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

2014AP1105-CRNM State of Wisconsin v. Hatim Muhammed Lowe
(L.C. #2012CF003250)

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

Hatim Muhammed Lowe appeals from a judgment entered after he pled guilty to second-degree reckless homicide with use of a dangerous weapon. *See* WIS. STAT. §§ 940.06(1) & 939.63(1)(b) (2011-12).[1] Lowe's postconviction and appellate lawyer, Jeffrey W. Jensen, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Lowe did not respond. After independently reviewing the record and the no-merit

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

Lowe was charged with first-degree intentional homicide with use of a dangerous weapon as a party to a crime and felon in possession of a firearm arising out of the death of Brandon Byrd. According to the complaint, in the middle of the day on June 23, 2012, a police officer arrived at the crime scene and found Byrd lying on a parking slab with gunshot wounds to his abdomen and a woman, Jamila Cotton, with a wound to her thigh. Byrd was subsequently pronounced dead at the scene.

Cotton told police that she was Byrd's girlfriend and that Byrd had been working on his car. She was standing by Byrd when she saw a man walk up to them with a gun in his hand. According to Cotton, the man pointed a gun at Byrd and fired two shots. Byrd began running and the man followed, firing additional shots. Cotton ran into the house.

The complaint further relayed that police spoke to Tremell Jackson. Jackson said that he had been friends with Jamal Lowe, who had recently been murdered.[2] Jamal was Hatim Lowe's brother. Jackson said that Lowe came to his house and asked him for a gun. Lowe told Jackson that the person who shot Jamal was in the area and that Lowe was going to shoot him in revenge. Jackson got a gun, and he and Lowe began walking to the location where Byrd was working on his car. Upon seeing Byrd, Lowe asked for the gun, which Jackson gave him. Afterward Jackson heard a number of shots and saw Byrd running. He saw Lowe shooting at Byrd. Jackson ran home and Lowe followed him there. Lowe gave the gun back to Jackson.

The complaint further alleged that Lowe had previously been convicted of the felony offense of manufacture/delivery of heroin.

The parties ultimately reached a plea agreement. Lowe pled guilty to an amended charge of second-degree reckless homicide with use of a dangerous weapon. The circuit court accepted his plea and sentenced Lowe to twenty-five years in prison.

In his no-merit report, counsel addresses whether there would be arguable merit to an appeal on three issues: (1) the circuit court's denial of Lowe's motion to suppress; (2) the validity of Lowe's plea; and (3) the circuit court's exercise of sentencing discretion. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursing these issues on appeal.[3]

Motion to Suppress

In most instances, a defendant who pleads guilty waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). However, WIS. STAT. § 971.31(10) makes an exception to this rule, which allows appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Smith***, 122 Wis. 2d at 434-35.

Here, Lowe filed a motion to suppress the identification made by Cotton. The motion alleged that Cotton's identification of Lowe was tainted by the fact that Lowe's image had been

[2] To avoid confusion, we will refer to Jamal by his first name only.

[3] The Honorable Ellen R. Brostrom denied Lowe's motion to suppress. The Honorable Jeffrey A. Wagner presided over the plea proceedings, sentenced Lowe, and entered the judgment of conviction.

broadcast on television, printed in the newspaper, and displayed on a billboard with police claiming that Lowe was a suspect in the homicide.

The circuit court concluded that Lowe's argument failed based on ***Perry v. New Hampshire***, 132 S. Ct. 716 (2012), and cited the language in that decision that "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." ***Id.*** at 724. The circuit court considered whether improper police conduct created a substantial likelihood of misidentification and found that this was not the situation presented. *See* ***id.*** (explaining that there is no *per se* exclusionary rule, instead the due process clause "requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification'") (citation omitted). The circuit court held that it was up to the jury to decide whether Lowe was the person who committed the crimes and, in doing so, could consider the fact that Cotton saw the billboards.

Perry makes clear:

> The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a [circuit] court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.
>
> Our unwillingness to enlarge the domain of due process … rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence.

Id. at 728. Consequently, we agree with counsel's assessment that "even though there may have been good reason to believe that Cotton's identification of Lowe was unreliable, this is not a

basis to suppress the evidence."[4] There would be no arguable merit to pursuing this issue on appeal.

Plea

Counsel next addresses whether Lowe has an arguably meritorious basis for challenging his plea on appeal. Pursuant to the plea agreement, Lowe pled guilty to second-degree reckless homicide with use of a dangerous weapon as the principal actor. In exchange, the State recommended substantial prison time to run concurrent to a revocation sentence Lowe was serving at the time. The agreement further provided that Byrd's family and the defense would be free to argue as to the length of Lowe's sentence. Additionally, Lowe agreed to pay reasonable restitution. Lowe confirmed this was his understanding of the plea agreement.

To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Lowe completed a plea questionnaire and waiver of rights form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d

[4] The court in ***Perry v. New Hampshire***, 132 S. Ct. 716 (2012), noted that suggestiveness leading to identifications is common:

> Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. *For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned "theft suspect," or hearing a radio report implicating the defendant in the crime.* Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have "suggested" to the witness that the defendant was the person the witness observed committing the crime.

Id. at 727-28 (emphasis added).

627 (Ct. App. 1987). The relevant jury instructions were attached to the form. The form listed the maximum penalties, and the circuit court confirmed that Lowe understood the potential sentence he was facing. The form, along with an addendum, further specified the constitutional rights that Lowe was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

We note that the circuit court did not recite the text of WIS. STAT. § 971.08(1)(c) verbatim. We have 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.[5] *See* ***id.***, ¶16 ("Substantively, the [circuit] court's warning complied perfectly with the statute, and linguistically, the differences were so slight that they did not alter the meaning of the warning in any way."). There would be no arguable merit to challenging the validity of Lowe's guilty plea.

[5] 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 you also understand if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization."

Sentencing

The next issue the no-merit report discusses is the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that 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, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit 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 circuit 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 circuit court's discretion. ***Gallion***, 270 Wis. 2d 535, ¶41.

In sentencing Lowe, the circuit court highlighted the violent nature of the offense, which amounted to "the gunning down of another individual in this community" and "taking the law into your own hands." After explaining that "[t]he whole incident showed a wanton disregard for human life" and detailing Lowe's lengthy criminal history, the circuit court found that Lowe was a significant risk to the community and that there was a need for protection. The circuit court concluded that Lowe needed to be punished and sentenced him to eighteen years of initial

confinement and seven years of extended supervision. Additionally, the circuit court held Lowe jointly and severally liable with Tremell Jackson for the stipulated amount of restitution.

The maximum sentence Lowe could have received was thirty years. *See* WIS. STAT. §§ 940.06(1), 939.50(3)(d), 939.63(1)(b). Lowe's sentence is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and although the sentence was ordered to run consecutive to the revocation sentence Lowe was serving at the time, neither this nor the length of the sentence is so excessive as to shock the public's sentiment, *see* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Although counsel does not specifically address it, we note that the circuit court ordered Lowe to pay the DNA surcharge without elaborating on its reasoning. *See* ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. It is unclear whether in fact Lowe has paid the surcharge in connection with this case. At the time he was sentenced, under WIS. STAT. § 973.047(1f), providing the sample was required, but the surcharge was not. In ***Cherry***, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge under the statutory authority in effect at the time, WIS. STAT. § 973.046(1g).[6] ***Cherry***, 312 Wis. 2d 203, ¶¶9-10. To that end, we held that the court "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶9.

[6] Effective January 1, 2014, the statutory authority for the discretionary imposition of the DNA surcharge, WIS. STAT. § 973.046(1g), was repealed and § 973.046(1r) was amended to make the imposition of the DNA surcharge mandatory for felonies. *See* 2013 Wis. Act 20, §§ 2353-2355 & 9426.

We subsequently explained that "***Cherry*** does not require a circuit court to use any 'magic words'" and specifically declined to adopt a rule requiring a circuit court to "explicitly describe its reasons for imposing a DNA surcharge." *See* ***State v. Ziller***, 2011 WI App 164, ¶¶2, 12, 338 Wis. 2d 151, 807 N.W.2d 241. The circuit court's imposition of the DNA surcharge in this case, considered in connection with the remainder of the sentencing record, reveals an appropriate exercise of sentencing discretion. *See* ***id.***, ¶13. In ***Ziller***, given that the circuit court found that the defendant had the ability to pay $10,000 in restitution, we held that there was no reason for the court to restate that the defendant had the ability to pay the $250 surcharge: "What is obvious need not be repeated." ***Id.*** Similar logic applies to the circumstances presented here where the circuit court ordered the stipulated amount of restitution, which exceeded $17,000, and also ordered Lowe to pay the DNA surcharge.

We agree with counsel's conclusion that there is no basis to modify Lowe's sentence.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of further representation of Lowe in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals