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April 8, 2015

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

2013AP2407-CRNM State of Wisconsin v. Brushae Brushawn Brown
(L.C. #2011CF2473)

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

Brushae Brushawn Brown appeals from a judgment convicting him of being a felon in possession of a firearm contrary to WIS. STAT. § 941.29(2)(a) (2013-14)[1] as a repeat offender. Brown's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). At the direction of this court, counsel filed three supplemental no-merit reports pursuant to RULE 809.32(1)(f). Brown filed responses to counsel's

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

supplemental no-merit reports. Upon consideration of the no-merit report and supplemental reports, Brown'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 Brown's guilty plea was 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 supplemental no-merit reports and Brown's responses address sentence credit. We conclude that Brown is not entitled to additional sentence credit.

With regard to the entry of his guilty plea, Brown answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Brown's guilty plea was knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Brown signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987).[2] Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea

[2] At the plea hearing, the circuit court corrected information on the plea questionnaire relating to the penalty range.

hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. Brown's status as a repeat offender was established at the plea hearing. WIS. STAT. § 973.12(1). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Brown's guilty plea.

The plea agreement provided that count two, another possession of a firearm charge, would be dismissed and read in. In ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, the court stated that 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. Here, the circuit court did not provide this information to Brown at the plea hearing. Nevertheless, we conclude that no issue with arguable merit arises because the circuit court did not order restitution and the facts of the read-in count, count two, were properly considered by the circuit court at sentencing. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

With regard to the sentence, 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 Brown to a seven-year term. In fashioning the sentence, the court considered the seriousness of the offense, Brown's character, history of other offenses and previous failure on extended 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 felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

Counsel's no-merit report did not discuss why a challenge to the circuit court's award of 163 days of sentence credit would lack arguable merit for appeal. The original judgment of conviction did not grant any sentence credit, and Brown filed two pro se sentence credit motions in this case seeking 581 days of credit. In response to Brown's pro se motions, the circuit court entered an order on April 1, 2013, awarding 163 days of sentence credit. We ordered three supplemental no-merit reports to resolve whether it is arguable that Brown is due additional sentence credit. The first and second supplemental no-merit reports demonstrated that with the exception of four possible days of sentence credit, Brown had received all credit due.[3] The third supplemental no-merit report advised that on February 22, 2015, the circuit court entered an order awarding Brown four additional days of sentence credit based upon the parties' stipulation to that credit.[4] We conclude that counsel has now demonstrated that Brown has received all sentence credit that is due and that a challenge to sentence credit would lack arguable merit for appeal.

In his responses, Brown argues that he is due additional sentence credit for the period from his arrest date, April 22, 2011, to the revocation of his extended supervision. Brown confuses being in custody with how days in custody are allocated for sentence credit purposes.

[3] An explanation of the basis for our sentence credit conclusion is found below.

[4] Brown contends that his counsel did not consult with him before stipulating to four additional days of sentence credit and that additional credit is due. Because we conclude that no more sentence credit is due, we do not address Brown's contention.

Brown was arrested in this case on April 22, 2011, placed on an extended supervision hold in Milwaukee County Circuit Court case No. 2007CF545 on April 29, had his extended supervision revoked on December 7, and served his revocation sentence until June 17, 2012. Brown was discharged from his revocation sentence on June 17 and returned to Milwaukee county's custody on this case. Brown pled guilty on October 3, 2012, and the court sentenced him in this case on November 27, 2012.

Brown appropriately received 163 days of credit in this case for the period from June 17 (discharge from revocation sentence) to November 27 (sentencing). The department of corrections' calculation provided with counsel's second supplemental no-merit report shows that Brown received credit against his Milwaukee County Circuit Court case No. 2007CF545 revocation sentence for the custody period of April 26, 2011, to June 17, 2012. Brown recently received four more days of credit in response to this court's February 10, 2015 order inquiring whether the department of corrections calculated sentence credit from the correct custody date.[5]

When Brown began serving his revocation sentence, he severed the connection between the revocation case and this case, and Brown was not entitled to any additional credit in this case for time spent in custody on the revocation case. ***State v. Beets***, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). Brown is not entitled to dual credit, i.e., credit applied to more than one case. ***State v. Jackson***, 2000 WI App 41, ¶¶17-19, 233 Wis. 2d 231, 607 N.W.2d 338. Credit in

[5] The department of corrections' calculation started with a custody date of April 26, 2011, not April 22, 2011, the day Brown was taken into custody. The sentence credit stipulation awarded Brown four additional days of sentence credit in this case.

relation to consecutive sentences[6] is allowed only on one consecutive sentence. ***Id.***, ¶¶19-20. Credit is applied to the first sentence imposed. ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). Here, credit for April 26, 2011, to June 17, 2012, was applied to the revocation sentence; four additional days of sentence credit were applied to the sentence in this case. No additional sentence credit is due in this case.

Brown claims that his appellate counsel has been ineffective in connection with sentence credit. Because we are satisfied that a claim of additional sentence credit lacks arguable merit, we do not address Brown's complaint about appellate counsel.

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 raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Colleen Marion of further representation of Brown 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 Colleen Marion is relieved of further representation of Brushae Brown in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[6] Brown was discharged from his revocation sentence before he was sentenced in this case.