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September 24, 2014

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

2013AP2284-CRNM State of Wisconsin v. Luis A. Rivera (L.C. #2011CF469)
2013AP2285-CRNM State of Wisconsin v. Luis A. Rivera (L.C. #2012CF147)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Luis A. Rivera appeals from judgments of convictions entered upon his no contest pleas to theft from a person, robbery with threat of force, and retail theft as a party to the crime, and from an order denying his postconviction motion to be declared eligible for the Challenge Incarceration and Earned Release programs. Rivera's 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

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

(1967). Rivera received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we conclude that the judgments and order 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.

In December 2011, the State charged Rivera in case No. 2011CF469 with one count of armed robbery as a party to the crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05. The complaint alleged that on November 30, 2011, two masked males approached a man parked in his residential parking stall and robbed him at gunpoint. Rivera was soon identified as a suspect. Several months later, the State filed a criminal complaint in case No. 2012CF147, charging Rivera with five separate counts as a repeater.[2] The complaint alleged that on November 26, 2011, Rivera and another suspect stole BB guns, masks, and other merchandise from three separate retailers. The men then entered a PayDay Loan store, where they pointed a gun at an employee, shoved her against the wall, forced her to open a safe, and made off with over $3000 in cash as well as the employee's purse. Rivera's DNA was discovered on the BB gun packaging.

Pursuant to a negotiated agreement, Rivera entered no contest pleas to a total of three charges across the two circuit court cases.[3] In No. 2011CF469, Rivera pled no contest to an amended charge of theft from a person, contrary to WIS. STAT. § 943.20(1)(a) and (3)(e), and the

[2] The complaint and information filed in No. 2012CF147 charged Rivera with two counts of armed robbery and three counts of retail theft. On all counts, Rivera was charged as a party to the crime and as a habitual offender (repeater) pursuant to WIS. STAT. § 939.62.

[3] Rivera entered his no contest pleas in the two circuit court cases on different dates. He was sentenced in connection with both cases on the same date. On that date, the court also imposed sentence in a third case, No. 2012CF237. Rivera did not appeal No. 2012CF237.

court imposed a ten-year bifurcated sentence, with five years of initial confinement and five years of extended supervision. In No. 2012CF147, in connection with count one, armed robbery, Rivera pled no contest to an amended charge of robbery by threat of force, contrary to WIS. STAT. § 943.32(1)(b), without the repeater enhancer. The trial court imposed a fifteen-year bifurcated sentence, with ten years of initial confinement and five years of extended supervision, to run consecutive to No. 2011CF469. Rivera also pled no contest to count three, retail theft, without the repeater enhancer, and received a nine-month jail sentence to run consecutive to count one.

Thereafter, appointed counsel filed a postconviction motion seeking to have Rivera declared eligible for the Earned Release and Challenge Incarceration programs and to withdraw his plea to the retail theft in No. 2012CF147. At the start of the postconviction hearing, appointed counsel informed the court that Rivera no longer wished to pursue his motion for plea withdrawal. After hearing the parties' arguments, the trial court denied Rivera's motion seeking eligibility for the Earned Release and Challenge Incarceration programs, and appointed counsel filed a no-merit notice of appeal. After reviewing counsel's no-merit report along with Rivera's response and the record, we ordered counsel to file a supplemental no-merit report addressing whether Rivera's pleas in No. 2012CF147 were knowingly and voluntarily entered and whether the judgments of conviction should be amended to reflect that only the retail theft conviction in No. 2012CF147 was as a party to the crime. ***State v. Rivera***, Nos. 2013AP999-CRNM and 2013AP1000-CRNM, order entered July 23, 2013 (WI App). In lieu of filing a supplemental no-merit report, appointed counsel voluntarily dismissed the no-merit appeal. By order entered August 16, 2013, we dismissed the appeal to allow Rivera to file an additional postconviction motion.

On September 13, 2013, appointed counsel filed an additional postconviction motion seeking to withdraw Rivera's pleas in No. 2012CF147 and requesting that the trial court amend the judgments of conviction to reflect that Rivera was convicted as a party to the crime only in connection with the retail theft charge. The trial court granted Rivera's motions to correct the judgments of conviction.[4] As he did before, Rivera withdrew his plea withdrawal motion. Appointed counsel again filed a no-merit notice of appeal. The no-merit report addresses whether there is any arguable challenge to the entry of Rivera's pleas or to the sentencing court's exercise of discretion.

We agree with appointed counsel's analysis and conclusion that Rivera has no viable and arguably meritorious grounds on which to withdraw his pleas. The records of both plea hearings demonstrate that the trial court engaged in appropriate colloquies and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The trial court specifically ascertained Rivera's understanding of the nature of and factual basis for the charges, the constitutional rights waived by his no contest pleas, the parties' plea agreement, and the maximum penalties for each offense. Additionally, the trial court ascertained that Rivera had reviewed, understood and signed the completed plea questionnaires filed with the court. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be

[4] The trial court entered amended judgments removing the party to a crime modifier from the theft and robbery convictions and adding the modifier to the retail theft conviction.

referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken).

Further, any potential plea withdrawal claim arising from case No. 2012CF147 either lacks merit or has been waived. The concerns underlying this court's July 23, 2013 order have now been addressed. As to our earlier observation that the trial court only reviewed the elements of party to a crime liability in connection with the retail theft count in No. 2012CF147, the judgments have now been corrected to remove this modifier from all but the retail theft conviction. The record provides ample support for the theory of liability discussed at Rivera's plea hearings; namely, that he directly committed the theft and robbery offenses. Additionally, Rivera has now twice indicated his desire to waive any potential plea withdrawal claim in connection with No. 2012CF147. In the no-merit report, appointed counsel asserts that he discussed with Rivera "that Rivera ought to decide if he wants to withdraw his plea(s) [in No. 2012CF147] with the assumption that he would get proper treatment inside the jail" and that Rivera "indicated he did not want to withdraw his plea(s) in any circumstance in Case [No.] 12CF147."[5] Rivera has not responded to counsel's no-merit report. We are satisfied that Rivera has knowingly elected to forgo a plea withdrawal motion in No. 2012CF147.

Appellate counsel's no-merit report also addresses whether the trial court's sentences were either illegal or the result of an erroneous exercise of discretion. We agree with counsel that the sentences imposed fell within the maximum penalty prescribed by statute and were

therefore lawful. We also agree that the sentences constituted a proper exercise of discretion. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, 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 trial court discussed the relevant sentencing factors under ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197, and explained that Rivera's criminal behavior was escalating and becoming more violent:

> For the last 18 years, from 14 to 32, you've chalked up 14 offenses; a number of burglaries, lot of property crimes, entry into vehicles, drug crimes. And while I'm told it's significant that you haven't had violent offenses, I think what … is significant … is that your crime spree is escalating. You have been to prison. You're out and you're committing more crimes. You're committing crimes of greater offense. What started out as property crimes has now escalated to crimes against people, using dangerous weapons.

The trial court considered Rivera's mental health needs and summarized the various interventions attempted by the department of corrections. The court determined that given Rivera's failed treatment and supervision history as well as his high risk of re-offense, "the only appropriate way to address what is really a violent acting out, robbery with guns, is significant incarceration because the public will be protected in no other way."

[5] In our July 23, 2013 order, we explained that Rivera's response to the no-merit report asserted that he was not properly medicated in the county jail and suggested that he would not have entered no contest pleas in No. 2012CF147 had he been receiving mental health treatment. Rivera's response also suggested that he would have pursued the previously-filed plea withdrawal motion but for appointed counsel's statement that Rivera would "end up in the county jail again where they would just take me off my medication again."

We further conclude that the trial court properly exercised its discretion in determining that Rivera was ineligible for the Challenge Incarceration or Earned Release programs. At sentencing, the court found Rivera ineligible "given the nature of these offenses." At the postconviction hearing, the court further supported its determination by citing to Rivera's prior correctional experience and failed treatment interventions:

> I'm not going to find eligibility for those things, for those two programs, given the significant nature of the crimes, given the significant past history, given the attempts that have been made and there hasn't been change. And there have been attempts at drug and alcohol treatment, there have been various programs and correctional experiences that have been tried and here we are with more crime being committed. So, I don't think another attempt is a wise and prudent use of the resources and the request is denied.

Finally, given the facts of these cases and the reduced charges to which Rivera pled, we cannot conclude that the sentence imposed is so excessive or unusual as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Kaczynski***, 2002 WI App 276, ¶13, 258 Wis. 2d 653, 654 N.W.2d 300 (where defendant received the benefit of a substantial charging concession, the trial court's imposition of the maximum sentence did not shock "the community's sense of justice"). Though Rivera received the maximum sentence on each of his three convictions, two of the three charges were substantially reduced pursuant to his plea agreement. Additionally, the repeater enhancers alleged in case No. 2012CF147 were dismissed, further reducing Rivera's exposure. Finally, several charges were dismissed as part of the plea agreement. There is no meritorious challenge to the trial court's sentencing decision.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgments and order, and discharges appellate counsel of the obligation to represent Rivera further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Luis A. Rivera in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals