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April 17, 2015

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

2014AP1315-CRNM State of Wisconsin v. Christopher Emmanuel Lovejoy, Jr.
(L.C. #2012CF5976)

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

Christopher Emmanuel Lovejoy, Jr. pled guilty to one count of being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a) (2011-12).¹ He now appeals from the judgment of conviction. Lovejoy's postconviction/appellate counsel, Assistant State Public Defender Kaitlin A. Lamb, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Lovejoy has not filed a response. We have independently reviewed the record and the no-merit report as mandated by *Anders*, and we

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

conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Lovejoy was charged with one count of possession of a firearm by a felon. According to the complaint, in December 2012, a police officer saw Lovejoy and another male walking in a field clearly marked with “No Trespassing” signs. When the officer and other squads attempted to catch up to the two, the men separated and fled. The officer saw Lovejoy lean forward to the ground and pick up what was later found to be a large piece of plywood. Believing that Lovejoy was concealing something, the officer exited his squad car and ordered Lovejoy to stop running. Lovejoy complied. When the officer looked under the plywood, he found a handgun.

The complaint further relayed—and incorporated supporting documentation to establish—that Lovejoy was previously convicted of being a felon in possession of a firearm and that the earlier conviction remained of record and was unreversed.

Lovejoy subsequently sought to suppress statements he made to police. He argued that the custodial statements he gave were involuntary because they were the result of improper police tactics, including deception and false promises. The circuit court denied the motion, and Lovejoy entered a guilty plea.

The circuit court accepted Lovejoy’s plea and found him guilty. The case proceeded to sentencing, and the circuit court sentenced Lovejoy to three years of initial confinement and two years of extended supervision. The circuit court waived the DNA surcharge.

The no-merit report concludes there would be no arguable merit to assert that: (1) the circuit court erred when it denied Lovejoy’s motion to suppress; (2) the plea was not knowingly,

voluntarily, and intelligently entered; or (3) the circuit court erroneously exercised its sentencing discretion.² This court agrees with postconviction/appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss the identified issues.

We begin with the suppression motion. Lovejoy argued that statements he made while in custody were the result of improper police tactics and, as such, they were made involuntarily. The essence of his argument was that he made his statement after being deceived into believing that his fingerprints would be found on the gun and after being threatened that police would implicate him if they investigated the gun and found that it was linked to any homicides. He also claimed that the police made a deal with him in that they allowed him to make a phone call if he agreed to give them a timeline on the gun.

When the prosecution wants to use a custodial statement of the defendant, it has the burden of proving, by a preponderance of the evidence, the sufficiency of the *Miranda* warnings and the knowing and intelligent waiver of *Miranda* rights.³ See *State v. Agnello*, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594; *State v. Santiago*, 206 Wis. 2d 3, 12, 556 N.W.2d 687 (1996). The State also has the burden of proving by a preponderance of the evidence that the defendant's statement was voluntary. See *State v. Jiles*, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. We review both determinations *de novo* because questions of law are presented by

² The Honorable J. D. Watts denied the suppression motion. The Honorable Glenn H. Yamahiro presided over the plea and sentencing proceedings.

³ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

the application of the constitutional standards to the historical facts. See *State v. Turner*, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987); *Agnello*, 269 Wis. 2d 260, ¶8; *Santiago*, 206 Wis. 2d at 18. We will uphold the circuit court’s findings of historical or evidentiary facts unless they are clearly erroneous. See *State v. Henderson*, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613.

Here, the circuit court began by clarifying with counsel that Lovejoy’s motion related not to a *Miranda* violation, but rather went to the voluntariness of Lovejoy’s statements. Then the court discussed its findings based on the testimony presented at the hearing and the transcript of the statements and the audio files.

The court found that the interviewing officer’s testimony was credible and that there were no violations of Lovejoy’s rights in terms of the location, length, and manner of the interview. The court found that no threats or promises were made to Lovejoy and that the officers’ demeanor throughout the interview “was [that of] casual conversation.” The court found that it was not improper police conduct for the officers to confront Lovejoy when they felt he was giving inconsistent statements or not telling the truth. As to comments that it would be bad for Lovejoy if the gun was linked to a homicide, the court found that the gun was stolen in 2008 and that the officers who interviewed Lovejoy were trying to establish a timeframe to determine whether it was connected to other crimes. The court concluded that this line of questioning did not amount to improper police tactics. In making its findings, the court complimented Lovejoy for his educational attainment, which included completion of high school and enrollment in college, and noted Lovejoy’s familiarity with the justice system, police, and the interrogation process.

The circuit court's findings of fact are not clearly erroneous. When we consider the totality of the circumstances surrounding it, Lovejoy's statement was voluntary. *See State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (the voluntariness of a statement is determined by the "totality of the circumstances" test which requires the court to balance the personal characteristics of the defendant against any police pressure). We conclude there is no arguable merit to a claim that the statement should have been suppressed.

We next turn to the guilty plea. There is no arguable basis to allege that Lovejoy's guilty plea was not knowingly, intelligently, and voluntarily entered. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form and addendum, which the circuit court referenced during the plea hearing. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The circuit court conducted a plea colloquy addressing Lovejoy's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, the fact that he could be sentenced up to the maximum, and the constitutional rights he was waiving by entering his plea. *See* § 971.08; *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; *Bangert*, 131 Wis. 2d at 266-72.

An argument could be made that the circuit court failed to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty plea, to:

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.”

See State v. Douangmala, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) “not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter”) (citation omitted). However, to be entitled to plea withdrawal on this basis, Lovejoy would have to show “that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization.” *See* § 971.08(2). There is no indication in the record that Lovejoy can make such a showing.

Beyond the defective deportation warning, the circuit court’s colloquy in conjunction with the plea questionnaire and waiver of rights form and addendum otherwise complied with the requirements of *Bangert* and *Hampton* for ensuring that a plea is knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the plea’s validity and the record discloses no other basis to seek plea withdrawal.

Lastly, we turn to the sentencing. We conclude 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. *See Gallion*, 270 Wis. 2d 535, ¶41.

In this case, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The circuit court found that this was an aggravated situation given that Lovejoy was on supervision for a prior conviction of felon in possession of a firearm when he committed the underlying crime in this case. The circuit court noted that Lovejoy’s excuse for having the gun was that “it’s a ‘Cowboy’ State” but concluded “[i]t’s a ‘Cowboy’ State because there[are] too many people running around with firearms that have felony convictions on their records, kind of like you.” The circuit court reflected on Lovejoy’s expressed goal of opening an animal shelter, but nevertheless found that he made a serious mistake and that consequences were required. The circuit court found that ordering Lovejoy to serve a concurrent sentence to the revocation sentence he was serving at the time would unduly depreciate the repetitive nature of the offense. Consequently, the circuit court ordered a consecutive sentence of three years of initial confinement and two years of extended supervision.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the circuit court’s compliance with *Gallion*. Further, there would be no merit to assert that the sentence was excessive. *See Ocanas*, 70 Wis. 2d at 185.

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 Assistant State Public Defender Kaitlin A. Lamb is relieved of further representation of Lovejoy in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals