



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/II

October 23, 2013

To:

Hon. Dennis R. Cimpl
Circuit Court Judge
Childrens Court Center
10201 W. Watertown Plank Rd.
Wauwatosa, WI 53226

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Russell D. Bohach
The Gettelman Mansion
2929 W. Highland Blvd.
Milwaukee, WI 53208

Karen A. Loebel
Asst. District Attorney
821 W. State Street
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kevin McToy 588387
Racine Youthful Offender Corr. Facility
P.O. Box 2500
Racine, WI 53404-2500

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

2013AP1230-CRNM State of Wisconsin v. Kevin McToy (L.C. # 2012CF92)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Kevin McToy appeals from a judgment convicting him of armed robbery with use of force as a party to a crime. McToy's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738 (1967). McToy filed a response. After reviewing the record, counsel's no-merit report, and McToy's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

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

The no-merit report addresses the following appellate issues: (1) whether McToy's guilty plea was knowingly, intelligently, and voluntarily entered and (2) whether the circuit court erroneously exercised its discretion at sentencing.

With respect to the entry of the guilty plea, the record shows that the circuit court engaged in a colloquy with McToy that satisfied the requirements of 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, ¶¶33, 38, 274 Wis. 2d 379, 683 N.W.2d 14. In addition, a signed plea questionnaire and waiver of rights form was entered into the record. We agree with counsel that any challenge to the entry of McToy's guilty plea would lack arguable merit.

With respect to the sentence imposed, the record reveals that the circuit court's decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing a sentence of ten years of imprisonment, the court considered the seriousness of the offense, McToy's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by the horrifying nature of the crime,² the court's decision does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, we agree with counsel that a challenge to the circuit court's decision at sentencing would lack arguable merit.

² McToy and another individual robbed a jewelry store. During the commission of the crime, they pointed guns at the owner of the store, knocked him to the ground, and threatened to kill him. They subsequently placed duct tape around the wrists and ankles of the individuals in the store and took items that did not belong to them.

As noted, McToy filed a response to counsel's no-merit report. In it, he contends that his trial attorney tricked him into entering the plea by guaranteeing him a lesser amount of prison time than he received. The problem with this argument is that it is directly contradicted by the record. During the plea colloquy, the circuit court asked McToy if, other than the plea negotiations, there were any other promises made to him to get him to plead guilty. McToy replied, "[N]o." Likewise, the court asked McToy if he understood that it was free to sentence him as it saw fit and that included the maximum sentence, which was forty years of imprisonment. McToy replied, "Yes." Given these questions and answers, we conclude that no arguable merit could arise from McToy's issue.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Russell D. Bohach of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of further representation of McToy in this matter.

Diane M. Fremgen
Clerk of Court of Appeals