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May 13, 2014

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

2013AP2038-CRNM State of Wisconsin v. Rodrick Douglas (L.C. #2011CF4310)

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

Rodrick Douglas appeals a judgment convicting him of one count of attempted strangulation and suffocation (domestic abuse), as a repeater, and one count of misdemeanor disorderly conduct (domestic abuse). Colleen Marion, Esq., filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738, 744 (1967). Douglas responded to the report. After considering the no-merit report and the response, and after conducting an independent review of the Record, we conclude that there are

no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.[1]

The no-merit report first addresses whether Douglas's guilty plea was knowingly, voluntarily, and intelligently entered. In order to ensure that a defendant is knowingly, voluntarily, and intelligently waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crime to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 616–617, 716 N.W.2d 906, 917. Although "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 184, 765 N.W.2d 794, 805 (citation and quotation marks omitted).

Douglas decided to enter his plea on the day that the trial was set to commence. The prosecutor stated the plea bargain on the record: Douglas agreed to plead guilty in exchange for a reduced charge of attempted strangulation and suffocation, as a repeater, and misdemeanor disorderly conduct, dismissing the repeater allegation attached to that charge. The prosecutor

[1] The circuit court granted Douglas's motion for postconviction relief, vacating the DNA surcharge it imposed on him. *See* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. No appeal has been taken from that order.

explained that he would recommend no more than three years of initial confinement on the attempted strangulation conviction, was free to argue for extended supervision as he saw fit on that conviction, and was free to argue about the length of the sentence for the misdemeanor disorderly conduct conviction. Douglas's lawyer told the circuit court that the information as recited was correct. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24. The circuit court informed Douglas that it was not bound to accept the recommendations of the lawyers and could sentence him to the maximum if it felt that was appropriate. Douglas said that he understood.

The circuit court asked Douglas whether he had reviewed the plea questionnaire and waiver-of-rights form with his lawyer and whether he signed it. Douglas said that he did. The form and attached addendum listed the constitutional and other rights Douglas was waiving by entering a plea, the penalties for the crime, and the elements of the crime. The circuit court informed Douglas that he was giving up certain constitutional rights by pleading guilty, and reviewed some of those rights with Douglas, who said that he understood. The circuit court asked the district attorney to state the maximum potential punishment Douglas faced on the record and then the circuit court questioned Douglas to ensure he understood the penalties. The circuit court also explained what the prosecutor would have to prove to convict him.

In response to the circuit court's questions, Douglas informed the court that he was thirty-four years old and had completed twelve years of schooling. The circuit court asked Douglas if he had any alcohol, medicines or drugs in his system, other than the medications his doctor had prescribed him. Douglas said he did not. The circuit court asked him if anyone was threatening him or promising him anything to enter the plea. Douglas said that no one was. The circuit court also asked Douglas whether he had enough time to talk to his lawyer about his decision to

plead guilty rather than go to trial. Douglas said that he did. Douglas stipulated that the facts alleged in the complaint could serve as a basis for the plea.

The circuit court failed to inform Douglas that if he was not a citizen, he could be deported as a result of the conviction as required by WIS. STAT. § 971.08(1)(c). This oversight does not serve as grounds for an appellate challenge because a person is only allowed to withdraw a plea based on the circuit court's failure to give an immigration warning where the person shows "'that the plea is likely to result in the defendant's deportation.'" *See* ***State v. Douangmala***, 2002 WI 62, ¶25, 253 Wis. 2d 173, 183, 646 N.W.2d 1, 6 (citation omitted). Therefore, based on the circuit court's thorough plea colloquy and the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report addresses whether there would be arguable merit to an assertion that Douglas was not competent to enter a valid plea. Douglas had a competency evaluation shortly after he was arrested because he refused to communicate with anyone. Dr. Erik Knudson, a psychiatrist, evaluated Douglas and testified regarding his findings. He explained that he evaluated Douglas by face-to-face contact, although Douglas would not communicate with him, and reviewed his medical records and observations made by staff regarding Douglas while he was hospitalized for over two weeks. Dr. Knudson also reviewed a report by Dr. Deborah Collins, a psychologist. Dr. Knudson concluded that Douglas was malingering, explaining that the behavior he was seeing was not consistent with mental illness. Dr. Knudson reached this conclusion based on the contrast between what the hospital staff observed of his behavior at some times and what he claimed of his abilities at other times. For example, Douglas would claim not to understand things when formally asked, but in a more informal session he readily understood information. The circuit court concluded that Douglas was competent to proceed

