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June 15, 2015

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

2014AP1319-CRNM State of Wisconsin v. John J. Casper
(L.C. # 2011CF006142)

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

John J. Casper pleaded guilty to one count of delivering cocaine (one gram or less), second or subsequent offense, contrary to WIS. STAT. §§ 961.41(1)(cm)1g. and 961.48(1)(b) (2011-12).[1] He now appeals the amended judgment of conviction. Casper's

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

postconviction/appellate counsel, Colleen Marion, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Casper filed a response raising six issues.[2] At this court's direction, postconviction/appellate counsel filed a supplemental no-merit report addressing those six issues. We have independently reviewed the record, the no-merit report, Casper's response, and the supplemental 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.

Casper was initially charged with first-degree reckless homicide in connection with the death of a man who overdosed on cocaine. Casper admitted to police that he gave the man crack cocaine in exchange for Percocet pills. Casper filed a motion to suppress statements he made to the police after he went to the police station for questioning. After an evidentiary hearing, the trial court denied the motion to suppress statements Casper made when he was first interviewed at the police station, but granted the motion to suppress statements Casper later made in an interview room in the detective bureau.[3]

Ultimately, the State determined that it could not prove that Casper provided the cocaine that killed the man, based on evidence that the man may have traded the crack cocaine for powder cocaine, which he later ingested.[4] Accordingly, the State amended the charge to

[2] When Casper filed his response to the no-merit report, his return address was an institution in Sturtevant, Wisconsin. Online Department of Corrections records indicate he may now be at an institution in Stanley, Wisconsin. We are sending copies of this order to both addresses and we direct Casper to inform this court of his current address.

[3] The Honorable Rebecca F. Dallet decided the motion to suppress.

[4] A defense investigator also discovered evidence that another person may have had access to the home where the man overdosed.

manufacturing/delivering cocaine, less than one gram, as a second or subsequent drug offense, contrary to WIS. STAT. §§ 961.41(1)(cm)1g and 961.48(1)(b) (2011-12). Casper entered a plea agreement with the State pursuant to which he pled guilty to the amended charge. The State agreed to recommend a prison sentence, leaving the length of that sentence to the trial court's discretion. Casper was free to argue for a different sentence.

The trial court conducted a plea colloquy with Casper, accepted Casper's guilty plea, and found him guilty. At sentencing, the trial court sentenced Casper to four years of initial confinement and four years of extended supervision, consecutive to any other sentences. It declared that Casper was eligible for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program (formerly the Earned Release Program), but only after serving two years of initial confinement. The trial court ordered Casper to provide a DNA sample but waived the DNA surcharge.

After Marion was appointed as Casper's postconviction/appellate counsel, she filed a motion to modify Casper's sentence based on assistance he provided to law enforcement in an unrelated investigation. The trial court granted the motion and modified the sentence to make Casper immediately eligible for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program.

Subsequently, postconviction/appellate counsel filed a no-merit report that analyzed two issues: (1) whether Casper's guilty plea was knowingly, voluntarily, and intelligently entered; and (2) whether the trial court erroneously exercised its sentencing discretion. Casper filed a response to the no-merit report asserting six issues, including: (1) the trial court's reliance on a

COMPAS[5] report and the fact that the report rated his potential for violence as high; (2) the admissibility of his statements to police (which was an issue addressed at a pretrial motion hearing, but which was not discussed in the no-merit report); (3) the trial court's reference to progressive punishment; (4) potential overcharging by the State; (5) whether the trial court "ripped up" some paperwork at sentencing and prejudged the case; and (6) whether the case should have been transferred to a different judge after the charge was amended from a homicide to a drug charge. We directed counsel to file a supplemental no-merit report addressing those six issues, which she has now done. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and supplemental no-merit report, and we independently conclude that pursuing those issues 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 motion to suppress. As noted, the trial court granted Casper's motion to suppress statements he made when he was interviewed a second time, so the only potential issue is whether the trial court erred when it denied Casper's suppression motion as to the first interview Casper gave. The supplemental no-merit report's detailed analysis of both the testimony offered and the trial court's ruling demonstrates that there would be no merit to challenging the trial court's ruling on appeal. The trial court's finding that Casper's statement was not involuntary is supported by testimony in the record—from both the detective and Casper—that Casper understood what the detective was asking and was able to communicate,

[5] Counsel indicates that COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions" and is a risk and needs assessment tool used by the Wisconsin Department of Corrections.

even though he may have been experiencing what he termed a “real intense body buzz” that made him “talk a little more” as a result of taking more than his usual dose of Percocet.

Further, the trial court’s ruling that Casper was not in custody is supported by numerous facts identified by the trial court, including that Casper came to the police station on his own after arranging to do so with the detective, was not patted down or restrained, was not threatened, and “was told he was not under arrest and … was free to leave.” As counsel notes, our supreme court affirmed the denial of a suppression motion in a similar case after concluding that the defendant was not in custody until after his confession. *See* ***State v. Koput***, 142 Wis. 2d 370, 375, 418 N.W.2d 804 (1988).

In his response to the no-merit report, Casper asserts that he did not think he could choose not to go to the police station because he was on extended supervision at the time. Casper presented this testimony at the hearing. He also testified that he did not feel like he could leave the conference room where he was talking to the detective until the interview was done. The trial court considered this testimony and ultimately determined that an objective person “would not have believed he was under arrest just by going involuntarily to the police station.” We agree with counsel that there would be no arguable merit to challenge this legal conclusion.

The second issue we briefly address is the guilty plea. There is no arguable basis to allege that Casper’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, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the printed jury instructions for the crime.

The trial court conducted a plea colloquy that addressed Casper'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.[6] *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.

The trial court referenced the guilty plea questionnaire that Casper completed with his trial counsel, and the trial court summarized the elements of the crime for Casper. The trial court confirmed with Casper that he knew the trial court was free to impose the maximum sentence, and it reiterated the maximum sentences and fines that could be imposed.[7] The trial court also discussed with Casper the constitutional rights Casper was waiving, such as his right to a jury trial and his right to testify in his own defense.

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[6] WISCONSIN STAT. § 971.08(1)(c) 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). In this case, the trial court paraphrased this statement and did not specifically mention the potential denials of admission into the country or naturalization. This does not provide a basis for plea withdrawal in this case. Even in cases where the warning is not given at all, a defendant is required 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 Casper could make such a showing.

[7] Because this was Casper's second or subsequent offense, the maximum sentence that could be imposed was nine years of initial confinement and five years of extended supervision. *See* WIS. STAT. §§ 939.50(3)(g) & 961.48(1)(b) (2011-12).

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

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 sentence was 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. Its extensive comments addressed Casper's prior criminal history, which included numerous drug-related

offenses and unsuccessful periods of placement in the community.[8] The trial court gave Casper credit for his guilty plea, but expressed concern that Casper could not stop using illegal drugs or abusing prescription drugs. It concluded that the presentence investigation's recommendation of one to two years of initial confinement was not "appropriate" because "[t]here needs to be more upfront prison time because Mr. Casper needs lengthy rehabilitation in prison." It also discussed how drug dealing harms 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 sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed up to nine years of initial confinement and five years of extended supervision. Its imposition of four years of initial confinement and four years of extended supervision was well within the maximum sentence and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

In his response to the no-merit report, Casper raises two issues with respect to sentencing. First, he objects to the trial court's reliance on a COMPAS report that rated his potential for violence as high. Casper argues that the COMPAS report is inaccurate because he does "not have any violence in [his] history." We are not convinced that Casper has identified an issue of arguable merit. As counsel notes, because there was no objection to the COMPAS report at sentencing, Casper would have to show that his trial counsel's performance was constitutionally

[8] The trial court said that it was not sentencing Casper based on the death of the man to whom he provided crack cocaine.

deficient in order to prevail on appeal. We have previously recognized that trial courts may rely on COMPAS reports at sentencing. *See* ***State v. Samsa***, 2015 WI App 6, ¶13, 359 Wis. 2d 580, 859 N.W.2d 149. Further, while the trial court did discuss the COMPAS report, it also stated: "COMPAS is only a tool. It's one of many, many things that I'm considering. It's not the main factor, but it's a tool for the Department of Corrections to use and it's a tool for me to use." Given the trial court's limited reliance on an acceptable tool, we are not convinced that there would be arguable merit to assert that trial counsel performed deficiently by not objecting and that Casper was prejudiced by that performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Casper's second concern is that the trial court said that "there has to be what was referred to in Children's Court as progressive discipline." Casper's response to the no-merit report takes issue with that approach, stating: "[The] Judge said at sentencing he was using progressive punishment[, so] since I did 3 y[ea]rs [in 2002] he was going to give me more time. The crime I was convicted for was a high quantity of drugs in [20]02 and the charge in 2012 was nowhere near as much so I do not believe progressive punishment fits." We agree with counsel that Casper is, in effect, challenging the trial court's exercise of sentencing discretion. The trial court's reasoning for imposing a significant sentence in light of Casper's criminal history and past failures in the community is an acceptable exercise of discretion under ***Gallion***. There would be no arguable merit to an appeal based on the trial court's comments regarding progressive discipline.

Next, we turn to the final three issues Casper raised in his response to the no-merit report. Casper asserts that he was the victim of prosecutorial misconduct because he was charged with first-degree reckless homicide before the case was thoroughly investigated. We agree with

counsel that there would be no arguable merit to pursue this issue on appeal. Given Casper's admission that he provided crack cocaine to the overdose victim the night he overdosed, there was probable cause to support the reckless homicide charge. After the defense's private investigation led to the discovery of information that there may have been another person in the apartment with the man the night he overdosed and that the man may have traded the crack cocaine for powder cocaine, the State concluded that it could not prove that the drugs that killed the man were the drugs Casper provided. The on-the-record statements of both trial counsel and the State concerning the amendment of the charge support postconviction/appellate counsel's assertion that "there is no indication of discriminatory prosecution."

Casper's response to the no-merit report also raised an issue concerning paperwork. He stated:

> It was brought to my attention something was ripped up after my sentencing by the Judge. This all should have been part of my transcripts. I would like to know what it was. If this was my sentencing paper I do not think it is fair that he made his mind up about my sentence without hearing the arguments of both parties.

Postconviction/appellate counsel notes that the transcripts do not contain any information about papers being ripped. She states that she contacted trial counsel and that he told her he "does not recall" that happening and "would have made a record if something like that had happened." Postconviction/appellate counsel concludes that "[t]here is nothing to suggest that—if paperwork was ripped up—that it pertained to this case or affected the court's sentencing decision." We agree with counsel's conclusion that there would be no merit to pursue this issue on appeal, as there is no evidence that the trial court ripped up papers concerning Casper's sentencing or that the trial court prejudged the case.

Finally, Casper's response to the no-merit report argued that his case should have been transferred to a different judge when the charge was amended from a homicide to a drug offense. He asserts that he was "still punished for the homicide." This issue has no potential merit. As the supplemental no-merit report explains, judicial substitution must be sought before arraignment, *see* WIS. STAT. § 971.20(4), and no such request was made in this case. Further, the trial court explicitly stated that it was not sentencing Casper for the homicide and explained the basis for the sentence it imposed. There would be no merit to assert that Casper is entitled to relief because the same judge presided over the case after the charge was amended.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Colleen Marion is relieved of further representation of Casper in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals