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October 7, 2014

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

2014AP88-CRNM State of Wisconsin v. Willie Nora Hill
(L.C. #2011CF322)

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

Willie Nora Hill appeals from a judgment of conviction, entered upon his guilty pleas, for three counts of failure to support a child, contrary to WIS. STAT. § 948.22(2) (2011-12).¹ Appellate counsel, Kaitlin A. Lamb, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Hill did not file a response. Following our initial review of the case, we directed counsel to file a supplemental no-merit report

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. Although the charges against Hill include time frames dating back to April 2006, because WIS. STAT. § 948.22(2) has remained the same, we cite the current version.

addressing potential issues with the plea colloquy. Now, having independently reviewed the record, the no-merit report, the supplemental no-merit report and the supporting affidavit, this court concludes there are no arguably meritorious issues and, therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

BACKGROUND

The following background is set forth in the complaint, which served as a factual basis for Hill's pleas. Hill was charged with four counts of failure to pay child support for 120 days or more from April 1, 2006 to May 31, 2007, April 1, 2008 to March 31, 2009, April 1, 2009 to March 31, 2010, and April 1, 2010 to December 31, 2010.

Pursuant to negotiations, Hill pled guilty to three counts of failure to pay child support. In exchange, the State moved to dismiss the fourth count. On count one, the State further agreed to recommend that Hill be sentenced to six months in the House of Correction with Huber release if a wage assignment was put into place. On the other two counts, the State would recommend twelve months of initial confinement and twenty-four months of extended supervision on each count, consecutive, imposed and stayed for four years of probation. The terms and conditions were to include paying child support each month and seeking and maintaining full-time employment. In addition, the State advised that the parties would be stipulating to restitution in the amount of the arrears with interest as of the sentencing date. The parties further stipulated that any unpaid restitution at the end of the sentence would be converted to a civil judgment.

The circuit court accepted Hill's pleas and adopted the State's sentencing recommendation. The parties stipulated to restitution.

In her no-merit report, counsel addresses whether there would be any arguable merit to an appeal on two issues: (1) the validity of Hill's pleas; and (2) the circuit court's exercise of sentencing discretion. We will address each issue in turn.

GUILTY PLEAS

We agree with counsel that there is no arguable basis for challenging Hill's guilty pleas. See *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Hill completed a plea questionnaire and waiver of rights form and an addendum, see *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the circuit court conducted a plea colloquy addressing Hill's understanding of the sentence he faced and the constitutional rights he was waiving by entering pleas, see WIS. STAT. § 971.08; *Bangert*, 131 Wis. 2d at 266-72. The circuit court also explicitly told Hill that at the time of sentencing, it did not have to follow the recommendation of the State or anyone else and that it could sentence him to the maximum amount of prison time. See *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

In her no-merit report, counsel noted that the circuit court did not confirm Hill's understanding of each element of the offense of failure to pay child support² and the maximum

² The circuit court's colloquy with Hill regarding the elements consisted of the following:

THE COURT: And you signed this guilty plea questionnaire and waiver of rights form after going through it with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand what you're charged with, why you're charged and the elements of this offense?

THE DEFENDANT: Yes, sir.

(continued)

fine he was facing on each count. Additionally, the circuit court did not ascertain whether any promises, agreements, or threats were made in connection with Hill's pleas. Notwithstanding, counsel concluded that there would be no merit to pursuing these potential defects.

At the outset we note that there is no issue with the circuit court's failure to inform Hill during the colloquy as to the maximum fine he was facing on each count because this information was set forth on the plea questionnaire and waiver of rights form. The charge was identified as "failure to support x 3" with the penalty as "3.5 years, \$10,000 fine or both." This was adequate under *Moederndorfer*. See *id.*, 141 Wis. 2d at 828.

This court, however, subsequently asked counsel to elaborate on her conclusion that there would be no merit to pursuing the other potential defects. Counsel was specifically directed to comment on the fact that the jury instructions applicable to failure-to-support offenses where the affirmative defense provided by WIS. STAT. § 948.22(6) applies were attached to the guilty plea questionnaire, see WIS JI-CRIMINAL 2152A, instead of the general failure-to-support instruction, see WIS JI-CRIMINAL 2152. There was no indication in the record that the affirmative defense applied to Hill.

In her supplemental no-merit report and supporting affidavit, counsel explains that Hill informed her that he understood the elements of failure to provide support at the time he pled. As such, he cannot make a prima facie showing that "he did not know or understand the information that should have been provided at the plea hearing." See *State v. Brown*, 2006 WI

THE COURT: Counsel, is that correct? You explained the elements to him?

[HILL'S TRIAL COUNSEL]: I did, Your Honor.

100, ¶2, 293 Wis. 2d 594, 716 N.W.2d 906. Moreover, the statutory definition and the three elements found in WIS JI-CRIMINAL 2152A are identical to those found in WIS JI-CRIMINAL 2152.

We agree with counsel's conclusion that the attachment of WIS JI-CRIMINAL 2152A does not provide a basis to argue that Hill was misled or misinformed about the nature of the offenses to which he pled. Counsel further notes that although both of the jury instructions erroneously stated that failure to support was a Class E felony when in actuality it is a Class I felony, the circuit court confirmed during the plea colloquy that Hill understood that he could be sentenced to the correct maximum penalty of 3.5 years of imprisonment on each count. *See* WIS. STAT. § 939.50(3)(i).

Regarding the lack of discussion as to whether any promises or threats had been made to Hill in connection with his proposed plea, the plea questionnaire and waiver of rights form that Hill signed indicates: "I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." The court confirmed that Hill signed the plea questionnaire and waiver of rights form after going through it with trial counsel. Additionally, counsel relays that Hill never alleged that anyone threatened or promised him anything to enter the plea and confirmed to her that this did not occur. In view of the record and counsel's representations to the court, we conclude there would be no merit to pursuing this issue.

We also note that the circuit court did not recite the text of WIS. STAT. § 971.08(1)(c) verbatim. We recently held that, although the statutory language is "strongly preferred," a court's failure to use the exact language set forth in § 971.08(1)(c) does not entitle a defendant to

plea withdrawal, as long as the court “substantially complied” with the statutory mandate. *See State v. Mursal*, 2013 WI App 125, ¶¶15-17, 20, 351 Wis. 2d 180, 839 N.W.2d 173. Like in *Mursal*, here, the circuit court substantially complied with the statute.³ *See id.*, ¶16.

There would be no arguable merit to a challenge to the plea’s validity under the *Bangert* line of cases.

SENTENCING

Counsel addresses 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. The primary objectives of a sentence include protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. A sentencing court should identify the objectives of greatest importance and explain how a particular sentence advances those objectives. *Id.* The necessary amount of explanation “will vary from case to case.” *State v. Brown*, 2006 WI 131, ¶39, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted).

³ WISCONSIN STAT. § 971.08(1)(c) directs courts to do the following, before accepting a plea of guilty or no-contest:

Address the defendant personally and advise the defendant as follows:
 “If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.”

Here, the circuit court stated: “And as a convicted felon, you can’t possess a firearm the rest of your life, you can’t vote in any election until you complete your sentence, *and if you’re not a citizen, you could be deported. Do you understand that?*” (Emphasis added.) Hill responded affirmatively.

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 it 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 court's discretion. *See Gallion*, 270 Wis. 2d 535, ¶41.

At sentencing, the State noted that as to count one, it had agreed to recommend Huber privileges if a wage assignment was in place at the time of sentencing. Because a wage assignment was *not* in place, the State recommended Hill serve six months in the House of Correction as straight time. As to counts two and three, in accordance with the negotiated plea agreement, the State recommended twelve months of initial confinement and twenty-four months of extended supervision, consecutive, imposed and stayed for four years of probation.

Before adopting the State's recommendation, the circuit court commented on the serious nature of the offenses and the "astronomical amount" of money Hill owed, which exceeded \$100,000. Additionally, in reflecting on the need for punishment, the circuit court noted that the term "deadbeat dad" was appropriate for Hill.

The record demonstrates that the circuit court followed the dictates of *Gallion* at the sentencing hearing. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing 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 of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Kaitlin A. Lamb is relieved of further representation of Willie Nora Hill in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals