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DISTRICT I

September 5, 2014

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

2014AP1247-CRNM State of Wisconsin v. Jose L. Reyes (L.C. #2012CF5138

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

Jose L. Reyes appeals from a judgment of conviction, entered upon his guilty plea, on one count of felony murder. Appellate counsel, Mark S. Rosen, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Reyes 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

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

there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Milwaukee police were dispatched to the area of South 14th and West Becher Streets, where they found the victim in this case face-down on the sidewalk. One officer observed blood coming from the victim's lower back and checked for a pulse, which he could not find. Officers spoke to two witnesses: one said he heard gunshots and described two individuals riding away from the area on bikes, and the other described a confrontation between two individuals and the victim and identified Reyes as the shooter. When questioned, Reyes admitted attempting to rob the victim, but said his co-actor was the shooter.

Reyes was charged with one count of first-degree intentional homicide and one count of attempted armed robbery with the use of force, both as party to a crime. Reyes ultimately agreed to resolve his case with a guilty plea to an amended charge of felony murder as party to a crime, with attempted armed robbery as the predicate offense. This had the effect of reducing Reyes's exposure from life imprisonment plus twenty years to thirty-five years' imprisonment. In exchange, the State would be free to make any sentence recommendation and comment on the facts of the case, Reyes's record, mitigating and aggravating factors, and anything else necessary to maintain candor to the court. The circuit court accepted the guilty plea, and ultimately sentenced Reyes to twenty-two years' initial confinement and eight years' extended supervision. The circuit court also ordered payment of the $250 DNA surcharge. Reyes filed a postconviction motion to vacate the surcharge as contrary to ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393. The circuit court granted the motion.

Counsel identifies three potential issues. The first is whether there is any basis for challenging whether Reyes's guilty plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Reyes completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form did not initially acknowledge the correct maximum penalties Reyes faced, but it was corrected in writing and orally at the plea hearing when the parties noticed the mistake, and care was taken to ensure Reyes understood the true maximum.[2] The form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

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, 683 N.W.2d 14. The circuit court complied with its mandatory duties. It additionally verified that Reyes understood he was giving up possible defenses. With respect to the factual basis for the plea, the parties and the circuit court acknowledged Reyes's claim that he was not the one who fired the gun, but a

[2] The plea questionnaire originally listed a maximum penalty of sixty years' imprisonment, although it is not clear why that particular penalty was listed. The actual maximum term of imprisonment, as the State and court informed Reyes at the plea hearing, was thirty-five years. *See* WIS. STAT. §§ 943.32(2) (armed robbery); 939.50(3)(c) (Class C felony punishment range); 939.32(1) (attempt) and 939.32(1g)(b)1. (attempt penalties); and 940.03 (felony murder). Felony murder is an unclassified felony, so the initial confinement portion of a bifurcated sentence cannot exceed seventy-five percent of the sentence. *See* WIS. STAT. § 973.01(2)(b)10. This means that Reyes's maximum thirty-five year sentence could be broken down to 26.25 years' initial confinement and 8.75 years' extended supervision. Reyes was informed of this division at the plea hearing. When trial counsel corrected the plea questionnaire form, though, he wrote that the possible maximum initial confinement term was "26 ½" years. There is no issue of arguable merit stemming from what is evidently a transcription error, as the discrepancy between the written revised penalty and the actual penalty is *de minimus*. *See* ***State v. Cross***, 2010 WI 70, ¶4, 326 Wis. 2d 492, 786 N.W.2d 64.

dispute over the shooter's identity in this case would not undermine the factual basis for the plea. Near the end of the colloquy, the circuit court expressly asked Reyes whether he had any questions about what it meant to be pleading guilty to felony murder, and Reyes said he had none. The circuit court then asked if Reyes understood everything, and he answered affirmatively.

The plea questionnaire and waiver of rights form, along with the circuit court's colloquy, appropriately advised Reyes of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The second 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, 678 N.W.2d 197. 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, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. 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, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that Reyes, who was eighteen years old at sentencing, had both a juvenile and an adult criminal record and a history of poor adjustment in a correctional setting. It determined that probation was obviously not appropriate—aside from the fact that probation would unduly depreciate the seriousness of the offense, Reyes had been on probation at the time of the homicide. The circuit court explained that punishment, to serve as a deterrent, was the biggest component of the sentence because behavior like Reyes's caused the whole community to suffer. After all, the victim had merely been walking down the street, going about his business before randomly being "jacked up" and killed by Reyes and his coactor.

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

The final issue counsel raises is whether the circuit court "correctly grant[ed] defendant's postconviction motion concerning the DNA surcharge." There is, of course, no issue of arguable merit to pursue on appeal in this regard because "[a] party cannot appeal from a judgment or order that is in its favor." *See* ***Kenosha Prof'l. Firefighters v. City of Kenosha***, 2009 WI 52, ¶15 n.9, 317 Wis. 2d 628, 766 N.W.2d 577.

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 Mark S. Rosen is relieved of further representation of Reyes in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals