, Burgess disputed two prison conduct reports he received in January and February 2008, indicating he had no recollection of those incidents.

The court acknowledged Burgess’s challenges to the PSI. That Burgess had no recollection of the 2008 conduct reports is not an assertion that they did not occur. Moreover, the court mentioned neither the conduct reports nor the claim that Burgess verbally threatened his probation agent when discussing the factors supporting the sentence imposed. To the extent Burgess disputed involvement in the 1986, 1993 and 1996 incidents, he had been either convicted or adjudicated delinquent of those incidents.

The court did mention the 1993 incident at sentencing, recounting anger issues Burgess had exhibited involving authority figures. The court stated: “I believe that you have spit in the face of security or corrections guards, that you’ve been disruptive in certain corrections-related programming, that you attempted to run an officer over in ‘93, that you became angry with US

Cellular when they turned off your phone.” Even assuming Burgess could prove at a hearing that he did not intentionally attempt to run over the officer, that incident was only one of several examples of his “anger issues” cited by the court. Further, Burgess’s anger was one of numerous factors considered by the sentencing court. Therefore, there is no arguable merit to a claim that Burgess was prejudiced by counsel’s failure to request a hearing on these challenges to the PSI.

Burgess also claims counsel was ineffective by failing to present facts to support a risk reduction sentence. As noted above, the sentencing court deemed Burgess ineligible for the risk reduction program, emphasizing the need to protect the public. Burgess contends that counsel should have argued that Burgess has a substance abuse problem; “has a serious risk of re-offense”; and could benefit from programming. The court, however, was informed of Burgess’s substance abuse problems and consequently ordered AODA assessment with follow-up treatment. Further, given the court’s emphasis on the need to protect the public, there is no arguable merit to a claim that Burgess was prejudiced by counsel’s failure to present additional facts in favor of the risk reduction program.

Next, Burgess asserts trial counsel was ineffective by failing to present evidence of the victim’s character “to counter victim impact evidence as it relates to the gravity of the offense.” Specifically, Burgess indicates that counsel should have rebutted victim impact statements with evidence of the victim’s history of violent offenses. The sentencing court, however, acknowledged that the victim “acted inappropriately” by hitting Burgess in the head and using “knives for threats.” The court, therefore, was aware the victim was not without culpability in the events preceding the fatal shooting. Any claim that Burgess was prejudiced by counsel’s failure to introduce additional evidence attacking the victim’s character would lack arguable

merit. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a *Machner*² hearing.

Finally, Burgess contends the judgment of conviction does not accurately reflect the judge's oral pronouncement. Specifically, Burgess points out that the court imposed costs and surcharges as a condition of extended supervision. The judgment of conviction includes a notation for payment of "all remaining costs, surcharges and assessments," but the notation does not fall under the section for conditions of extended supervision. Because this appears to be a clerical error, upon remittitur, the court shall enter an amended judgment of conviction moving the reference to payment of all remaining costs, surcharges and assessments under the section for conditions of extended supervision, consistent with the court's oral pronouncement.

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

Therefore,

IT IS ORDERED that the judgment is modified, and as modified, affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Paul G. Bonneson is relieved of further representing Burgess in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

² *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).