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DISTRICT II

May 13, 2015

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

2014AP1396-CRNM	State of Wisconsin v. Thomas Jefferson Marshall, Jr. (L.C. # 2008CM177)
2014AP1397-CRNM	State of Wisconsin v. Thomas Jefferson Marshall, Jr. (L.C. # 2009CF1342)
2014AP1398-CRNM	State of Wisconsin v. Thomas Jefferson Marshall, Jr. (L.C. # 2009CM2027)
2014AP1399-CRNM	State of Wisconsin v. Thomas Jefferson Marshall, Jr. (L.C. # 2010CF421)
2014AP1400-CRNM	State of Wisconsin v. Thomas Jefferson Marshall, Jr. (L.C. # 2010CM939)
2014AP1401-CRNM	State of Wisconsin v. Thomas Jefferson Marshall, Jr. (L.C. # 2011CF1194)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated appeals, Thomas Marshall, Jr. appeals from judgments convicting him on his no contest pleas of two counts of battery contrary to WIS. STAT. § 940.19(1) (2013-

14),[1] two counts of misdemeanor bail jumping contrary to WIS. STAT. § 946.49(1)(a), criminal damage to property contrary to WIS. STAT. § 943.01(1), fleeing an officer contrary to WIS. STAT. § 346.04(3), possession of tetrahydrocannabinols with intent to deliver contrary to WIS. STAT. § 961.41(1m)(h), felony bail jumping contrary to WIS. STAT. § 946.49(1)(b), and intentionally pointing a firearm contrary to WIS. STAT. § 941.20(1)(c). Marshall's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Marshall received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgments 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 Marshall's no contest pleas were knowingly, voluntarily and intelligently entered and (2) whether the circuit court properly exercised its sentencing discretion. We agree with appellate counsel that these issues lack arguable merit for appeal.

With regard to the entry of the no contest pleas, Marshall answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court

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

that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.[2] The record discloses that Marshall's no contest pleas were knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they 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 Marshall signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). 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 hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Marshall's no contest pleas.

Numerous counts were dismissed and read in at sentencing. 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. The circuit court advised Marshall that it could consider the facts of the read-in charges at sentencing. Although the circuit court did not advise Marshall that the

[2] The no-merit report acknowledges that at the plea hearing, the circuit court erroneously described possession of tetrahydrocannabinols with intent to deliver, a Class I felony, as a Class H felony. Nevertheless, the court correctly described the penalty associated with a Class I felony. This defect in the colloquy was an "insubstantial defect" pursuant to ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482. No issue with arguable merit arises.

dismissed and read-in counts could be a basis for restitution, the circuit court did not order restitution. We see no issue with arguable merit for appeal.

With regard to the sentences, 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 Marshall to two consecutive three and one-half year terms for possession of tetrahydrocannabinols and fleeing an officer, two years of probation to be served concurrently for each of the misdemeanor convictions and felony bail jumping, and six months in jail consecutive to the felony prison terms for pointing a firearm and one misdemeanor bail jumping offense. In fashioning the sentences, the court considered the seriousness of the offenses, the scope of the dismissed and read-in offenses, Marshall's character and history of other offenses and substance abuse, 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 sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. Sentence credit was granted in response to Marshall's motion seeking such credit. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

Marshall filed two petitions for sentence adjustment under WIS. STAT. § 973.195. In the fleeing case, appeal No. 2014AP1397-CRNM (Racine county circuit court case no. 2009CF1342), the circuit court denied Marshall's petition because he had already served the confinement portion of his sentence. The record supports this decision.

In the tetrahydrocannabinols possession case, appeal No. 2014AP1399-CRNM (Racine county circuit court case no. 2010CF421), the circuit court rejected Marshall's good conduct, rehabilitation and interest of justice claims. The court found that Marshall had been convicted of and sentenced for multiple crimes, and the tetrahydrocannabinols case was only "the tip of the iceberg." In light of Marshall's four-year course of criminal conduct, which yielded numerous convictions and thirty-four dismissed and read-in offenses, the court concluded that reducing the confinement portion of Marshall's sentence would not serve the sentencing goal of protecting the community. No issue with arguable merit arises from the circuit court's denial of Marshall's sentence adjustment petitions.

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 judgments of conviction and relieve Attorney Dustin Haskell of further representation of Marshall in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin Haskell is relieved of further representation of Thomas Marshall, Jr. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals