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October 2, 2013

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

2013AP159-CRNM State of Wisconsin v. Randy D. Love (L.C. #2012CF96)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Randy D. Love appeals from a judgment of conviction for robbery by threat of force, as a party to the crime, a Class E felony, contrary to WIS. STAT. §§ 943.32(1)(b), 939.50(3)(e), and 939.05 (2011-12).[1] Upon Love's no contest plea, the trial court ordered an eight-year bifurcated sentence, with four years each of initial confinement and extended supervision. Love's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v.***

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

California, 386 U.S. 738 (1967). Love received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we note a minor discrepancy between the trial court's oral pronouncement, in which no fine was ordered, and the judgment, which reflects a $10 fine. This appears to be a clerical error and we order that upon remittitur, the judgment shall be modified to remove the $10 fine. *See* ***State v. Prihoda***, 2000 WI 123 ¶15, 239 Wis. 2d 244, 618 N.W.2d 857 (where there is a conflict, the sentencing court's unambiguous oral pronouncement trumps the written judgment of conviction). We conclude that the judgment, as modified, may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

On February 8, 2012, Love and his five co-defendants entered a Polo Ralph Lauren Store and stole about $7000 worth of merchandise while threatening to hit or shoot anyone who interfered. The defendants drove to the store in two cars, and an employee was able to describe the vehicles, including one of the license plate numbers. Officers located the vehicles and, pursuant to a traffic stop, discovered the stolen merchandise and arrested the defendants. Several defendants, including Love, made statements admitting their involvement in the robbery to police. Pursuant to a plea agreement, which required the State to cap its recommendation at five years of initial confinement and five years of extended supervision,[2] Love pled no contest to the robbery charge and the court ordered a presentence investigation report (PSI). The PSI recommended a bifurcated sentence between five and seven years.

[2] The State also agreed not to charge a retail theft incident from January 2012. It appears that this incident was alleged in the State's other acts motion.

Appellate counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Love's no contest plea, and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

With regard to Love's plea, the record shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court also drew Love's attention to the completed plea questionnaire form and verified that Love reviewed, understood and signed the document. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form is not an adequate substitute for an in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken). There is no arguable merit to a claim that Love's plea was anything other than knowing, intelligent, and voluntary.

We also conclude that there is no arguably meritorious challenge to the trial court's exercise of discretion at sentencing. In fashioning the sentence, the trial court considered the seriousness of the offense, the defendant's character, history, and rehabilitative needs, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court considered the offense to be aggravated by the number of co-defendants acting in unison:

> Bottom line is, in terms of the aggravating side, you've got a group of individuals with I don't know how else to look at it but a mob

> mentality who went into this store and truly victimized the individuals in the store where they were fearful for their own lives and safety and it was all a matter of grabbing all they could grab as a group and with the threat again being made to the people who were in the store.

The trial court noted that Love's offenses seemed to be escalating and evinced "a level of behavior that was getting more and more out of control." The court explained that it looked at each defendant individually, and that Love's criminal history, including his previously revoked probation, as well as his behavior while in jail awaiting disposition of the present offense, were "disturbing":

> To have this kind of record already at 18, gives the Court great concern with regard for what kind of counseling needs he has and what's going to be available to get Mr. Love on the right path here because the behavior up to this particular incident and now through the behavior in the jail does show an individual who is out of control.

The trial court gave Love credit for acknowledging his own rehabilitative needs in terms of anger management and substance abuse, but also considered the PSI's individualized risk assessment which classified Love as at a high risk for both violent and nonviolent recidivism. The court explained that incarceration was necessary to protect the public and to address Love's rehabilitative needs, and determined that an eight-year bifurcated sentence, which was "something in between" the recommendations of the PSI and the State, was the "minimal period of time to address these sentencing needs." The trial court ordered Love to pay the DNA surcharge[3] and found him eligible for both the Earned Release and Challenge Incarceration

[3] The trial court ordered payment of the WIS. STAT. § 973.046(1g) DNA surcharge given the nature of Love's offense. This is an appropriate exercise of discretion under ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393.

Programs after he had served two years of initial confinement. Restitution was later set at zero dollars.

According to the no-merit report, Love has expressed concern that his sentence is too harsh in light of those ordered in his co-defendants' cases. We agree with appellate counsel's analysis and his conclusion that despite any disparity, the trial court properly exercised its discretion in sentencing Love. Wisconsin recognizes the importance of "individualized sentencing." ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Disparities in sentencing from one case to the next do not show an erroneous exercise of discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 187-88, 233 N.W.2d 457 (1975). Disparities must be arbitrary or based on considerations not pertinent to proper sentencing discretion in order to constitute a denial of equal protection. ***Id.*** Here, the trial court's sentence was based on relevant facts and proper considerations. Additionally, under the circumstances of this case, it cannot reasonably be argued that Love's sentence is so excessive as to shock the public's sentiment. ***Id.*** at 185. *See also* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). There is no arguably meritorious challenge to the sentencing court's exercise of discretion.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment as modified, and discharges appellate counsel of the obligation to represent Love further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is modified to remove the $10 fine, and as modified, summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew H. Morgan is relieved from further representing Randy D. Love in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals