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DISTRICT I

September 4, 2014

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

2014AP604-CRNM State of Wisconsin v. Tyrone Christopher Jones (L.C. #2011CF2887)
2014AP605-CRNM State of Wisconsin v. Tyrone Christopher Jones (L.C. #2011CF2931)

Before Fine, Kessler and Brennan, JJ.

Tyrone Christopher Jones appeals from a judgment of conviction, entered upon his guilty pleas, on two counts of attempting to obtain a controlled substance by misrepresentation. Appellate counsel, Colleen Marion, Esq., has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Jones was advised of his right to file a response, but has not responded. Upon this court's independent review of the Record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On June 9, 2011, a man dropped off a prescription to be filled at a pharmacy in Glendale. The prescription was made out to Tyrone Jones for 120 thirty-milligram tablets of oxycodone. When the pharmacy called the prescribing physician to verify the prescription, the doctor indicated the paperwork was fraudulent: Jones was not a patient and the doctor had not written the prescription. Police did not find Jones at the address on the prescription, but it was his ex-girlfriend's home. Pharmacy employees later identified Jones from a photo array. He was also recorded on video.

On June 23, 2011, prescriptions for 240 milliliters of codeine and 120 ten-milligram methadone pills were presented to a Milwaukee pharmacy. The prescriptions were made out to Tyrone Jones. The pharmacist, who knew the prescribing doctor and his handwriting, did not recognize the signature and reported the fraud to police. Jones was arrested and admitted dropping off the codeine prescription, but denied dropping off the methadone prescription.

Jones was charged in two separate cases, each with one count of attempting to obtain a controlled substance by misrepresentation, a Class H felony, contrary to WIS. STAT. §§ 961.43(1)(a) and 939.32. Jones and the State agreed to resolve the matter with a deferred prosecution agreement. Jones would plead guilty to the two counts charged, and there would be a six-month suspension in proceedings prior to entry of any judgment of conviction. Jones would be expected to cooperate with a monitoring agency, obtain employment, and complete forty hours of community service.

If the agreement were successfully completed, the State would move to amend one of Jones's counts to a violation of WIS. STAT. § 450.11(7)(a), an unclassified misdemeanor punishable by a fine of up to $500 or imprisonment of up to six months, *see* WIS. STAT.

§ 450.11(9)(a), and recommend a time-served disposition. The State would also move to dismiss the other charge. If Jones did not successfully complete the agreement, the State would seek to revoke it, enter a judgment of conviction based on the guilty pleas, and recommend a twelve-month sentence in the House of Correction with six months' straight time.

Jones entered his pleas on January 11, 2012. At a final review hearing on July 23, 2012, and again on September 25, 2012, the parties agreed to an extension of the agreement so that Jones could complete and document his community service hours. But Jones failed to appear at hearings on October 8 and October 16, 2012, and a bench warrant was issued. The warrant was finally served on August 21, 2013. The State moved to revoke the agreement because Jones had left the jurisdiction—he was found in Minnesota—before completing the agreement. The circuit court revoked the agreement and imposed the one-year sentence recommended by the State.[1]

Counsel identifies three potential issues: whether the deferred prosecution agreement is valid, whether there is any basis for a challenge to the validity of Jones's guilty pleas, and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

The State, in drafting the deferred prosecution agreement, referenced WIS. STAT. § 971.37(5), entitled "Deferred prosecution programs; domestic abuse," and which "does not preclude use of deferred prosecution agreements for any alleged violations not subject to this section." Stated another way, while § 971.37 specifies several domestic abuse crimes for which

[1] The Honorable Michael D. Guolee accepted the original plea. The Honorable Glenn H. Yamahiro monitored compliance, ultimately issuing the bench warrant. The Honorable Ellen Brostrom revoked the agreement, entered the judgment of conviction, and imposed sentence.

deferred prosecution agreements may be used, such agreements are not prohibited with respect to other crimes just because those crimes are not also enumerated in the deferred-prosecution-agreement statute.

Though the deferred prosecution agreement varies slightly from WIS. STAT. § 971.37—it provides for amendment, not dismissal, of one charge, *see* WIS. STAT. § 971.37(3)—this is not fatal, as the agreement can be treated as a contract generally. *See* ***State v. Kaczmarski***, 2009 WI App 117, ¶¶8–10, 320 Wis. 2d 811, 819–820, 772 N.W.2d 702, 706–707.

In addition, though the entry of judgment was to be deferred for six months, the written agreement included provisions for extension of the deferral period. Among other things, the agreement specifies that "the defendant agrees that if any date is set beyond the agreement's expiration date by the Court, the [d]efendant is agreeing to an extension of the agreement until that date." Jones entered his guilty plea on January 11, 2012, suggesting the deferral period would expire on or about July 11, 2012. The first status hearing was in April 2012 and, at that hearing, a final hearing was set for July 23, 2012. Under the express written terms, then, the agreement was extended at least through that hearing.

At the July 23, 2012 hearing, Jones indicated he had not finished his community service. The parties then agreed to a sixty-day extension, through September 25, 2012; stipulated extensions are also permitted under the written terms of the agreement. At the September 25 hearing, Jones did not have the required documentation for his community service. The court set a new hearing for October 8, 2012, so that Jones could obtain the proof of completion. Jones, however, did not appear on October 8, and defense counsel did not know why. The circuit court imposed but stayed a warrant through October 16, 2012.

When Jones did not appear on October 16, the circuit court lifted the stay on the warrant. The deferred prosecution agreement provided that "if at any time during the pendency of the case a bench warrant is issued for the defendant's arrest, the defendant agrees that the agreement shall be automatically extended up until at least the date for the [d]efendant's next appearance in court on this case." Thus, the agreement was extended through September 3, 2013, the date on which Jones appeared for the return on the warrant and the date on which the State sought to revoke the agreement. Accordingly, we agree with counsel's conclusion that there is no arguable merit to a claim that the deferred prosecution agreement is invalid.

There is no arguable basis for challenging whether Jones's guilty pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12, 20 (1986). Jones completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827–828, 416 N.W.2d 627, 629–630 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly acknowledged the maximum penalties Jones faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 389 N.W.2d at 21. The form additionally listed the "DPA, filed with the Court" under the section in which the terms of the plea bargain are to be recited. The written agreement clearly spells out the benefits to Jones for successful completion of the agreement and the penalties for his noncompliance, along with various other terms.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24. At the start of the hearing, the State recited the key provisions of the deferred prosecution agreement—namely, that upon successful completion of the agreement, one charge would be

amended and one charge dismissed, but if the agreement were revoked, the State would recommend twelve months in the House of Correction. Upon direct inquiry by the circuit court, Jones expressly acknowledged those terms. After the court confirmed that Jones understood the terms of the deferred prosecution agreement, it then complied with most of its mandated colloquy duties. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 616–617, 716 N.W.2d 906, 917. However, it failed to do three things: ascertain whether any threats or promises, other than the State's offer, had been made to secure Jones's plea; establish that Jones understood the court would not be bound by any sentencing recommendations; and provide the deportation warning. *See* ***ibid.***; *see also* WIS. STAT. § 971.08(1)(c).

When the circuit court fails to comply with the mandated plea colloquy duties, a defendant may move to withdraw his pleas. *See* ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. However, the defendant must allege not only the circuit court's failure to perform a duty, but also that the defendant did not know or understand the omitted information. ***Ibid.*** Here, counsel reports that she is unaware of any information that would allow Jones to satisfy the second ***Bangert*** prong. In addition, the plea questionnaire form confirms the voluntariness and provides the omitted information regarding sentencing and immigration. *See* ***Moederndorfer***, 141 Wis. 2d at 828, 416 N.W.2d at 630; *see also* ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 184, 765 N.W.2d 794, 805. Accordingly, we agree with counsel that there is no arguable merit to a challenge to the plea's validity.

The final 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, 549, 678 N.W.2d 197, 203. At sentencing, a 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, 606, 712 N.W.2d 76, 82, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557, 678 N.W.2d at 207. 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 may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606, 712 N.W.2d at 82.

The circuit court recognized that there are more serious crimes than the ones Jones committed, but that his behavior was still problematic: Jones's record with controlled substances went back to 1999, with some intervening domestic violence incidents. Also, addiction created a problem for the community, causing addicts to engage in dangerous behavior towards themselves and the community.

The maximum possible sentence Jones could have received was six years' imprisonment. The sentence of one year of imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

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 Colleen Marion, Esq., is relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals