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April 20, 2015

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

2014AP1316-CRNM State of Wisconsin v. Joshua T. Tatum
2014AP1317-CRNM (L.C. #2013CF3227 and 2013CF4404)

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

Joshua Tatum pled guilty to one count of criminal damage to property (over $2500 in property damage) as an act of domestic abuse and one count of felony intimidation of a witness as an act of domestic abuse, contrary to WIS. STAT. §§ 943.01(2)(d), 968.075(1)(a), and 940.43(7) (2013-14).[1] He now appeals from the judgments of conviction in the two cases, which have been consolidated for appeal. Tatum's postconviction/appellate counsel, Matthew R.

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

Meyer, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Tatum has not filed a response.[2] We have independently reviewed the records and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Tatum was charged with three counts of second-degree recklessly endangering safety while armed after discharging a gun eleven times into a parked car belonging to the mother of his two daughters while his daughters and their mother were nearby. He was subsequently charged with two counts of felony intimidation of a witness and four counts of felony intimidation of a victim based on phone conversations he had with the mother of his children (hereafter, "the victim"), his own mother, and his brother. According to the criminal complaint in the intimidation case, Tatum spoke with his brother and his mother about discouraging the victim from coming to court to testify. The complaint further alleged that Tatum called the victim and told her to "stay out" of the way of the prosecutor and that Tatum would be free if the witnesses "don't come to court on me."

Tatum challenged the legal basis for three of the intimidation counts on grounds that they were multiplicitous. Tatum also moved to sever the two criminal cases, which had previously been joined. The trial court indicated that it would decide both motions on the day of trial, although it questioned the viability of the multiplicity motion after hearing brief oral argument

[2] After the no-merit report was filed, Tatum filed a *pro se* motion seeking to voluntarily dismiss the appeal. We directed counsel to discuss Tatum's appellate options with him again. Counsel subsequently notified this court that Tatum wished to withdraw his *pro se* motion. Counsel also asked that Tatum be given thirty days to file a response to the no-merit report. We granted that request by order dated October 15, 2014. Tatum did not subsequently file a response to the no-merit report or seek additional time to respond.

from the parties. The motions ultimately were not decided because on the day of trial, Tatum entered a plea agreement with the State.

Pursuant to the plea agreement, the State amended one count of second-degree recklessly endangering safety to one count of felony criminal damage to property, and Tatum pled guilty to that amended count. The remaining two counts of second-degree recklessly endangering safety were dismissed outright. In the second case, Tatum agreed to plead guilty to one count of felony intimidation of a witness and the remaining five intimidation counts were dismissed and read in for sentencing purposes. Both parties were free to argue for an appropriate sentence.

The trial court accepted Tatum's guilty pleas, found him guilty, and proceeded to sentencing later that same day. For the criminal-damage-to-property count, the trial court imposed a prison sentence of one-and-a-half years of initial confinement and two years of extended supervision. For the witness intimidation count, the trial court imposed a concurrent sentence of four years of initial confinement and four years of extended supervision. The trial court ordered Tatum to provide a DNA sample and pay one DNA surcharge "as part of rehabilitation."[3]

Meyer was appointed to represent Tatum in postconviction and appellate proceedings. He filed a no-merit report that concludes there would be no arguable merit to assert that: (1) the pleas were not knowingly, voluntarily, and intelligently entered; and (2) the trial court

[3] In ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393, this court provided a non-exclusive list of numerous factors a court could consider when deciding whether to impose a DNA surcharge, including "any other factors the trial court finds pertinent." *See* ***id.*** In this case, the trial court exercised its discretion and explained that it had determined that payment of the surcharge in one of the cases would advance Tatum's rehabilitation. We conclude there would be no merit to challenge the trial court's exercise of discretion to impose the DNA surcharge in this case.

erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's 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 guilty pleas. There is no arguable basis to allege that Tatum's guilty pleas were 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 plea questionnaire and waiver of rights forms, which the trial court referenced during the plea hearing.[4] *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to each of the forms was an addendum reciting additional understandings, such as the fact that Tatum was giving up his "right to challenge the constitutionality of any police action." The printed jury instructions for both crimes were also attached to the forms. The trial court conducted a plea colloquy that addressed Tatum's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, 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.

[4] The guilty plea questionnaire and waiver of rights form for the criminal-damage-to-property case mistakenly listed the maximum penalty for the witness intimidation case, and vice versa. However, the trial court correctly stated the maximum penalties for each crime during the sentencing colloquy and at the sentencing hearing. We conclude there would be no arguable merit to challenge the guilty pleas based on these scrivener's errors on the forms.

The trial court referenced the guilty plea questionnaire that Tatum completed with his trial counsel, and the trial court summarized the elements of the crimes for Tatum. The trial court confirmed with Tatum that he knew the trial court was free to impose the maximum sentence on each charge, and it stated the maximum sentences and fines that could be imposed. The trial court also explained the significance of the fact that five of the intimidation charges would be dismissed and read in for sentencing purposes. Both parties stipulated that the facts in the complaints provided a factual basis for the pleas, and Tatum personally agreed that the facts in the complaints were true.

Based on our review of the record, we conclude that the plea questionnaires and waiver of rights forms, the attached jury instructions, Tatum's conversations with his trial counsel, and the trial court's colloquy appropriately advised Tatum of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. There would be no basis to challenge Tatum's guilty pleas.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial 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 sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court said that shooting the gun into the car in the presence of others was "an extremely serious offense" that could have resulted in someone's injury or death. The trial court called the witness intimidation "extremely concerning and aggravated" and referenced Tatum's "controlling" behavior. The trial court gave Tatum credit for pleading guilty, which avoided having his children and the victim take the stand at trial. The trial court also noted that Tatum had benefitted from the dismissal of "a significant amount of counts." The trial court said that "the need to protect the public" warranted "time out of the community."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While Tatum received the maximum sentence of one-and-a-half years of initial confinement and two years of extended supervision for the criminal-damage-to-property count, the second sentence—which was less than the maximum—was imposed concurrently, which means Tatum will spend only four years in initial confinement. Further, Tatum benefitted greatly from the dramatic reduction in charges: he was originally facing ninety years of imprisonment and he lowered his exposure to thirteen-and-one-half years. The net sentence imposed for both crimes was four years of initial

confinement and four years of extended supervision. We discern no erroneous exercise of sentencing discretion.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Matthew R. Meyer is relieved of further representation of Tatum in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals