



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 II

February 26, 2014

To:

Hon. Peter L. Grimm
Circuit Court Judge
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Ralph Sczygelski
Sczygelski & Pangburn Law Firm, LLC.
713 Washington St.
Manitowoc, WI 54220-4525

Eric Toney
District Attorney
Fond du Lac County
160 South Macy Street
Fond du Lac, WI 54935

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

Daryl R. Dudevoire 592633
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2013AP1994-CRNM State of Wisconsin v. Daryl R. Dudevoire (L.C. #2012CF157)

Before Brown, C.J., Reilly and Gundrum, JJ.

Daryl Dudevoire appeals from judgments convicting him as party to the crime of burglary contrary to WIS. STAT. § 943.10(1m)(a) (2011-12)¹ and aggravated battery contrary to WIS. STAT. § 940.19(6)(a). Dudevoire was also convicted of misdemeanor bail jumping contrary to WIS. STAT. § 946.49(1)(a). Dudevoire's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Dudevoire received a

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

copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgments because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Dudevoire's no contest pleas were knowingly, voluntarily and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether Dudevoire received effective assistance from his trial counsel. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of the no contest pleas, Dudevoire answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.² The record discloses that Dudevoire's no contest pleas were knowingly, voluntarily and intelligently entered, *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, *State v. Harrington*, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The court also explained party to the crime liability and the significance of the dismissed and read-in offenses. Additionally, the plea questionnaire and waiver of rights form Dudevoire signed is competent evidence of knowing and voluntary pleas. *State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights

² We note that the circuit court did not warn Dudevoire, as required by *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794, that his no contest pleas could lead to deportation. No issue with arguable merit arises because the presentence investigation report confirms that Dudevoire is a citizen of the United States.

form may not be relied upon as a substitute for a substantive 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 a plea is taken. *Hoppe*, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Dudevoire's no contest pleas.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Dudevoire to consecutive maximum felony terms: twelve and one-half years for burglary and six years for aggravated battery. The court also imposed a one-year term of probation with nine months in jail for bail jumping. In fashioning the sentences, the court considered the seriousness of the offenses, Dudevoire's character and history of other offenses, the impact on the victim, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The felony sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentences of confinement and extended supervision. Because he was convicted of a crime under WIS. STAT. ch. 940, Dudevoire was not eligible for the Challenge Incarceration Program or the Earned Release Program. Sec. 973.01(3g) and (3m). The victim's restitution request was adequately documented, and the court did not err in imposing restitution. WIS. STAT. § 973.20(3) and (7). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

The circuit court stated reasons for requiring Dudevoire to pay the DNA surcharge under WIS. STAT. § 973.046. *State v. Cherry*, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d

393. No issue of arguable merit could arise from a challenge to the imposition of the DNA surcharge.

The no-merit report addresses whether Dudevoire received effective assistance from his trial counsel. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing.

The no-merit report relates that Dudevoire has the following complaints about his trial counsel: (1) counsel was drawing pictures on her paperwork during sentencing, (2) counsel failed to effectively argue for a shorter sentence, and (3) counsel failed to seek recusal of the circuit court judge because that judge presided over a sentencing for Dudevoire's father.

While we cannot comment on counsel's "doodling," we have reviewed the sentencing transcript, and we see no deficient performance by counsel.³ Counsel sought correction and clarification of the presentence investigation report and she tried to mitigate Dudevoire's prior offenses. During lengthy sentencing remarks, counsel argued that the circuit court should consider Dudevoire's youth and difficult childhood and family relationships. Counsel argued for a stayed sentence and a lengthy term of probation. Dudevoire does not suggest what additional information his trial counsel should have conveyed to the court at sentencing. That the court

³ We observe that pursuant to the plea agreement, fifteen counts were dismissed and read in.

imposed the maximum felony terms is not attributable, on this record, to counsel's efforts at sentencing.

On the question of recusal, there is no indication that the circuit court judge was unable to preside impartially. We have upheld the circuit court's exercise of sentencing discretion based on the record before us. We see no issue with arguable merit for appeal.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did 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, affirm the judgments of conviction and relieve Attorney Ralph Sczygelski of further representation of Dudevoire in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Ralph Sczygelski is relieved of further representation of Daryl Dudevoire in this matter.

Diane M. Fremgen
Clerk of Court of Appeals