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DISTRICT I

September 10, 2014

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

2014AP871-CRNM State of Wisconsin v. Shawn Lee Lemieux (L.C. #2012CF4595)

Before Fine, Kessler and Brennan, JJ.

Shawn Lee Lemieux appeals a judgment convicting him of felon in possession of a firearm and possession of cocaine, more than forty grams, with intent to deliver and use of a dangerous weapon. He also appeals a postconviction motion denying his motion to modify his sentence. Attorney Urszula Tempska filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738, 744

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

(1967). Lemieux responded to the no-merit report. Attorney Tempska then filed a supplemental no-merit report. After considering the reports and response, and after conducting an independent review of the record, we conclude that there are no issues of arguable merit that Lemieux could raise on appeal. Therefore, we summarily affirm the judgment of conviction and order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether the postconviction court properly denied Lemieux's motion to modify his sentence. The circuit court sentenced Lemieux to twenty years of imprisonment for possession of cocaine with intent to deliver, with ten years of initial confinement and ten years of extended supervision. The circuit court also sentenced Lemieux to a concurrent ten-year term of imprisonment for being a felon in possession of a firearm, with five years of initial confinement and five years of extended supervision. In his postconviction motion, Lemieux argued that the circuit court erroneously exercised its discretion when it summarily found Lemieux ineligible for the Challenge Incarceration Program and the Earned Release Program. In denying the postconviction motion, the circuit court explained:

During its rendition of sentence, the court considered the serious nature of the offenses, the defendant's prior record, including a prior drug conviction for possession with intent to deliver cocaine, his postconviction conduct, which was read in for sentencing, and the need to protect the community. The court also considered the defendant's substantial rehabilitative needs and determined that those needs had to be addressed in a confined setting. Taking all the relevant sentencing factors into consideration ... the court found the defendant ineligible for [the Challenge Incarceration Program and the Earned Release Program] because it intended that he serve the full duration of the initial confinement term.

When deciding a postconviction challenge to a sentence, the circuit court has an additional opportunity to explain its sentence and its exercise of discretion during sentencing. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). The circuit court

did exactly that here, explaining in detail why it found Lemieux ineligible for the programs. Because the circuit court explained why it did not make Lemieux eligible for the programs and the transcript shows the court properly exercised its discretion in all respects, there would be no arguable merit to an appellate challenge to Lemieux's sentence.

In his response, Lemieux points out that the sentencing hearing transcript shows that the circuit court made him ineligible for the Challenge Incarceration Program and the Earned Release Program after sentencing him on count two, possession of a firearm by a felon, but did not explicitly state that he was ineligible for the programs as to count one. The sentencing transcript is arguably ambiguous, though the less strained reading is that Lemieux was ineligible as to both counts. We agree, however, with the supplemental no-merit report's conclusion that this issue lacks arguable merit because the circuit court clearly stated in its order denying the postconviction motion to modify Lemieux's sentence that it intended at sentencing to ensure that Lemieux spent the entire ten years of initial incarceration in custody. A necessary implication is that Lemieux's ineligibility for the programs applied to both counts. Because the circuit court clarified any ambiguity in its postconviction decision, there would be no arguable merit to this issue on appeal.

The no-merit report next addresses whether Lemieux'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, 716 N.W.2d 906. 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, 765 N.W.2d 794 (citation and quotation marks omitted).

At the plea hearing, the prosecutor stated the plea agreement on the record. Lemieux and his lawyer told the circuit court that the agreement as recited was in accord with their understanding. *See State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court informed Lemieux that it was not bound to accept the recommendation of the district attorney and could sentence him to more time than the lawyers requested. Lemieux said that he understood. The circuit court informed Lemieux that he was giving up his constitutional rights by pleading guilty, and reviewed those rights with Lemieux, who said that he understood. The circuit court informed Lemieux of the potential maximum prison term and other penalties he faced and Lemieux said that he understood the information. The circuit court asked Lemieux whether he discussed with his lawyer what the State would have to prove to convict him, including the jury instructions which listed the elements of the crimes, and Lemieux said that he had reviewed and understood the information. The circuit court also asked Lemieux whether he had reviewed the plea questionnaire and waiver-of-rights form with his lawyer, and whether he understood it and signed it. Lemieux said that he did. The form listed the constitutional and other rights Lemieux was waiving by entering a plea, the penalties for the crimes, and the elements of the crimes. The circuit court informed Lemieux that if he was not a U.S. citizen, he could be deported as a result of the conviction. Lemieux stipulated that the facts alleged in the

complaint were true and could serve as a basis for the plea. 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 also addresses whether there were any other legal errors that marred Lemieux's prosecution. We agree with Attorney Tempska's conclusion that there are no other errors in the proceedings. Moreover, even if there had been, a valid guilty plea waives defects and defenses that are not jurisdictional. *See State v. Dietzen*, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991). Our independent review of the record reveals no arguable basis for reversing the judgment of conviction and order denying postconviction relief. Therefore, we affirm the judgment and order, and we relieve Attorney Tempska of further representation of Lemieux.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Urszula Tempska is relieved of any further representation of Lemieux in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals