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DISTRICT I

April 2, 2015

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

2014AP2409-CRNM State of Wisconsin v. Marquis J. Chapman (L.C. #2013CM4586)

Before Kessler, J.[1]

Marquis J. Chapman appeals a judgment convicting him of misdemeanor bail jumping in a situation involving domestic abuse, as a habitual criminal.[2] Attorney Benjamin J. Peirce filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14).

[2] The Honorable Lindsey Grady conducted the plea hearing. The Honorable Mel Flanagan imposed Chapman's sentence.

14)[3] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Chapman filed a response. After considering the no-merit report and the response, and after conducting an independent review of the record, we conclude that there are no issues of arguable merit that Chapman could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be arguable merit to a claim that Chapman's guilty plea was not knowingly, voluntarily, and intelligently entered. In order to ensure that a defendant is knowingly, voluntarily and intelligently 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, as part of its inquiry, 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).

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

During the plea hearing, the circuit court conducted a colloquy with Chapman during which it reviewed the elements of the crime to which Chapman was pleading guilty and the maximum penalties Chapman faced by entering a plea. Chapman informed the court that he understood. The prosecutor stated the plea agreement on the record and the circuit court explained to Chapman that it was not required to follow the recommendation of either the prosecutor or Chapman's lawyer. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court informed Chapman that if he was not a citizen of the United States of America, he could be deported if he pled guilty to the crime. *See* ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1.

The circuit court ascertained that Chapman had reviewed the plea questionnaire and waiver-of-rights form, that he had both read the form and had it read to him by his lawyer, and he had signed it. Chapman acknowledged that he understood the information on the form. The circuit court personally reviewed the constitutional rights Chapman was waiving by entering the plea and ascertained that Chapman had reviewed the constitutional rights with his lawyer, which were listed on the plea questionnaire. The circuit court determined that Chapman was twenty-eight years old, had a high school diploma and had at least a semester of college education. The circuit court asked Chapman whether it could rely on the facts listed in the criminal complaint as a basis for the plea, and Chapman's lawyer said that it could. Based on the circuit court's thorough plea colloquy with Chapman, and Chapman's review of 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 next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion when it sentenced Chapman to nine months in jail, consecutive to any other sentence. The circuit court primarily considered Chapman's

criminal history, his character and the interests of the community in deciding his sentence. It concluded that probation was not appropriate in light of Chapman's dismal performance following the rules when he was previously on supervision. The circuit court considered appropriate factors in deciding what length of sentence to impose and 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. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

Chapman argues in his response that the circuit court relied on inaccurate information about his prior criminal record when it sentenced him. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***Id.***, ¶26 (quotation marks and citation omitted).

In recounting Chapman's prior involvement with the criminal justice system, the prosecutor informed the court that a printout from the National Crime Information Center (NCIC) showed that Chapman had eleven prior arrests and "there's a no process referral noted for armed habitual criminal, aggravated unlawful use of a weapon on a person, … and aggravated unlawful use of a weapon or vehicle." Chapman contends this information was inaccurate. Although the basis for Chapman's complaint is not entirely clear, it appears that he believes this information was inaccurate because he was never charged with these crimes. Chapman also points to the fact that the prosecutor told the court that the NCIC printout showed

that Chapman had been charged with one count of aggravated assault on June 26, 2007, and one count of battery on August 16, 2007, although these charges were dismissed.

There is no arguable merit to Chapman's claim that the circuit court relied on inaccurate information based on the referrals that were not processed and the charges that were dismissed. It is well established that a sentencing court may consider evidence of a person's history of undesirable behavior patterns, including uncharged offenses and dismissed offenses. *See* ***State v. Straszkowski***, 2008 WI 65, ¶36, 310 Wis. 2d 259, 750 N.W.2d 835. Chapman's due process right to be sentenced on the basis of accurate information was not violated when the prosecutor gave the circuit court this information.

Chapman also premises his inaccurate information claim on the fact that the prosecutor told the court that he had been convicted of selling controlled substances to individuals under the age of eighteen. The prosecutor informed the court that Chapman had four prior convictions according to the NCIC printout, including one for selling controlled substances to individuals under the age of eighteen. The prosecutor then clarified: "at least that is how I read it, it's all abbreviated, so it's hard for me to tell what it actually means."

It is axiomatic that the circuit court was permitted to consider evidence of Chapman's prior convictions in framing the sentence. In light of this solid legal principle, the basis for Chapman's complaint is hard to discern, but he may be attempting to argue that the information is *factually inaccurate* because he was convicted of selling controlled substances, but not of selling controlled substances to minors in particular. The NCIC printout is not included in the appellate record so we are unable to determine whether it provides that Chapman was convicted of selling controlled substances to minors, or whether it provides that Chapman was convicted of

selling controlled substances in general. Regardless, Chapman cannot show that the court gave explicit attention or specific consideration to the information he contends was incorrect. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶14 ("Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'") (citation omitted). The circuit court mentioned the conviction for selling drugs to minors only one time, very briefly, during its lengthy sentencing comments. Based on Chapman's history of criminal conduct and the remarks made by the court at sentencing, we conclude that the circumstances of that single conviction did not form the basis for the sentence the court imposed. Therefore, there would be no arguable merit to a claim that Chapman's due process rights were violated because the circuit court relied on inaccurate information at sentencing.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Benjamin J. Peirce of further representation of Chapman.

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

IT IS FURTHER ORDERED that Attorney Benjamin J. Peirce is relieved of any further representation of Chapman in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals