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DISTRICT I

October 30, 2013

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

2013AP465-CRNM State of Wisconsin v. Deandre M. Miller (L.C. #2008CF1933)

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

Deandre M. Miller[1] appeals from a judgment of conviction, entered upon his guilty pleas, on one count of first-degree sexual assault with use of a dangerous weapon, one count of armed robbery with the use of force, and one count of burglary. Appellate counsel, Jon A. LaMendola, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS.

[1] For whatever reason, the circuit court's caption—and, thus, this court's caption—currently spells the defendant's first name as "Deandre," even though on various forms, defendant has signed his name as "D'Andrea."

STAT. RULE 809.32 (2011-12).[2] Miller was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Miller burglarized an apartment in April 2008, stealing a World War I rifle and a BB gun. He then used the BB gun in what the sentencing court would later call a "one-day crime spree." Miller first approached victim D.W., pointing the gun at her and forcing her into a nearby backyard, where Miller first made her perform mouth-to-penis intercourse with him at gunpoint. He then told her, "I'm ready. I want to get you from behind." He directed her to pull down her pants, and he forced penis-to-vagina intercourse. When he was finished, Miller asked D.W. whether she had any money. She opened her purse to show that she did not, and Miller let her leave. Miller next approached R.J., displaying the gun and asking her for money. R.J. told Miller she did not have any money, but gave Miller a pack of cigarettes, and Miller moved on. A few hours later, Miller approached L.P., again brandishing a gun and asking for money. L.P. gave Miller five dollars.

D.W. positively identified Miller from a line-up, but the other two victims were less confident in their identifications. Miller also gave a statement to police in which he essentially admitted committing the aforementioned crimes.

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

Miller was charged with one count of kidnapping, two counts of first-degree sexual assault with the use of a dangerous weapon, two counts of attempted armed robbery with the use of force, one count of armed robbery with the use of force, and one count of burglary. Defense counsel raised an issue of competency; after an examination, Miller was deemed competent to proceed. He first pled not guilty by reason of mental disease or defect (NGI), but the evaluating psychiatrist concluded Miller had been able to appreciate the wrongfulness of his conduct at the time of his crimes, so Miller returned to a not-guilty plea.

Miller had moved to suppress his statement to police, but lost. He also had a second competency evaluation based on his behavior in the middle of the suppression hearing; the examiner concluded he was competent. The case proceeded to a jury trial. However, after the jury indicated that it had reached its verdicts, but before it returned to the courtroom, the trial court advised the parties that if there were any guilty verdicts, it planned to order another competency evaluation. It explained that though Miller seemed to have understood the proceedings and had behaved appropriately throughout, it had observed Miller sometimes talking to himself and using strange gestures, so it would seek the additional evaluation out of an "abundance of caution." The jury convicted Miller on all seven charges.

The trial court ordered a new competency evaluation. The first evaluation was by Dr. Robert Rawski, who had performed the original competency and NGI evaluations. He concluded that this time, Miller was not competent to proceed. The State requested a second opinion, and the trial court ordered an evaluation from Dr. Anthony Jurek. Jurek also concluded that Miller was not competent. In short, Miller suffers from paranoid schizophrenia. Shortly before committing the crimes charged in this case, he had stopped taking his medication. This was not initially a problem—Rawski had been aware that Miller was unmedicated when he

performed the first evaluations, but noted that Miller was nevertheless asymptomatic. Miller, however, eventually decompensated, apparently because he was either not medicated or undermedicated while in custody of the jail. Further, Jurek noted that the median onset age for schizophrenia is the early twenties and, as Miller was twenty-two years old, it was possible that Miller's disease was simply evolving. Both Rawski and Jurek believed that Miller could be restored to competency with medication, and the trial court ordered Miller committed for treatment.

Within three months, Miller had been restored to competency. Trial counsel moved for a new trial on the grounds that Miller may not have been competent during the trial proceedings. She explained her reasons for not raising competency before trial, including her belief that certain behaviors were indicative of malingering, although Jurek had subsequently explained to her that those particular behaviors were quite typical of schizophrenia. Trial counsel was replaced with a successor because it appeared likely that trial counsel would become a witness in postconviction proceedings.

Successor counsel, however, managed to negotiate a plea agreement with the State. In exchange for Miller's guilty pleas to three counts, the State would not object to the circuit court vacating the jury's verdicts. The State would dismiss two counts outright and dismiss and read in the other two. Additionally, the State would recommend prison, but with no specific length, and the defense would be free to argue for an appropriate sentence. Ultimately, the circuit court accepted Miller's guilty pleas to one count of first-degree sexual assault with use of a dangerous weapon, one count of armed robbery with the use of force, and one count of burglary. The kidnapping count and one of the attempted armed robbery counts were dismissed, while the remaining sexual assault count and attempted armed robbery count were dismissed and read in.

The circuit court ordered Miller to serve two years' initial confinement and three years' extended supervision on the burglary, concurrent to two years' initial confinement and four years' extended supervision for the armed robbery. Those concurrent terms were set consecutive to twelve years' initial confinement and eight years' extended supervision for the sexual assault.

Though counsel does not specifically raise it, the first issue we address is whether there is any arguable merit to a challenge to the circuit court's denial of Miller's ***Miranda/Goodchild***[3] motion to suppress his statement to police. *See* WIS. STAT. § 971.31(10) (An order denying a motion challenging the admissibility of a defendant's statement may be reviewed in an appeal from the judgment of conviction, notwithstanding the fact that the judgment was entered on a guilty plea.). The motion alleged that Miller was unable to understand his ***Miranda*** warnings because of his mental illness and that, at the time of his statement, he was under the influence of intoxicants, rendering his statement involuntary. However, two officers testified about reading Miller his rights. They testified that Miller seemed calm and answered their questions appropriately, and that Miller did not appear intoxicated in any fashion. Miller also testified about receiving—and understanding—his ***Miranda*** rights. Based on that testimony, we conclude the circuit court properly denied the motion, so there is no arguable merit to a challenge to the denial of the suppression motion.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determined whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65.

The first issue counsel addresses in the no-merit report is whether there is any arguable basis for challenging Miller's pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Within the context of the pleas, counsel also discusses Miller's competency.

WISCONSIN STAT. § 971.13(1) prohibits the trial of incompetent defendants. Competency requires a defendant to possess "sufficient present ability to consult with [counsel] with a reasonable degree of rational understanding" and a rational, factual understanding of the proceedings against the defendant. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). An attorney has a duty to raise an issue of competency if there is reason to doubt a defendant's competency to proceed. *See* ***State v. Meeks***, 2003 WI 104, ¶44, 263 Wis. 2d 794, 666 N.W.2d 859.

There is no arguable merit to a claim of incompetency to enter the plea: Miller had been successfully restored to competency about eight months prior to the plea hearing. In restoring Miller to competency, doctors had settled on a medication regimen that involved giving Miller injections of a medication that would last for two weeks. Miller acknowledged at the plea hearing that he was still on this medication and that he was able to understand the proceedings. Successor trial counsel was also careful to note that Miller was "very lucid, very understanding, very -- comprehended everything." Successor counsel noted that the last plea offer prior to the trial would have required Miller to plead to four counts, not three, and further advised the circuit court, "I am a hundred percent comfortable with what [Miller] is doing today." Thus, the record indicates that Miller was competent to proceed with the plea.

Miller completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form generally acknowledged the maximum penalties Miller faced and, though one maximum had been understated, the circuit court noted the error on the form, informed Miller and counsel of the error, and then advised Miller of the true maximum penalty. The questionnaire, along with an addendum, also specified the constitutional rights Miller was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08 (2007-08), ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court ascertained Miller's background and ability to understand the proceedings; ensured no threats or promises had been made to Miller to secure the pleas; inquired whether Miller had reviewed possible defenses with counsel; verified that Miller understood the nature and elements of the offenses to which he was pleading, along with the correct maximum potential penalties; determined that a factual basis existed to support the pleas; reviewed with Miller the constitutional rights he was surrendering with the pleas; confirmed that Miller understand the circuit court was not bound by any sentence recommendations; notified Miller of the direct consequences of his pleas; and provided the immigration warning required by statute. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. It also explained to Miller the effects of the charges that would be dismissed outright and those that would be dismissed and read in.

The plea questionnaire and waiver of rights form and addendum and the circuit court's colloquy appropriately complied with the requirements for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

Appellate counsel also 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. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit 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 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 circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Our review of the record satisfies us that the circuit court appropriately considered relevant sentencing objectives and factors. In part, the circuit court noted that Miller had high needs for mental health treatment, follow-through on medication, and sobriety, concluding that he posed a high risk to the community if not medication-compliant. The circuit court also adequately explained why probation was not appropriate and why it chose both concurrent and consecutive sentences.

The maximum possible sentence Miller could have received was over 112 years' imprisonment. The sentences effectively totaling twenty-six years' imprisonment are well within

the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[4]

Our independent review of the record reveals no other potential issues of arguable merit.[5]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jon A. LaMendola is relieved of further representation of Miller in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] Counsel also addresses, briefly, whether there are any new factors justifying a sentence modification motion, *see* ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828, and whether there is any arguable merit to a claim of ineffective assistance of trial counsel, *see* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We agree with counsel's assessment that the record does not support any arguably meritorious claim of either type.

[5] We do, however, observe the following. At sentencing, the circuit court directed Miller to provide a DNA sample and then specifically stated, "I waive the surcharge." The judgment of conviction states, "Provide DNA sample, pay surcharge." It is not clear why the judgment of conviction does not conform to the circuit court's oral pronouncement. In this case, however, we decline to order the judgment of conviction corrected. Because Miller was convicted of first-degree sexual assault, contrary to WIS. STAT. § 940.225, imposition of the surcharge was *mandatory*, not discretionary. *Cf.* WIS. STAT. § 973.046(1r) *with* § 973.046(1g).