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May 27, 2015

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

2014AP1502-CRNM State of Wisconsin v. Leslie B. Falls (L.C. #2010CF313)

Before Brown, C.J., Reilly and Gundrum, JJ.

Leslie B. Falls appeals a judgment of conviction and an order denying his postconviction motion. Falls' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Falls filed a response. Counsel then filed a supplemental no-merit report. Falls then filed a supplemental response. After reviewing the record, counsel's reports, and Falls' responses, we conclude that there are no issues with

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

arguable merit for appeal. Therefore, we summarily affirm the judgment and order. WIS. STAT. RULE 809.21.

In June 2010, the State filed a criminal complaint against Falls for his actions in a home invasion in Oshkosh. According to the complaint, Falls and three other men entered a home in the early morning hours, believing it to be the residence of drug dealers. They restrained the occupants, threatened them with guns, and demanded to know where the drugs and money were. As it turned out, the occupants were not drug dealers, and the men had targeted the wrong home. The men still took property from the home, however. The man who served as the lookout for the home invasion later identified Falls as one of the participants.

Falls eventually entered a no contest plea to the charge of burglary while armed as a party to a crime and as a repeater. Additional charges of armed robbery and false imprisonment were dismissed and read in. The circuit court imposed a sentence of eight years of initial confinement followed by seven years of extended supervision. After realizing that its term of extended supervision exceeded what was statutorily allowable, the court amended the judgment of conviction to reflect a sentence of eight years of initial confinement followed by five years of extended supervision. Falls appealed, and appointed counsel filed a no-merit report.

In response to the no-merit report, Falls asserted that his plea was not knowing or voluntary because he was not informed that, for party to a crime liability, "a person does not aid and abet if [he or she] is only a bystander or spectator and does nothing to assist the commission of a crime." *See* WIS JI—CRIMINAL 400. Falls maintained that he had no idea a crime was planned until it was being perpetrated by his co-actors and that he pled no contest because he believed his simple presence at the scene constituted aiding and abetting. We concluded that the

issue had arguable merit and rejected the no-merit report. *See* ***State v. Falls***, No. 2012AP2554-CRNM, unpublished op. and order (WI App Jan. 24, 2014).

Falls subsequently filed a postconviction motion to withdraw his no contest plea. In it, he renewed his argument that he did not knowingly and voluntarily enter his plea because he did not fully understand the meaning of party to a crime. Falls brought the argument pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), due to an allegedly defective plea colloquy.[2] Falls also raised a claim of newly discovered evidence related to two statements made by a co-defendant named Yannick Messan, who Falls described as a friend. The statements were generally supportive of Falls' contention that he was merely a bystander to the crime.

The circuit court held a hearing on the motion. There, Falls testified that he entered his plea because he believed that his presence at the scene made him liable as a party to a crime. He further testified that, until he received Messan's statements, he believed all of his co-defendants were placing the blame on him and would not corroborate his innocence. Falls acknowledged having previously been convicted of offenses as a party to a crime.[3] He also acknowledged discussing with trial counsel the possibility of arguing to a jury that he was merely a bystander. Nevertheless, he denied knowing that being a bystander was a valid defense to party to a crime

[2] At the plea hearing, the circuit court told Falls that party to a crime "means you either directly committed [the crime] or aided and abetted in [sic] another in committing it." However, the court did not explain the bystander defense found in the party to a crime jury instruction.

[3] Falls had twenty-two prior criminal convictions and adjudications. They included two counts of armed robbery as a party to a crime and one count of robbery with force as a party to a crime.

liability. Finally, Falls acknowledged previously corresponding with Messan by letter and that Messan's two statements were conflicting.[4]

Falls' trial counsel, Paul E. Zilles, also testified at the hearing. Because the parties disagreed as to who had the burden,[5] the circuit court called Zilles on its own, briefly questioned him regarding discussions he had with Falls about defenses, and permitted the parties to cross-examine him. Zilles testified that he discussed potential defenses with Falls, including the bystander defense. Zilles explained that "[b]ecause of the way facts were unraveling … we believed that the jury wouldn't buy the—or understand or see [Falls] as a bystander." In describing some of those facts, Zilles acknowledged that three co-defendants gave statements identifying Falls and Messan as the main actors and that Falls' girlfriend saw Falls in possession of property belonging to one of the victims.

Ultimately, the circuit court denied Falls' postconviction motion. The court determined that Falls' argument regarding his understanding of party to a crime liability and the bystander defense was "not credible." The court also concluded that Messan's statements were not

[4] In Messan's first statement, he blamed another co-defendant for setting up both he and Falls. In Messan's second statement, he indicates that he planned the robbery without Falls' knowledge.

[5] The State believed that Falls' motion had morphed into an ineffective assistance of counsel claim where the defendant carried the burden. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Falls' counsel denied making such a claim and noted that the motion was brought pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Under ***Bangert***, a defendant must make a prima facie showing that his or her plea was accepted without complying with WIS. STAT. § 971.08 or other court-mandated duties, and that he or she did not know or understand the information the court failed to provide. ***Bangert***, 131 Wis. 2d at 274. If a defendant makes this initial showing, the burden shifts to the State to show, by clear and convincing evidence, that the plea nonetheless was knowingly and voluntarily entered, even though the plea colloquy was inadequate. ***Id.***

credible and would not lead to a reasonable probability of a different outcome. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997). This no-merit appeal follows.

The no-merit report first addresses whether the circuit court properly denied Falls' postconviction motion. Whether a plea is knowing and voluntary is a question of constitutional fact. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We accept the circuit court's findings of fact unless they are clearly erroneous but independently determine whether those facts demonstrate that the plea was knowing and voluntary. ***Id.*** Meanwhile, we review a circuit court's decision to grant or deny a newly discovered evidence motion for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590.

Here, Falls' only complaint about the entry of his no contest plea was that he did not fully understand the meaning of party to a crime vis-à-vis the bystander defense found in the jury instruction. The circuit court found Falls' testimony at the postconviction motion hearing to be "self-serving" and "[n]ot always on point." By contrast, the court found Zilles' testimony "clear to the point" and lacking in motive for falsification. The court further found that Zilles went through the bystander defense with Falls and that Falls' claimed lack of understanding was not credible. These findings are supported by the record and are not clearly erroneous. Consequently, we are satisfied that Falls' plea was knowing and voluntary.

The circuit court also concluded that Messan's statements were not credible and would not lead to a reasonable probability of a different outcome because "he's already been convicted and … trying to help the friend out." Given this observation, as well as the fact that Messan's statements were conflicting and not completely in line with Falls' testimony at the

postconviction hearing,[6] we conclude that the circuit court properly denied Falls' claim of newly discovered evidence.[7] Accordingly, we agree with counsel that any challenge to the denial of Falls' postconviction motion would lack arguable merit.

The no-merit report next addresses whether Falls' no contest plea had a sufficient factual basis. The criminal complaint contained a statement from one of Falls' co-defendants, indicating that he and Falls had gone to Oshkosh to "hit a lick," which means rob a house for some weed. The statement further described Falls' actions of entering the home while armed with a revolver and yelling at the victims to tell him where the drugs were. In addition, the complaint contained statements from the victims indicating that they did not consent for anyone to enter the residence or steal any of their property. At the plea hearing, the circuit court asked Falls, "Do you agree with what's in the complaint and that is basically what happened?" Falls replied, "Yes." Falls also agreed that he had a prior felony conviction from 2009, thereby qualifying him for the repeater enhancer. Finally, testimony at Falls' preliminary hearing confirmed that stolen property from the victims was found at the residence where he was staying. In light of the foregoing, we agree with counsel that any challenge to the factual basis for Falls' plea would lack arguable merit.

Finally, the no-merit report addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the circuit court's decision had a "rational and

[6] Falls testified that he knowingly participated in a drug deal that went bad because his co-defendants decided to commit a robbery instead. However, Messan's second statement indicates that Falls was not doing anything illegal and that his sole reason for going along with the co-defendants was to provide them with a ride because he was their friend.

[7] Perhaps recognizing the weaknesses in Messan's statements, Falls indicates in his second response that he "waives" the argument concerning the newly discovered evidence.

explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered the seriousness of the offense, Falls' character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Falls' lengthy criminal history and the dangerous behavior he engaged in, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, we agree with counsel that any challenge to the circuit court's decision at sentencing would lack arguable merit.

As noted, Falls filed multiple responses in this case. In them, he contends that (1) the State failed to assume its burden of proving that his plea was knowing and voluntary under ***Bangert***, (2) the circuit court failed to apply the ***Bangert*** standard when reviewing Falls' first argument that he did not knowingly and voluntarily enter his plea, (3) the circuit court erred by calling and questioning Falls' trial counsel at the postconviction motion hearing, (4) the testimony of Falls' trial counsel was protected by attorney-client privilege and he should not have been permitted to testify, and (5) postconviction counsel was ineffective for failing to raise these issues at the hearing.

There are several problems with Falls' contentions. First, the fact that the State failed to assume its burden of proof under ***Bangert*** is irrelevant, as the record shows, by clear and convincing evidence, that Falls' plea was knowingly and voluntarily entered. Second, the circuit court's determination that Falls' first argument was "not credible" was sufficient to dispose of it, regardless of whether the court explicitly applied the ***Bangert*** standard. Third, WIS. STAT.

§ 906.14 permits a circuit court to call and interrogate witnesses, and there is no indication that the court functioned as a partisan for the State in its brief questioning of trial counsel.[8] Fourth, ***Bangert***, 131 Wis. 2d at 275, specifically authorizes the examination of trial counsel to shed light on the defendant's knowledge or understanding of information necessary for him or her to enter a knowing and voluntary plea. Finally, counsel cannot be found ineffective for failing to pursue issues that have no merit. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. For these reasons, we are not persuaded that Falls' contentions present issues of arguable merit.

Our independent review of the record does 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 and relieve Attorney Erica L. Bauer of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of further representation of Falls in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[8] To the extent that Falls claims the circuit court's conduct demonstrated bias, he fails to overcome the presumption that a court is free of bias and prejudice. *See* ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994).