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July 2, 2014

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Troy E. Mason
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You are hereby notified that the Court has entered the following opinion and order:

2012AP2600-CRNM State of Wisconsin v. Troy E. Mason (L.C. # 2010CF2988)

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

Troy Mason appeals from judgments convicting him of throwing/expelling bodily substances (a felony) contrary to WIS. STAT. § 941.375(2) (2009-10),[1] disorderly conduct (domestic abuse) contrary to WIS. STAT. § 968.075(1)(a) and WIS. STAT. § 947.01, and obstructing and resisting contrary to WIS. STAT. § 946.41(1), all misdemeanors. Mason's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12) and

[1] All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Anders v. California, 386 U.S. 738 (1967). Mason received a copy of the report and filed a response to it. We have considered the no-merit report, Mason's response, and counsel's supplemental no-merit report, and we have independently reviewed the record as mandated by ***Anders*** and RULE 809.32. We conclude that there are no issues that would have arguable merit for appeal. Therefore, we summarily affirm the judgments. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Mason's guilty and no contest pleas were knowingly, voluntarily and intelligently entered and had a factual basis (2) and whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

Mason pled guilty to the felony and no contest to the misdemeanors. With regard to the entry of his pleas, Mason answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.[2] The record discloses that Mason's pleas were knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260,

[2] The circuit court did not warn Mason that his guilty and no contest pleas could lead to deportation. ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. No issue with arguable merit arises because the presentence investigation report confirms that Mason is a citizen of the United States.

The presentence investigation report also confirms that Mason earned his high school equivalency degree, a fact not elicited by the circuit court during the plea colloquy.

The circuit court did not give Mason any information about the potential consequences for count two of the information, which was dismissed and read in pursuant to the plea agreement. In ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, the court stated that the circuit court should advise the defendant that it may consider read-in charges when imposing sentence, may require a defendant to pay restitution on a read-in charge, and that the State cannot prosecute a read-in charge in the future. Because the circuit court did not refer to count two at sentencing, we conclude that no issue with arguable merit arises from the circuit court's failure to give the ***Straszkowski*** advisements.

389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Mason's pleas.[3]

With regard to the sentences, 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 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Mason to a three and one-half year term for throwing/expelling bodily substances, nine months each for obstructing and resisting, and ninety days for disorderly conduct. In fashioning the sentences, the court considered the seriousness of the offenses, Mason's character, substance abuse issues, history of prior offenses and previous failure on probation and parole, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court declared Mason ineligible for the Challenge Incarceration Program but eligible for the Earned Release Program. WIS. STAT. § 973.01(3g) and (3m). The felony sentence complied with § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The misdemeanor sentences did not exceed the statutory maximum. The court did not misuse its discretion when it imposed concurrent

[3] During the plea hearing, the circuit court indicated that it preferred to accept a guilty plea, not a no contest plea, to the felony charge of throwing/expelling bodily substances. The court confirmed that no civil suit had been commenced against Mason by a party claiming injury as a result of Mason's felony conduct which reduced the perceived benefit of a no contest plea. In his response to counsel's no-merit report, Mason complains that the circuit court expressed this preference. The court's remark does not rise to the level of impermissible judicial participation in plea negotiation. *See* ***State v. Hunter***, 2005 WI App 5, ¶7, 278 Wis. 2d 419, 692 N.W.2d 256 (2004). At the time the circuit court made this remark, Mason had agreed not to contest the felony charge. A no contest plea and a guilty plea have the same consequence for a defendant's criminal liability. ***State v. Vander Linden***, 141 Wis. 2d 155, 160, 414 N.W.2d 72 (Ct. App. 1987). This issue lacks arguable merit for appeal.

sentences consecutive to a sentence imposed after revocation. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

We turn to Mason's response to counsel's no-merit report. In his response, Mason complains that his trial counsel referred to his conduct as being "repetitious and dangerous." We are unable to locate this remark in the record. Mason has not established an issue with arguable merit for appeal.

Mason attempts to justify why he resisted the police officer attempting to apprehend him. Mason pled guilty to resisting, and the circuit court was free to consider the factual basis for the offense. In addition, both trial counsel and Mason tried to mitigate this offense at sentencing. No issue with arguable merit arises.

Mason argues that the circuit court did not consider mitigating circumstances, including his mental health issues. The weight to be given to the factors at sentencing and the circumstances of the case is solely within the discretion of the circuit court. ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. We have concluded that the circuit court properly exercised its sentencing discretion. This issue lacks arguable merit for appeal.

Mason agues that the circuit court was not impartial. Our review of the record does not support Mason's claim that the circuit court was other than impartial.

Mason argues that he did not know that it was illegal to spit at a police officer. Ignorance of the law is no defense. ***State v. Hurd***, 135 Wis. 2d 266, 276, 400 N.W.2d 42 (Ct. App. 1986). This issue lacks arguable merit for appeal.

Mason complains that he did not complete a plea questionnaire. While it is true that no plea questionnaire was completed in this case, we reviewed the plea colloquy, and we concluded that it complied with the requirements of ***Hoppe***. Mason does not allege that he did not understand any information provided by the circuit court during the plea colloquy. No issue with arguable merit arises.

Mason complains that he was intimidated in the circuit court. Our review of the record discloses no improprieties in Mason's interactions with the circuit court or with the prosecutor. This issue lacks arguable merit for appeal.

Mason alleges that he was assaulted in jail in December 2010. This matter is outside the scope of this appeal.

Mason contends that the presentence investigation report was inaccurate. Mason explains that when the presentence investigation report author asked for his version of events, he lied to the author in an attempt to preserve his opportunity for community supervision. Mason cannot complain on appeal about inaccurate information in the presentence investigation report as a result of his decision to be less than truthful with the presentence investigation report author. *See* ***Zindell v. Central Mut. Ins. Co. of Chicago***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (appellant cannot complain of error induced by appellant).

Mason contends that at some point in the representation, his appellate counsel agreed to file a sentence modification motion seeking concurrent sentences. Counsel's supplemental no-merit report concludes that this issue lacks arguable merit for appeal because the sentences were a proper exercise of sentencing discretion, and Mason cannot show the required new factor for

sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828. This issue lacks arguable merit for appeal.

Mason argues that he did not receive effective assistance from his trial counsel. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

Mason argues that trial counsel was ineffective because counsel failed to object to Mason's false statements to the presentence investigation report author, the circuit court's failure to consider mitigating circumstances, and the circuit court's stated preference that Mason plead guilty to the felony. We have concluded that these issues do not present arguable merit for appeal. Therefore, Mason cannot show the prejudice required for an ineffective assistance of trial counsel claim. *See* ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgments of conviction and relieve Attorney Shelley Fite of further representation of Mason in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Shelley Fite is relieved of further representation of Troy Mason in this matter.

Diane M. Fremgen
Clerk of Court of Appeals