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DISTRICT I

April 24, 2014

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

2013AP1952-CRNM State v. Reginald Adam Keaton (L.C. #2011CF1916)

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

Reginald Adam Keaton appeals from a judgment of conviction, entered upon his guilty pleas, for second-degree reckless homicide and second-degree recklessly endangering safety, contrary to WIS. STAT. §§ 940.06(1) and 941.30(2) (2011-12).[1] Appellate counsel, John T. Wasielewski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Keaton did not file a response. After independently reviewing

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

The Honorable David L. Borowski presided over the plea proceedings in this case and the Honorable Jeffrey A. Wagner sentenced Keaton and entered the judgment of conviction.

the record and the no-merit report, this court concludes there are no arguably meritorious issues and, therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

As set forth in the complaint, which served as a factual basis for Keaton's pleas, on April 22, 2011, police were dispatched to the scene of a shooting where they observed Joseph Lee on the ground. Lee had been shot, but was alive. He was transferred to the hospital.

Approximately one block away from where they found Lee, the police found a man in a vehicle who had suffered a gunshot wound to his head. He was pronounced dead at the scene.

Three days later, a detective spoke to Lee, who advised that on the night of the shootings, Keaton had called him about a drug deal. Lee drove his vehicle and met Keaton. Also present in the vehicle was Lee's cousin, who was the homicide victim in this case. According to Lee, Keaton got in the vehicle, pulled out a gun and shot Lee in the face. After he was shot, Lee heard a second shot and grabbed the driver's side door in an attempt to flee. He was then shot again in his right shoulder. Lee ran down the street until he collapsed.

In the amended information that followed, Keaton was charged with first-degree intentional homicide, use of a dangerous weapon, attempted first-degree intentional homicide, use of a dangerous weapon, and possession of a firearm by a felon. The first-degree intentional homicide charge alone carried with it the potential for a life sentence. *See* WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a).

Pursuant to a plea agreement, Keaton pled guilty to reduced charges of second-degree reckless homicide and second-degree recklessly endangering safety. In exchange, the State requested that the court dismiss the remaining charge of felon in possession of a firearm. The State further agreed to make a global sentencing recommendation of fifteen years of initial

confinement with the amount of extended-supervision time to be left to the circuit court's discretion. The State agreed that it would not take a position on whether the sentence would run concurrently or consecutively to a revocation sentence Keaton was serving at the time. The State also noted on the record that as part of the agreement, Keaton would be responsible for restitution. The circuit court accepted Keaton's pleas and set the matter over for sentencing.

On the charge of second-degree reckless homicide, the circuit court sentenced Keaton to ten years of initial confinement and five years of extended supervision. On the charge of second-degree recklessly endangering safety, the circuit court sentenced Keaton to five years of initial confinement and three years of extended supervision, with the sentences to run consecutive to each other and to the revocation sentence Keaton was serving. Additionally, the circuit court ordered Keaton to pay $2675 to the homicide victim's family, which related to funeral expenses.

Counsel identifies two potential issues for appeal: whether the circuit court properly accepted Keaton's guilty pleas and whether it appropriately exercised its sentencing discretion. We will address each issue in turn.

There is no arguable basis for challenging Keaton's guilty pleas. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Keaton completed a plea questionnaire and waiver of rights form and an addendum, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the circuit court conducted a thorough plea colloquy addressing Keaton's understanding of the charge against him, the penalties he faced, and the constitutional rights he was waiving by entering a plea, *see* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72. The circuit court also explicitly told Keaton that at the time of sentencing, it might follow the State's recommendation, it might follow Keaton's attorney's

recommendation, or it might do something different. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

The plea questionnaire and waiver of rights form (with the relevant jury instructions, which were attached), the addendum, and the circuit court's colloquy appropriately advised Keaton of the elements of his offense and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent and voluntary. There would be no arguable merit to a challenge to the plea's validity and the record discloses no other basis to seek plea withdrawal.

The second issue counsel raises is 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. The primary objectives of a sentence include protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A sentencing court should identify the objectives of greatest importance and explain how a particular sentence advances those objectives. ***Id.*** The necessary amount of explanation "'will vary from case to case.'" ***State v. Brown***, 2006 WI 131, ¶39, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted).

In seeking to fulfill the sentencing objectives, the 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 it 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 court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

At sentencing, the circuit court commented on Keaton's history of undesirable behavior patterns, emphasizing that Keaton was on probation at the time he committed the underlying offenses. With the goals of punishing Keaton and protecting the community, the circuit court sentenced him to fifteen years of imprisonment comprised of ten years of initial confinement and five years of extended supervision on the count of second-degree reckless homicide and eight years of imprisonment comprised of five years of initial confinement and three years of extended supervision on the count of second-degree recklessly endangering safety, with the sentences to run consecutive to each other and to a revocation sentence Keaton was serving. The record demonstrates that the circuit court followed the dictates of ***Gallion*** at the sentencing hearing. Further, the circuit court's sentence, which fell 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, was not so excessive that it shocks the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Although counsel does not specifically address it, we note that the circuit court ordered Keaton to pay the DNA surcharge without elaborating on its reasoning. *See* ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. It is unclear whether in fact Keaton has paid the surcharge in connection with this case. At the time he was sentenced, under WIS. STAT. § 973.047(1f), providing the sample was required, but the surcharge was not: In ***Cherry***, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge under the statutory authority in effect at the time, WIS. STAT.

§ 973.046(1g).[2] ***Cherry***, 312 Wis. 2d 203, ¶¶9-10. To that end, we held that the court "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶9.

We subsequently explained that "***Cherry*** does not require a circuit court to use any 'magic words'" and specifically declined to adopt a rule requiring a circuit court to "explicitly describe its reasons for imposing a DNA surcharge." *See* ***State v. Ziller***, 2011 WI App 164, ¶¶2, 12, 338 Wis. 2d 151, 807 N.W.2d 241. The circuit court's imposition of the DNA surcharge in this case, considered in connection with the remainder of the sentencing record, reveals an appropriate exercise of sentencing discretion. *See* ***id.***, ¶13. In ***Ziller***, given that the circuit court found that the defendant had the ability to pay $10,000 in restitution, we held that there was no reason for the court to restate that the defendant had the ability to pay the $250 surcharge: "What is obvious need not be repeated." ***Id.*** Similar logic applies to the circumstances presented here where the circuit court ordered the stipulated amount of restitution and then proceeded to order Keaton to pay the DNA surcharge if he had not previously done so. We conclude there would be no arguable merit to challenging the circuit court's exercise of its sentencing discretion on this or any other basis.

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

Upon the foregoing, therefore,

[2] Effective January 1, 2014, the statutory authority for the discretionary imposition of the DNA surcharge, WIS. STAT. § 973.046(1g), was repealed and § 973.046(1r) was amended to make the imposition of the DNA surcharge mandatory for felonies. *See* 2013 Wis. Act 20, §§ 2353-2355 & 9426.

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

IT IS FURTHER ORDERED that John T. Wasielewski is relieved of further representation of Reginald Adam Keaton in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals