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**WISCONSIN COURT OF APPEALS**
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT I**

January 21, 2015

*To*:

Hon. M. Joseph. Donald
Circuit Court Judge
Children's Court Center
10201 W. Watertown Plank Rd.
Wauwatosa, WI 53226

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Matt Last
Gamino Law Offices
1746 S. Muskego Ave.
Milwaukee, WI 53204

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Cashmeir T. Williams 551853
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

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2014AP1989-CRNM State of Wisconsin v. Cashmeir T. Williams (L.C. #2013CF3336)

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

Cashmeir T. Williams appeals a judgment convicting him of armed robbery with threat of force, as a party to a crime, and possession of a firearm by a felon. He also appeals an order denying his motion for resentencing. Attorney Matt Last 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 (1967). Williams was informed of his right to file a response, but

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

he did not do so. After considering the no-merit report and conducting an independent review of the record, we conclude that there are no issues of arguable merit that Williams could raise on appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses whether Williams's guilty plea was knowingly, voluntarily, and intelligently entered. In order to ensure that a defendant is knowingly, intelligently, and voluntarily 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 crimes 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, 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).

During the plea hearing, the prosecutor stated the plea agreement on the record. Williams's attorney told the circuit court that the agreement as recited was in accord with his understanding. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court informed Williams of the potential maximum prison term he faced and the elements of each charge, ascertaining that Williams understood each point as it was explained. The circuit court reviewed with Williams the constitutional rights he was waiving by entering a plea. The circuit court asked Williams whether he had reviewed the information on the plea

questionnaire and waiver of rights form and asked whether he had any questions. Williams told the circuit court that he did not have any questions about information on the form and that the information on the form was correct. The circuit court verified that Williams was nineteen years old and had completed twelve years of schooling. The circuit court also found that there was a factual basis for the plea based on the facts set forth in the criminal complaint.

There was one important omission from the plea colloquy. The circuit court did not inform Williams that if he was not a citizen, he could be deported as a result of the conviction. *See* ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1. However, we agree with the no-merit report's conclusion that there would be no viable appellate challenge to this omission because there is no indication that Williams is subject to deportation. *See* ***id.*** In all other respects, the plea colloquy complied with WIS. STAT. § 971.08. Based on the circuit court's 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 addresses whether there would be arguable merit to a claim that the circuit court's sentence was harsh and excessive. To successfully claim that the circuit court's sentence was harsh and excessive, a defendant must show "an unreasonable or unjustifiable basis for it in the record." ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). Williams faced a total of fifty years in prison and a fine of $125,000 on the two charges. The circuit court imposed seventeen years of imprisonment for armed robbery, with eight years of initial confinement and nine years of extended supervision. The circuit also imposed ten years of imprisonment for being a felon in possession of a firearm, with five years of initial confinement and five years of extended supervision. Before imposing sentence, the circuit court heard testimony from Williams's family members on his behalf and considered both the aggravating

circumstances and the mitigating circumstances applicable to this case. The circuit court said that this was a serious crime and Williams had acted violently in committing it, hitting the victim over the head with a gun, which accidentally fired. The circuit court also noted that Williams had a prior record, including a felony conviction as an adult, and was on supervision when he committed these crimes. The circuit court concluded that prison was necessary to protect the public and to address Williams's treatment needs because his actions showed that he is a dangerous individual. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence is not too harsh in light of the facts and circumstances of this case. There would be no arguable merit to a claim that the circuit court's sentence was unduly harsh or otherwise a misuse of discretion.

The no-merit report addresses whether there would be arguable merit to a claim that the State breached the plea agreement. "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244. "When a prosecutor does not make the negotiated sentencing recommendation, that conduct constitutes a breach of the plea agreement." ***State v. Smith***, 207 Wis. 2d 258, 272, 558 N.W.2d 379. To be entitled to relief, the prosecutor's breach must be material and substantial, which means that the "breach must deprive the defendant of a material and substantial benefit for which he or she bargained." ***Id.*** "Even an oblique variance will entitle the defendant to a remedy if it 'taints' the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for." ***State v. Knox***, 213 Wis. 2d 318, 321, 570 N.W.2d 599 (Ct. App. 1997). In ***Knox***, the prosecutor recommended a consecutive prison term, which prompted defense counsel to request a recess to confer with the

prosecutor. ***Id.*** at 320. The prosecutor then advised the court that there had been a miscommunication regarding the plea agreement and that she wished to recommend a concurrent prison term. ***Id.*** at 320-21. We held that the breach was not material and substantial because "[i]t was not intended to affect the substance of the agreement by sending a veiled message to the sentencing court that greater punishment than provided for in the plea agreement was warranted." ***Id.*** at 322. We also pointed out that "the deviation from the original terms drew a prompt objection and was shown to be the result of a mistake that was quickly acknowledged and rectified." ***Id.*** at 322-23.

The parties informed the circuit court during the plea hearing that the State would leave the sentence to the discretion of the circuit court pursuant to the plea agreement. During the sentencing hearing, the circuit court asked if there had been plea negotiations. In response, the prosecutor incorrectly said that "the State agreed to recommend prison, leaving the length and bifurcation up to the Court, as well as the question of consecutive or concurrent." During the prosecutor's argument, he mentioned prison several times, saying that Williams deserved "to be placed in prison" and that this was "a prison case." When the prosecutor finished making his argument, the circuit court asked defense counsel if it was his understanding that the State would recommend a prison sentence, leaving the length of the sentence to the circuit court's discretion. Defense counsel asked the circuit court for permission to confer with the prosecutor, who then informed the circuit court that he made a mistake and wanted to leave the length of the sentence up to the circuit court without recommending prison.

The circuit court expressed its concern that Williams might believe that the prosecutor breached the plea agreement by arguing for prison. Williams's lawyer responded by saying that he did not think the prosecutor's statements breached the plea agreement, but had instead been a

mistake, which had been rectified. Williams's lawyer also said that the prosecutor's argument that Williams should go to prison, with the length of time committed to the circuit court's discretion, "might be a distinction without practical significance" in this case from what was bargained for, which was an argument that the length of time should be decided by the circuit court.

We conclude that the prosecutor's initial argument that Williams be placed in prison, with the length of time committed to the circuit court's discretion, does not provide grounds for an arguably meritorious appellate challenge. The prosecutor's statement arguably breached the plea agreement by recommending prison, which means at least one year of incarceration, rather than remaining silent on the length of time Williams should be incarcerated, but the breach was not material and substantial in this case because Williams clearly expected to be sentenced to imprisonment. Williams was being sentenced for two felonies and had acted violently during the armed robbery for which he was being sentenced. He had a prior criminal record and was on probation at the time this offense occurred. Williams himself argued that he should receive *four years* of imprisonment, with two years of initial confinement and two years of extended supervision. As explained by the circuit court in denying the postconviction motion, it was clear based on the circumstances of the case that Williams "could not reasonably have expected a sentence other than one to the Wisconsin state prison." Williams was thus not deprived of what he hoped to receive by entering the plea agreement, which was that the State would leave the length of his sentence to the circuit court's discretion. And, like the defendant in ***Knox***, the prosecutor immediately rectified his mistake, making instead the bargained for recommendation, and the circuit court explicitly stated that it would not consider the State's prior request for

prison time. Based on the circumstances of this case, there would be no arguable merit to a claim that Williams is entitled to appellate relief based on a breach of the plea agreement.

Finally, the no-merit report addresses whether Williams received effective assistance of counsel during the sentencing hearing. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As the circuit court explained in its order denying Williams's postconviction motion, Williams's lawyer promptly took action to clarify the State's recommendation after the prosecutor incorrectly said that Williams should go to prison. Therefore, Williams's lawyer did not perform deficiently. There would be no arguable merit to a claim that Williams received ineffective assistance of counsel.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment of conviction and the order denying Williams's motion for resentencing. We also relieve Attorney Matt Last of further representation of Williams.

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 Matt Last is relieved of any further representation of Williams in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*