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DISTRICT II

April 23, 2014

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

2013AP2026-CRNM State of Wisconsin v. Marcell C. Brown (L.C. # 2012CF180)

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

Marcell C. Brown appeals from a judgment of conviction for armed robbery with use of force, as a party to the crime. Brown's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Brown 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 report and an independent review of the record, we conclude that

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

the judgment 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.

Two men entered a Taco Bell restaurant in West Bend and each man had a gun. One employee was hit in the head with the butt of the gun. The other employee was pushed to the ground and then forced to open the safe. Cash and coins were taken. Brown admitted that he participated in the crime with his brother. He was charged with being a party to the crimes of substantial battery, misdemeanor battery, and armed robbery with the use of force. He was also charged with being a felon in possession of a firearm. Brown entered a guilty plea to the armed robbery charge. The two battery charges were dismissed. The felon in possession charge was dismissed as a read-in at sentencing. The prosecution was free to argue for any sentence. Based on the seriousness of the offense and that Brown was on extended supervision when he committed the crime, the circuit court imposed a twenty-year sentence consisting of ten years' initial confinement and ten years' extended supervision to be served consecutive to a sentence Brown was then serving.

The no-merit report addresses the potential issues of whether Brown's plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. Our review of the record persuades us that no issue of arguable merit could arise from either point.

With one exception, the circuit court engaged in an appropriate colloquy with Brown and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***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.[2] To establish Brown's understanding of the waiver of his constitutional rights, the circuit court referenced the plea questionnaire Brown had signed and obtained Brown's confirmation of understanding of his waiver. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. The elements of the offense, including party to a crime liability, were reviewed with Brown. The difference between charges dismissed outright and dismissed and read in was also discussed.[3] During the plea colloquy the circuit court did not give Brown the deportation warning required by WIS. STAT. § 971.08(2). However, the failure to give the warning is not grounds for relief because the record establishes that Brown was born in the United States and Brown could not show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1. No issue of arguable merit arises from the taking of the plea.

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. The court adequately discussed the facts and factors relevant to the seriousness of the offense, Brown's character and history of prior offenses, and the need to

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[2] Brown appeared by videoconferencing at the plea hearing. The circuit court made a record that Brown personally waived his right to be present in the same courtroom as the judge. The statutory right to be present under WIS. STAT. § 971.04(1)(g) can be waived and a valid waiver was made. *See* ***State v. Soto***, 2012 WI 93, ¶42, 343 Wis. 2d 43, 817 N.W.2d 848.

[3] ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835, suggests that at the plea hearing the circuit court "should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge." Although Brown did not receive an advisement of this breadth during the plea hearing, the record reflects he was aware that in contrast to charges dismissed outright which the circuit court said it would not consider, the read-in charge could be considered at sentencing.

protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Although the wrong COMPAS assessment was originally attached to the presentence investigation report (PSI), the error was corrected and the circuit court spoke with the PSI author at the start of the sentencing hearing and confirmed that the author had used the correct COMPAS assessment when writing the PSI. Further, we cannot conclude that the twenty-year sentence when measured against the maximum forty-year sentence is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). No meritorious challenge to the sentence exists.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved from further representing Marcell C. Brown in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals