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**DISTRICT I**

May 13, 2014

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

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2013AP2322-CRNM State of Wisconsin v. Nathaniel J. Nelson
(L.C. #2013CF225)

Before Kessler, J.

Michael W. Nelson pleaded guilty to the charge that he intentionally and knowingly accompanied, as a passenger, a person who was driving a motor vehicle without the owner's consent, contrary to WIS. STAT. § 943.23(4m) (2011-12).[1] He now appeals from the judgment of conviction. Nelson's postconviction/appellate counsel, Timothy L. Baldwin, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Nelson has not filed a response. We have independently reviewed the record and the no-merit

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

report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Nelson was originally charged with operating a motor vehicle without the owner's consent, a Class I felony. The criminal complaint alleged that an officer conducted a traffic stop "after seeing [a van] disregard a stop sign." When he approached the van, all three occupants were in the backseat and no one was in the driver's seat. A passenger told the officer that Nelson had been driving. The complaint stated that Nelson told the officer "that he had 'rented' the van for $25 from someone named 'Man Man'" and "that he knew 'in his heart' that the van was stolen."

Nelson did not file any pretrial motions and waived the preliminary hearing. He subsequently entered into a plea agreement with the State pursuant to which the State amended the charge to knowingly accompanying, as a passenger, a person who was driving a motor vehicle without the owner's consent, which is a Class A misdemeanor punishable by up to nine months of imprisonment and a $10,000 fine. *See* WIS. STAT. §§ 943.23(4m), 939.51(3)(a). Pursuant to the plea agreement, both sides were free to argue. At the plea/sentencing hearing, the State explained the reason for the reduction in the charge: Nelson's statements were "not the strongest confession" and to pursue the felony charge, the State would have had to rely on the passenger's testimony to prove that Nelson had been driving, which "made for a somewhat difficult case to prove."

The State recommended "a long imposed and stayed sentence" and a period of probation with thirty days of condition time. Nelson said that he agreed with the State's probation recommendation, but asked for the "possibility of expungement upon successful completion of

probation." Nelson also asked that the trial court not impose any jail time as a condition of probation.

The trial court imposed a nine-month sentence, stayed it, and placed Nelson on probation for one year. The trial court also imposed thirty days of condition time and said that Nelson could be released to attend classes to get his GED. Because the parties did not reach a stipulation on restitution, the trial court set a date for a restitution hearing, but at a subsequent hearing, Nelson stipulated to $500 in restitution to the van's owner.

After sentencing, Nelson filed a motion to stay the thirty days of condition time pending the outcome of his appeal. The trial court denied the motion, finding that there was no apparent appealable issue and that there was no reason to stay the condition time.

The no-merit report addresses three issues. First, the report states that Nelson told his postconviction/appellate counsel that he does not wish to withdraw his plea and that in any event, there are no meritorious issues to be pursued with respect to Nelson's guilty plea. Second, the report states that there is no basis to challenge the trial court's exercise of sentencing discretion or any other aspects of the sentencing. Finally, the report concludes that there would be no basis to assert that trial counsel provided ineffective assistance. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss the plea hearing and sentencing issues.

We begin with the plea. There is no arguable basis to allege that Nelson's guilty plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246,

260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy addressing Nelson's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea.[2] *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court confirmed that Nelson had gone through the crime's elements and penalties with trial counsel, and the elements were also attached to the guilty plea questionnaire. The trial court told Nelson that it was not bound by the parties' recommendations, and it reiterated the maximum sentence and fine that could be imposed. Both parties agreed that the trial court could use the criminal complaint as a factual basis for the plea. The plea questionnaire, waiver of rights form, Nelson's conversations with his trial counsel, and the trial court's colloquy appropriately advised Nelson of the elements of the crime and the potential

[2] We note that the trial court neglected to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

*See* ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). However, to be entitled to plea withdrawal on this basis, Nelson would have to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Nelson can make such a showing.

penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Nelson's guilty plea.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial 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. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court recognized that "[p]eople don't like to have their cars stolen" and noted that Nelson had previous involvement in the juvenile justice system that led to him being provided services

through a wrap-around program.[3] The trial court said that punishment was not its most important goal and that deterrence was a primary goal, noting that it wanted to "stop [Nelson] from committing crimes." The trial court explained that it believed that thirty days of condition time would further its goal of deterring Nelson from future criminal behavior. The trial court also explained that based on Nelson's prior juvenile contacts "and the facts and circumstances here," it did not believe that making Nelson eligible for expungement was appropriate. Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***.

Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While the trial court imposed the maximum sentence of nine months, it stayed that sentence and placed Nelson on probation, as he requested. Further, Nelson had already received a significant benefit from the reduced charge. There would be no merit to an argument that the sentence "shock[s] public sentiment and violate[s] the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***id.*** For these reasons, we conclude that there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentence.

We further conclude that there would be no basis to challenge the trial court's discretionary decision to deny the motion to stay the condition time pending the outcome of Nelson's appeal. Nelson did not offer a specific reason for delaying the condition time or a viable issue that he planned to pursue on appeal.

[3] The State said that Nelson's juvenile record included adjudications for battery with a disorderly (continued)

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

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 Timothy L. Baldwin is relieved of further representation of Nelson in this matter. *See* WIS. STAT. RULE 809.32(3).

*Diane M. Fremgen*
*Clerk of Court of Appeals*

conduct charge read in, and possession of THC.