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

2013AP2497-CRNM State of Wisconsin v. Edward Dean Cox (L.C. # 2012CF105)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Edward Cox appeals from a judgment convicting him of armed robbery contrary to WIS. STAT. § 943.32(2) (2011-12)[1] and kidnapping contrary to WIS. STAT. § 940.31(1)(a). Cox's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Cox received a copy of the report and filed numerous responses. Appellate counsel filed a RULE 809.32(1)(f) supplemental no-merit report to which

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

Cox has responded.[2] Upon consideration of the reports, Cox's responses, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Cox's guilty pleas were knowingly, voluntarily, and intelligently entered and had a factual basis and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

The circuit court conducted a plea colloquy with Cox. With regard to the explanation of the constitutional rights waived by Cox's guilty pleas, we conclude that the plea colloquy is defective on its face because the circuit court relied upon the plea questionnaire as a substitute for a substantive colloquy regarding the constitutional rights waived by the plea.[3] ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Nevertheless, as we conclude below, the defect was insubstantial and does not provide a basis for plea withdrawal. ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482.

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[2] In response to this court's October 22, 2014 order, Cox advised the court that he will not discharge appellate counsel. He requests that this court decide this appeal.

[3] The court asked Cox, "On the front of the Plea Questionnaire that you signed there are certain constitutional rights that are—you've indicated that you are giving up. Did you talk with your attorney about the fact that you're giving up those constitutional rights?" Cox responded, "Yes, sir, I did." The court stated, "And do you understand that you are giving up those constitutional rights?" Cox responded, "Yes, sir." The court did not elaborate on the constitutional rights beyond this exchange, effectively relying upon the plea questionnaire as a substitute for a colloquy about the constitutional rights waived by Cox's guilty pleas.

Hoppe cautions against using the plea questionnaire as a substitute for a substantive colloquy. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. Nevertheless, we conclude that the defect in the colloquy was an "insubstantial defect" pursuant to ***Taylor***. In ***Taylor***, the supreme court affirmed the denial of a plea withdrawal motion without a hearing because the record showed that the defendant knew he was exposed to an eight-year sentence as a repeater even though the circuit court informed him at the plea colloquy that the maximum penalty was six years. ***Taylor***, 347 Wis. 2d 30, ¶8.

Here, the record reveals that six days before his plea hearing, Cox engaged in a colloquy with the circuit court in which he waived his right to a jury trial. During that colloquy, the circuit court reviewed each of the constitutional rights set out on the plea questionnaire Cox later signed. Cox does not contend that he did not understand the constitutional rights waived by his guilty pleas at the time he entered those pleas.

With the exception of the colloquy defect discussed above, the record discloses that the balance of the colloquy was proper under ***Hoppe***. *See* ***Hoppe***, 317 Wis. 2d 161, ¶18. We conclude that Cox's guilty pleas were knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and they had a factual basis in the complaint, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Cox's guilty pleas.

In one of his responses, Cox argues that the circuit court did not explain the significance of the charges that were dismissed and read in. As Cox's counsel described the plea agreement, the remaining counts were to be dismissed. After the court accepted Cox's guilty pleas, the court

mentioned that the remaining counts "will be dismissed, and I assume, read in for purposes of sentencing. Am I correct?" The prosecutor responded, "Yes, Judge." The court did not mention the advisements for read-in offenses discussed in ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835 (the circuit court should advise the defendant that it may consider read-in charges when imposing sentence, may require a defendant to pay restitution on a read-in charge, and that the State cannot prosecute a read-in charge in the future). We conclude that no issue with arguable merit arises because at sentencing, the circuit court specifically stated that it would not consider the dismissed and read-in counts. The court did not order restitution. Therefore, no arguable issue for appeal arises relating to the dismissed counts.[4]

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Cox to consecutive terms of twenty-five years for armed robbery and thirty years for kidnapping. In fashioning the sentences, the court considered the seriousness of the offenses, Cox's character, history of other offenses, and previous failure on supervision, 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 court deemed Cox ineligible for the Challenge Incarceration Program and the Earned Release Program.[5] The felony sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. Because Cox was

[4] Because Cox was not prejudiced by his trial counsel's failure to object to the court's description of the plea hearing, an ineffective assistance claim would lack arguable merit for appeal. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

[5] Cox's conviction for kidnapping, WIS. STAT. § 940.31(1)(a), rendered him ineligible for the Challenge Incarceration Program and the Earned Release Program. WIS. STAT. § 973.01(3g), (3m).

convicted of kidnapping, an offense under WIS. STAT. ch. 940, the circuit court also properly required him to register as a sex offender. WIS. STAT. § 973.048(1m)(a).[6] We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

We turn to Cox's numerous responses to the no-merit report. Cox argues that he did not commit the crimes to which he pled guilty and he was high on drugs the night of the crimes. The criminal complaint alleged that Cox admitted to a detective that he committed the armed robbery and kidnapping at a laundromat. At the plea hearing, the circuit court took the factual basis for the guilty pleas from the complaint. In the presentence investigation report, Cox admitted that he committed the armed robbery and kidnapping. At sentencing, Cox stated that he was sorry for his conduct. Cox pled guilty, and he must show a manifest injustice justifying plea withdrawal. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Any claim that Cox did not commit the crimes of conviction would lack arguable merit on this record.

Cox argues that his guilty pleas were not knowing, voluntary, and intelligent because the circuit court did not properly advise him of the maximum possible penalties: forty years' maximum imprisonment per crime, twenty-five years' maximum confinement and fifteen years' maximum extended supervision. The record does not support Cox's claim. At the initial appearance, the court informed Cox that he faced forty years of imprisonment for the crimes to which he later pled guilty. The court repeated the advisement at the plea hearing. On this record, Cox cannot contend that he did not understand the potential punishment. ***Taylor***, 347

[6] The complaint, which provided the factual basis for the guilty pleas, alleged that Cox held a victim against her will in a laundromat and sexually assaulted her in front of her child. Sex offender registration was permitted because the WIS. STAT. § 940.31(1)(a) kidnapping was sexually motivated. WIS. STAT. § 973.048(1m)(a).

Wis. 2d 30, ¶28. Furthermore, the court did not have a duty to specifically advise Cox of the breakdown between the potential terms of confinement and extended supervision. ***Id.***, ¶42 n.12. Cox argues that WIS. STAT. § 302.113(9)(am), which relates to release on extended supervision, is unconstitutional. Section 302.113(9)(am)[7] addresses revocation of extended supervision after a defendant has been released to extended supervision. The statute allows for reconfinement for a period not exceeding the time remaining on the bifurcated felony sentence.

Cox contends that the most recent version of the extended supervision revocation statute, WIS. STAT. § 302.113(9)(am), is unconstitutional because it allows "a reviewing authority" (the Division of Hearings and Appeals or the Department of Corrections, § 302.113(9)(ag)) to revoke extended supervision and return a defendant to prison for a specified period of time not exceeding the time remaining on the sentence. This version of the statute was created in 2009 Wis. Act 28, § 2726, for extended supervision revocations occurring on or after October 1, 2009. ***State v. Harris***, 2012 WI App 79, ¶26 n.7, 343 Wis. 2d 479, 819 N.W.2d 350.

[7] WISCONSIN STAT. § 302.113(9)(am) provides:

> If a person released to extended supervision under this section violates a condition of extended supervision, the reviewing authority may revoke the extended supervision of the person. If the extended supervision of the person is revoked, the reviewing authority shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence. The order returning a person to prison under this paragraph shall provide the person whose extended supervision was revoked with credit in accordance with [WIS. STAT. §§] 304.072 and 973.155.

Under the circumstances of the appeal before us, Cox's constitutional challenge to WIS. STAT. § 302.113(9)(am) is not ripe. In determining whether a claim is ripe for judicial review, the court considers whether the issue is fit for judicial decision and the hardship to the parties of withholding the court's consideration. ***State v. Thiel***, 2012 WI App 48, ¶7, 340 Wis. 2d 654, 813 N.W.2d 709. Cox's constitutional challenge becomes ripe only after he becomes subject to § 302.113(9)(am) after an extended supervision violation, revocation, and reconfinement. Cox must serve thirty-five years in prison before he is released to extended supervision. Cox faces no hardship if this court deems his constitutional challenge not ripe. Because the challenge is not ripe, the challenge lacks arguable merit in the context of this appeal.[8]

Cox claims that the Division of Hearings and Appeals changes the circuit court's sentence when it revokes extended supervision and reconfines. This argument lacks merit. A defendant is exposed to the entire sentence imposed by the sentencing court. How that sentence is allocated between confinement and extended supervision depends upon whether the defendant is successful on extended supervision. Moreover, Cox is not yet subject to this scheme. This issue lacks arguable merit in the context of this appeal.

Cox contends that he will not receive credit for time served if he is reconfined after a violation of extended supervision. Cox is wrong. WISCONSIN STAT. § 302.113(9)(am) provides that a person who is reconfined after revocation of extended supervision receives credit as

[8] Without reaching the merits of Cox's constitutional challenge, we note that ***State v. Horn***, 226 Wis. 2d 637, 653, 594 N.W.2d 772 (1999), upheld the constitutionality of WIS. STAT. § 973.10(2) (1995-96), which permitted administrative revocation of probation.

required by other specified statutes. Moreover, Cox is not yet subject to this scheme. This issue lacks arguable merit in the context of this appeal.

Cox appears to allege ineffective assistance of trial counsel. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

Cox states that he has been attempting to obtain jail records to determine how often Attorney Michael Murphy visited him in jail and the duration of their visits. Murphy represented Cox at the plea hearing. At that time, Cox informed the court that he "had a sufficient opportunity to speak with [his] attorney to discuss the pluses and minuses and pro and cons of entering a plea in these particular matters." Two months later, Cox and Murphy appeared for a scheduled sentencing hearing. At that hearing, Cox requested new counsel because Murphy was not getting him assistance with his drug and alcohol issues or working toward an outcome that would yield supervised release. The court explained that based upon the information before the court regarding Cox's prior offenses and his guilty pleas in this case, supervised release was unlikely. The circuit court permitted Murphy to withdraw, and the State Public Defender appointed new counsel, who represented Cox at sentencing.

Cox has not shown that a claim of deficient performance by Murphy would have arguable merit for appeal. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (deficient performance is required for an ineffective assistance claim). Cox does not allege any failing of

Murphy that impacted his representation. Our independent review of the record does not reveal the existence of an ineffective assistance claim.

Cox seeks an evidentiary hearing and a change of venue. Neither of these claims has merit for appeal.

Counsel's supplemental no-merit report addresses Cox's claim that his trial counsel should have contacted two witnesses, Holly T. and her mother, because these witnesses would have provided a defense. Appellate counsel contacted these witnesses. The witnesses told counsel that they were in the laundromat and did not see an attack occur. However, their claims are at odds with the laundromat's security videotape. The videotape shows the period of time during which Holly T. and her mother claim to have been in the laundromat. The videotape shows an empty laundromat except for the victim, her child, and the attacker. The videotape also shows the arrival of the police. The claims of Holly T. and her mother also contradict Cox's admissions in the complaint, the presentence investigation report, and at sentencing that he committed the crimes of conviction. Cox cannot establish that he was prejudiced by his trial counsel's failure to contact these witnesses. ***Id.*** (prejudice is required for an ineffective assistance of counsel claim).[9]

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be

[9] In his final filings in this court (received by this court on December 16, 2014, and January 20, 2015), Cox contends, among other things, that he does not have a tattoo on his genitals, a distinguishing feature noted by the sexual assault victim. This contention is at odds with Cox's admission in the complaint that he has such a tattoo and his admissions of guilt.

raised on appeal, we accept the no-merit report, affirm the judgment of conviction, and relieve Attorney Andrew Hinkel of further representation of Cox in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew Hinkel is relieved of further representation of Edward Cox in this matter.

Diane M. Fremgen
Clerk of Court of Appeals