based on the doctor's testimony, which was supported by twenty-four-hour-per-day observation when Douglas was in the hospital. We will affirm a circuit court's decision that a defendant is competent where, as here, its finding is not clearly erroneous. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 223–224, 558 N.W.2d 626, 630–631 (1997). There would be no arguable merit to a claim that Douglas was incompetent to proceed.

The no-merit report next addresses whether there would be arguable merit to a claim that Douglas was erroneously precluded from pursuing a plea of not guilty by reason of mental disease or defect. *See* WIS. STAT. § 971.06(1)(d). When Douglas began communicating with his lawyer, he decided to change his plea to guilty. The circuit court was not required to ascertain via a personal colloquy that Douglas intended to abandon his plea of not guilty by reason of mental disease or defect. *See* ***State v. Francis***, 2005 WI App 161, ¶26, 285 Wis. 2d 451, 466, 701 N.W.2d 632, 639. Moreover, the report by Dr. Collins, who was asked to examine Douglas to assess the viability of the special plea, stated that Douglas was malingering. Dr. Collins's report did not support the special plea. Therefore, there would be no arguable merit to an appellate challenge based on Douglas's decision to change his plea to guilty, rather than not guilty by reason of mental disease or defect.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Douglas to four years of imprisonment for strangulation, with thirty months of initial confinement and eighteen months of extended supervision, and ninety days of imprisonment for disorderly conduct, to be served concurrently. During its sentencing comments, the circuit court considered the gravity of the offense, saying that Douglas had terrorized his wife and children and might have killed his wife if he had choked her much longer. The circuit court considered Douglas's mental health problems and the severe

deterioration in his physical health over the year he had been in jail since the crime occurred. Douglas lost 170 pounds and refused to talk to almost anyone, including his lawyer and his doctors. The circuit court said that Douglas, who did not have an extensive prior record, needed to stabilize his physical and mental health so that he could work on his issues and return to the community as a healthy person. Although his wife had divorced him while the charges were pending, the circuit court noted that Douglas could be a good father to his children if he first attended to his physical and mental health. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39–46, 270 Wis. 2d 535, 556–560, 678 N.W.2d 197, 207–208, and its decision was a reasonable exercise of discretion in light of the circumstances presented. Therefore, there would be no arguable merit to a challenge to the sentence on appeal.

In his response, Douglas explains that he is a diabetic with diabetic neuropathy and multiple other health problems. He states that he is being held in segregation because of his political views and the fact that he has filed civil suits against the prison. He asks this court to order injunctive relief against the Department of Corrections due to the way he is being treated. We do not have supervisory authority over the Department of Corrections. *See* ***Kirsch v. Endicott***, 201 Wis. 2d 705, 718 n.4, 549 N.W.2d 761, 766 n.4 (Ct. App. 1996). We do not have the authority in the context of the criminal appeal from Douglas's conviction to order the Department to provide particular services to Douglas. Douglas may pursue his requests for relief through the prison administrative process and through a civil action alleging a violation of constitutional rights if he wishes to do so, although it appears that he will be released very soon.

Our independent review of the Record reveals no potential issues for appeal. Therefore, we affirm the judgment of conviction and relieve Colleen Marion, Esq., of further representation of Douglas in this matter.

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

IT IS FURTHER ORDERED that Colleen Marion, Esq., is relieved of any further representation of Douglas in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals