



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

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To:

Hon. Daniel J. Bissett
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Melissa M. Konrad
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Ana Lyn Babcock
Babcock Law, LLC
P.O. Box 22441
Green Bay, WI 54305

Christian A. Gossett
District Attorney
P. O. Box 2808
Oshkosh, WI 54903-2808

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

Leric L. Hess 564340
Prairie Du Chien Corr. Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

2013AP2475-CRNM State of Wisconsin v. Leric L. Hess (L.C. #2012CF704)

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

Leric L. Hess appeals from a judgment of conviction for armed robbery as a party to the crime and as a repeater. His 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). Hess received a copy of the report, was advised of his right to file a response, and has elected not to do so. We required appellate counsel to file a supplemental no-merit report after our initial review found potential problems with the plea taking. Upon consideration of appellate counsel's submissions

and an independent review of the record, we conclude that 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.

Hess and four other young men were charged as parties to the crimes of armed robbery and burglary after four of them broke into a home, pointed a gun at one of the occupants, and removed an Xbox system and cash box from the home. Hess entered a no contest plea to the armed robbery charge and the burglary charge was dismissed as a read in at sentencing. As part of the plea agreement, the prosecution would recommend a sixteen-year sentence and Hess was free to argue for any sentence. At sentencing, the prosecution complied with the plea agreement. Hess was sentenced to seven years' initial confinement and seven years' extended supervision, to be served consecutive to previous sentences.

When a guilty or no contest plea is entered, one of the first issues to be considered in a no-merit appeal is whether the plea was freely, voluntarily and knowingly entered. To be constitutional, a guilty plea must affirmatively be shown to be knowing, voluntary and intelligent. *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). At the plea hearing, the trial court must address the defendant personally and fulfill several duties outlined in *Bangert*, WIS. STAT. § 971.08, and additional case law. *State v. Brown*, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. These duties include ascertaining whether any promises or threats were made in connection with the plea; establishing the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is

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

subjecting himself; ascertaining whether a factual basis exists to support the plea; informing the defendant of the constitutional rights he is waiving and verifying that he understands that he is giving up these rights; establishing personally that the defendant understands that the trial court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement; notifying the defendant of the direct consequences of his plea; and notifying the defendant that if he is not a citizen of the United States, his guilty plea could result in deportation, exclusion from admission to this country, or the denial of naturalization. *State v. Cross*, 2010 WI 70, ¶18, 326 Wis. 2d 492, 786 N.W.2d 64; *Brown*, 293 Wis. 2d 594, ¶35. The trial court may refer to a plea questionnaire, but may not rely on it as a substitute for a personal, in-court colloquy. *State v. Hoppe*, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794.

The no-merit report concludes that the trial court failed to conduct a proper personal plea colloquy with Hess about the maximum penalties he was facing but that a motion to challenge the plea lacks merit because Hess cannot allege that he did not understand the maximum penalties. *See Brown*, 293 Wis. 2d 594, ¶62 (a motion to withdraw a plea is only meritorious if the defendant can allege that he did not know or understand that aspect of his plea that is related to a deficiency in the plea colloquy). Appellate counsel has provided an affidavit stating that counsel conferred with Hess, and in the conversation, Hess indicated that he knew the maximum penalties. The potential claim that the trial court failed to ascertain Hess's understanding of the maximum penalties lacks merit.

The supplemental no-merit report concludes that there is arguable merit to a plea withdrawal claim based on the trial court's failure to address Hess personally about his understanding of the elements of the crime and Hess's assertion that he did not understand all the

elements. See *Brown*, 293 Wis. 2d 594, ¶¶46-48 (the court may make a record that it has ascertained the defendant's understanding of the charge in any one of three ways: (1) by personally summarizing the elements for the defendant; (2) by asking defense counsel whether he or she explained the elements of the crime to the defendant and having counsel summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing; or (3) by referring to something in the record evidencing the defendant's knowledge of the nature of the charge prior to the plea hearing).² However, appellate counsel's affidavit indicates that Hess does not want to pursue a motion to withdraw his plea in light of potential risks which counsel discussed with Hess. Hess has waived the potential defect in the plea taking and we do not require appellate counsel to pursue a motion for plea withdrawal.³ We need not further discuss the plea taking.

The no-merit report concludes that the prosecution failed to prove the prior convictions which supported the repeater enhancer and Hess did not validly admit to being a repeat offender.⁴ The report also concludes that no meaningful remedy is available to Hess because the penalty enhancer was not utilized at sentencing. We conclude that a claim that the prior

² The no-merit report did not address whether the record demonstrated Hess's understanding of the elements of the crime because counsel determined that Hess was sufficiently advised when the trial court asked Hess, "[Y]ou did as a party to the crime with the intent to steal take property from the person or presence of the owner by using or threatening use of a dangerous weapon?" We directed appellate counsel to discuss the issue further in a supplemental no-merit report because there was no discussion of the elements of party to the crime liability and no jury instruction was attached to the plea questionnaire and it could not be relied on evidencing Hess's understanding of the elements.

³ Our April 8, 2014 order requiring a supplemental no-merit report explained that if Hess did not want to pursue plea withdrawal, he will be deemed to have affirmatively waived the potential defect.

⁴ It was not enough that the trial court asked Hess during the plea colloquy, "And you agree that you would be a repeater as that term is defined under the Wisconsin Statutes?" See *State v. Watson*, 2002 WI App 247, ¶5, 257 Wis. 2d 679, 653 N.W.2d 520.

convictions were not adequately proven lacks merit. The prior convictions were recited in the presentence investigation report (PSI) as well as a PSI Hess had prepared. The recitation in the PSIs was adequate proof. *See State v. Goldstein*, 182 Wis. 2d 251, 257-58, 513 N.W.2d 631 (Ct. App. 1994).

The no-merit report addresses whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes this issue as without merit. The sentence was imposed to meet the objectives of not unduly depreciating the offense, punishment and addressing Hess's rehabilitative needs. It was a proper exercise of discretion.

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 Hess 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 Ana L. Babcock is relieved from further representing Leric L. Hess in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals