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

2014AP934-CRNM State of Wisconsin v. Quema A. Smith
(L.C. #2013CF1497)

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

Quema A. Smith pleaded guilty to one count of armed robbery with threat of force and one count of first-degree recklessly endangering safety by use of a dangerous weapon, contrary to WIS. STAT. §§ 943.32(2), 941.30(1), and 939.63(1)(b) (2011-12).[1] He now appeals from the amended judgment of conviction. Smith's postconviction/appellate counsel, Kaitlin A. Lamb, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Smith has not filed a response. We have independently reviewed the record and

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

the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

According to the criminal complaint, Smith was involved in two criminal incidents within a few minutes of each other. First, Smith approached two people at an ATM, pointed a gun at them, demanded their money, and fled. Second, Smith approached a vehicle that was stopped at a stop sign and tried to open the driver's door. The driver drove away, but then circled the block looking for Smith, saw Smith in a parking lot, and "tried to ram" Smith with his vehicle. In response, Smith fired a gun at the vehicle fifteen times, hitting the vehicle twice. Police later apprehended Smith and questioned him regarding both incidents. Smith admitted that he robbed the man at the ATM and obtained forty dollars. Smith also admitted that he intended to pull the driver from the car and take his money. Smith said that after the driver drove toward him, Smith fired the gun because "he thought the guy in the car was 'on something' or was going to do something."

Smith was charged with one count of armed robbery with threat of force, one count of attempted armed robbery with threat of force, and one count of attempted first-degree intentional homicide by use of a dangerous weapon. Smith did not file any pretrial motions. He entered a plea agreement with the State pursuant to which he pled guilty to armed robbery with threat of force and to a reduced charge of first-degree recklessly endangering safety by use of a dangerous weapon. The attempted armed robbery charge was dismissed and read in. The State agreed to recommend a global sentence of ten years of initial confinement and eight years of extended supervision, and Smith was free to argue for a different sentence.

The trial court accepted Smith's guilty pleas and found him guilty. A presentence investigation (PSI) report was prepared, and the defense also submitted its own sentencing memorandum, which noted that these are Smith's first felony convictions. The trial court sentenced Smith to ten years of initial confinement and five years of extended supervision for the first-degree recklessly endangering safety charge, and it imposed a concurrent sentence of five years of initial confinement and five years of extended supervision for the armed robbery. The trial court ordered Smith to provide a DNA sample and "pay the surcharges and costs associated with harvesting and processing the sample and adding it to the database."[2]

Lamb was appointed to represent Smith in postconviction and appellate proceedings. She filed a motion to amend the judgment of conviction to reflect that the charge that was dismissed and read in was *attempted* armed robbery with threat of force, rather than armed robbery with threat of force as stated in the judgment of conviction. The trial court granted the motion and amended the judgment of conviction.

Lamb then filed a no-merit report that concludes there would be no arguable merit to assert that: (1) the pleas were not knowingly, voluntarily, and intelligently entered; and (2) the trial court erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack

[2] This is a valid reason to impose the DNA surcharge, so there would be no merit to challenge the trial court's exercise of discretion. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (One factor for trial court to consider when deciding whether to impose the DNA surcharge is "whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost.").

arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss the identified issues.

We begin with the guilty pleas. There is no arguable basis to allege that Smith's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents was an addendum reciting additional understandings, such as the fact that Smith was giving up his "right to challenge the constitutionality of any police action." The printed jury instructions were also attached, as was a signed acknowledgment that Smith would be ineligible to vote until his civil rights are restored. The trial court conducted a plea colloquy—during which it repeatedly referred to the guilty plea questionnaire and its attachments—that addressed Smith's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea.[3] *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

[3] We recognize that the trial court did not comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty plea, to:

> 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."

(continued)

The trial court referenced the guilty plea questionnaire that Smith completed with his counsel, and the trial court read the charges to Smith. The trial court also asked trial counsel whether she had explained to Smith the meaning of having a charge read in, and she replied affirmatively. In addition, Smith said that he understood what a read-in charge is. The trial court confirmed with Smith that he knew the trial court was free to impose the maximum sentence on each charge, and it reiterated the maximum sentences and fines that could be imposed. Both parties stipulated that the facts in the complaint provided a factual basis for the pleas, and Smith personally agreed that the facts in the complaint were true.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form and attached jury instructions, Smith's conversations with his trial counsel, and the trial court's colloquy appropriately advised Smith of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. There would be no basis to challenge Smith's guilty pleas.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***,

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See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). To be entitled to plea withdrawal on this basis, however, Smith would have to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Smith can make such a showing, and the no-merit report states that "[n]othing suggests that Mr. Smith is not a United States citizen."

2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial 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. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court recognized that this was "a serious case" and said that Smith was "lucky he's not here on a real homicide based upon my review of the facts." The trial court noted that Smith had "apparently emptied the clip" and that the driver could have been killed. The trial court noted that Smith, who was seventeen when he committed the crimes, did not have an adult criminal record, but had been under a juvenile consent decree for stealing a car at the time he committed these offenses. The trial court said that Smith's youth was "a two-edged sword," because it explained Smith's lack of maturity, but "it also means that he probably remains a danger to the community while that [maturation] process takes place," which the trial court said was "borne

out by the COMPAS Assessment in which his overall risk potential for violent recidivism is high."[4] The trial court said that it was giving "significant weight to the protection of the community," having considered Smith's dangerous actions. The trial court recognized that Smith had expressed "some level of sincerity here about what he did," but concluded that "the facts of the case would be unduly depreciated by following [trial] counsel's recommendation" of five years of initial confinement and five years of extended supervision.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Smith benefitted from the reduction in charges and the fact that the two sentences are concurrent, and the total sentence is far less than the fifty-seven-and-a-half years that could have been imposed. We discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

Our independent review of the record reveals no other potential issues of arguable merit.

[4] The PSI report referred to the "COMPAS actuarial assessment tool" and attached a report indicating risk factors for Smith.

Upon the foregoing, therefore,

IT IS ORDERED that the amended judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals