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January 22, 2014

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

2012AP2383-CRNM State of Wisconsin v. Russell L. Gray (L.C. # 2010CF352)
2012AP2601-CRNM State of Wisconsin v. Russell L. Gray (L.C. # 2011CF174)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Attorney Farheen Ansari, appointed counsel for Russell Gray, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses the validity of Gray's plea and sentence. Gray has responded to the no-merit report. Upon independently reviewing

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

the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Pursuant to a plea agreement, Gray pled no contest to aggravated battery and felony bail jumping. The court imposed consecutive sentences of one year and six months of initial confinement and three years of extended supervision for each of the convictions.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Gray's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

Here, the court held a hearing as to a proposed resolution of Gray's multiple pending cases, and the parties informed the court that they had reached a proposed agreement. The State said that, under the proposed agreement, Gray would plead guilty or no contest to aggravated battery and the parties would jointly recommend one year and six months of initial confinement, and three years of extended supervision; Gray would plead guilty or no contest to felony bail jumping, and the parties would jointly recommend one year of initial confinement and three years of extended supervision, consecutive to the battery sentence; and all other charges against Gray would be dismissed, except that one case would have all charges dismissed with one charge

read-in for sentencing purposes. Gray stated that he agreed that those were the terms of the proposed agreement.[2]

At the plea and sentencing hearing, the court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Gray and determine information such as Gray's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea.[3] *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The court noted that, at the prior hearing, Gray had submitted a signed plea questionnaire and waiver of rights form and the parties had informed the court as to the plea agreement. The court also informed Gray that it was not bound by the plea agreement and that it could impose up to three years of initial confinement and three years of extended supervision on each conviction, and that those sentences could be imposed consecutively. Gray confirmed that he understood that information.

[2] The parties informed the court that the proposed plea agreement was dependent on Gray's full payment of the restitution and surcharge for two charges of issuing a worthless check, and that payment had not yet occurred. Additionally, the parties disputed whether Gray would be entitled to sentence credit for time he was in custody in relation to the case that would have all the charges dismissed and one read-in. The court continued the case to allow the parties to resolve those issues. At the subsequent hearing, the parties indicated that Gray had made the required payments, and that the parties now agreed Gray was entitled to the disputed sentence credit.

[3] By order dated November 21, 2013, we noted that the circuit court failed to personally advise Gray of the deportation consequences of his plea, contrary to WIS. STAT. § 971.08(1)(c). We stated that there may be an arguable basis for plea withdrawal if Gray could show that his plea is likely to result in his "deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. We directed counsel to review that issue and consult with Gray. Counsel then informed us that Gray is a United States citizen, and thus this issue lacks arguable merit. Based on the information provided by counsel, we determine that this issue lacks arguable merit for appeal.

Gray asserts in his no-merit response that his counsel informed him that he would get a sentence of probation on the battery conviction.[4] Gray also states that his counsel indicated that the sentences for the two convictions would be imposed concurrently. Gray asserts that he believed at the time he entered his pleas that the sentences for the two charges had to run concurrently. However, our review of the record indicates that Gray understood the maximum penalty he faced upon entering his plea. Gray stated at the hearing on the proposed plea agreement that he agreed the proposed agreement included the terms as stated on the record by the State, which included a joint recommendation of one and a half years of initial confinement on the battery conviction and a consecutive sentence of one year of initial confinement on the bail jumping conviction. Additionally, Gray stated at the plea hearing that he understood that he could receive up to three years of initial confinement on each conviction, and that those sentences could be imposed consecutively. Finally, counsel's misjudging the likely sentence would not support an arguably meritorious claim of ineffective assistance of counsel. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272.

Gray also asserts that his counsel advised Gray to take the plea deal or the prosecutor would "hang" him. Gray asserts he did not commit the battery as alleged in the criminal complaint, and that he entered a plea only because there were so many charges against him that he had to fight.

[4] Gray's no-merit response also addresses an arson charge that was dismissed as part of the global plea agreement in these cases. Because that charge was dismissed, we do not address Gray's challenges to that charge.

We determine that there would be no arguable merit to a claim that counsel was ineffective by advising Gray that it was in his best interest to accept the State's offer. "[A] lawyer has the right and duty to recommend a plea bargain if he or she feels it is in the best interests of the accused." ***Id.***, ¶17. Our review of the record indicates that counsel negotiated a plea deal with the State that significantly lowered Gray's potential exposure.

Gray then asserts that the circuit court breached the plea agreement by sentencing Gray to one year and six months of initial confinement on the felony bail jumping conviction, when the parties agreed to recommend one year of initial confinement. However, as the court made clear at the plea hearing, the court was not bound by the plea agreement and was free to impose up to the maximum sentence on each conviction. Gray indicated he understood that information.

Gray also argues that he was denied the right to testify on his own behalf and present witnesses at the preliminary hearing, and that if he had done so he would not have been bound over for trial. He asserts that his counsel was ineffective by failing to demand that Gray be allowed to testify and present witnesses at the preliminary hearing. However, the preliminary hearing tests only whether there are sufficient facts to believe that the defendant committed a felony. ***State v. Anderson***, 2005 WI 54, ¶24, 280 Wis. 2d 104, 695 N.W.2d 731. The court may not choose between competing facts. ***Id.*** The victim testified at the preliminary hearing, thus supporting bindover. If Gray had testified or had others testified as to a different version of events, that would not have changed the outcome of the preliminary hearing.

We determine on our review of the record that there is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Gray's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Gray's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered the facts relevant to the standard sentencing factors and objectives, including the need to protect the public, Gray's character, and gravity of the offense. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. Although the sentence was greater than the joint sentencing recommendation under the plea agreement, it was within the applicable penalty range. *See* WIS. STAT. §§ 940.19(4); 946.49(1)(b); 939.50(3)(h); 973.01(2)(b)8. The sentence was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Gray 394 days of sentence credit, on counsel's stipulation. We discern no erroneous exercise of the court's sentencing discretion.

Gray argues that he was sentenced to one year and six months of initial confinement for issuing an $18.00 worthless check, and contends that sentence is excessive and unusual and disproportionate to the crime. However, Gray was convicted of aggravated battery and felony bail jumping, and the charge of issuing a worthless check was dismissed. As we have explained, we discern no arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion.

Finally, Gray argues that his sentence credit should have been applied differently between his two convictions, which Gray believes would have resulted in a different amount of time on extended supervision. However, WIS. STAT. § 302.113(4) provides that the aggregate terms of confinement and extended supervision in consecutive sentences are treated as single

continuous terms. Thus, however the sentence credit was divided, it would apply to the single continuous term of initial confinement.

We have considered the remainder of the assertions in Gray's no-merit response, and determine they do not support any arguably meritorious postconviction or appellate issues. Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Ansari is relieved of any further representation of Gray in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals