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**DISTRICT I**

July 6, 2015

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

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2014AP897-CRNM
2014AP898-CRNM

State of Wisconsin v. Tracy Lionall Granberry
(L.C. # 2012CF004557) and (L.C. # 2012CF005056)

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

Tracy Lionall Granberry appeals the convictions, entered on his guilty pleas, for felony bail jumping in a domestic abuse incident as a repeater in Milwaukee County case no. 2012CF4557 and for felon in possession of a firearm and misdemeanor intimidation of a witness in a domestic abuse incident as a repeater in Milwaukee County case no. 2012CF5056. *See* WIS. STAT. §§ 946.49(1)(b), 968.075(1)(a), 939.621(1)(b), (2), 941.29(2)(a), 940.42 (2011-

12).[1] Postconviction/appellate counsel, Annice M. Kelly, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Granberry has responded.[2] Kelly subsequently moved this court to withdraw as counsel, and we allowed her to do so. Granberry's successor counsel, Nicholas C. Zales, advised this court that, after reviewing the case file and speaking with Granberry, he agrees with Attorney Kelly's conclusion and intends to rely on the no-merit report she submitted. After independently reviewing the records, the no-merit report, and Granberry's response, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In Milwaukee County case no. 2012CF4557, Granberry was charged with disorderly conduct in a domestic abuse incident as a repeater and with felony bail jumping in a domestic abuse incident as a repeater. The charges stemmed from events that occurred in September 2012. According to the complaint, the victim, S.H., found Granberry inside her home, in violation of the terms of his bail. S.H. relayed that Granberry then left in her vehicle. When she located him and asked for her vehicle, Granberry told S.H. he had loaned it to a friend. When the vehicle was returned to S.H., she got in it with the intent to leave. Before she was able to do so, Granberry pulled her out and proceeded to punch her in the nose. As S.H. attempted to defend herself, Granberry bit her, punched her in the face, and dragged his fingernails against her

[1] We previously concluded, on our own motion, that these matters were appropriate for consolidation.

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

[2] Granberry's response is a letter stating that he wants this court to review his case as provided by WIS. STAT. RULE 809.32.

right cheek. At this point, S.H. stopped struggling and let Granberry push her into the passenger seat. Granberry drove S.H. back to her home.[3]

The complaint additionally relayed that Granberry had been convicted of two prior misdemeanor domestic abuse offenses in the ten years immediately preceding the charges in case no. 2012CF4557.

In Milwaukee County case no. 2012CF5056, Granberry was charged with possession of a firearm by a felon and four counts of felony bail jumping. The charges stemmed from events that took placed on November 17, 2012. Around 2:00 a.m. on that date, police responded to a call from S.H. According to the complaint, S.H. told police that Granberry was inside her home. The day before, Granberry came to S.H.'s home and asked to use her vehicle. S.H. allowed him to do so because she believed Granberry had a new job and was sober. When Granberry failed to return the vehicle, S.H. began to call him. When Granberry answered, S.H. believed he was intoxicated. She told him to return her vehicle and leave. When Granberry later returned, he went inside S.H.'s home and refused to leave. S.H. then called police.

After forcing entry into S.H.'s home because the door was blocked, police found Granberry hiding under a bed. Granberry was wearing only boxer shorts. When asked where his clothing was, Granberry pointed to a pile of clothing in the living room. The police conducted a search incident to Granberry's arrest and found a Smith & Wesson magazine with thirteen bullets in Granberry's pants pocket. The police also found a Smith & Wesson semi-automatic handgun on the floor underneath Granberry's clothes. S.H. later confirmed that this was her firearm and

[3] The record indicates that S.H. gave a statement about these events the following day.

that it was not in the kitchen where she had left it. Granberry was the only person in S.H.'s apartment at the time.

The complaint further alleged that Granberry was a convicted felon and detailed the open domestic violence cases pending against Granberry and the conditions of his bail.

An amended information was subsequently filed adding a count of misdemeanor intimidation of a witness in a domestic abuse incident as a repeater based on information that Granberry had attempted to dissuade S.H. from testifying against him.

Granberry ultimately pled guilty to three charges. In case no. 2012CF4557, he pled guilty to felony bail jumping in a domestic abuse incident as a repeater. In case no. 2012CF5056, he pled guilty to possession of a firearm by a felon and misdemeanor intimidation of a witness in a domestic abuse incident as a repeater. Pursuant to the plea agreement, the State agreed to move to dismiss and read in the other counts.[4] The State further agreed to recommend a prison term without specifying the length. The court accepted Granberry's pleas, dismissed the other counts against him, and sentenced him to four years of initial confinement and eight years of extended supervision.

In the no-merit report, counsel addresses whether there would be arguable merit to an appeal on the following issues: the validity of Granberry's pleas; whether the complaint established a factual basis that Granberry possessed the gun; and whether Granberry's trial counsel was ineffective for not moving to withdraw Granberry's plea pre-sentencing. For

[4] There were four open cases pending against Granberry at the time of the plea hearing. The circuit court previously consolidated the cases for purposes of trial. We discuss only those charges that are relevant to the no-merit proceedings presently before us.

reasons explained below, we agree with the conclusion that there would be no arguable merit to pursing these issues on appeal. Additionally, we will address the circuit court's exercise of its sentencing discretion.

***The Validity of Granberry's Pleas***

We address in tandem the first two issues discussed by counsel in the no-merit report. In doing so, however, we note that counsel's discussion of these issues focused on Granberry's plea to the felon in possession of a firearm charge. We agree with counsel's analysis as it relates to that specific charge and have further considered whether Granberry has an arguably meritorious basis for challenging his other pleas on appeal.

To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Granberry completed a plea questionnaire and waiver of rights form and an addendum in each case. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The forms listed the maximum sentences Granberry faced, and the circuit court confirmed that Granberry understood the length of time he was facing. The forms, along with the addendums, further specified the constitutional rights that Granberry was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

We further note that Granberry agreed during the plea hearing that the facts as alleged in the criminal complaints were true, and the parties agreed that the court could use the criminal complaints as the factual basis to support the pleas. We accept counsel's conclusion that the

facts were sufficient to establish the element of possession and further conclude that the complaints were adequate to support the pleas to the other charges.[5]

There would be no arguable merit to challenging the validity of Granberry's guilty pleas.

***Sentencing***

We have also considered whether there would be an 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. ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the circuit court found that the charges in these cases were aggravated, explaining: "I mean, you look at this pattern with all these cases, Mr. Granberry, and you were

[5] Because it was not in the complaint, the charge of misdemeanor intimidation of a witness in a domestic abuse incident as a repeater (which was set forth in an amended information) was detailed on the record.

just out of control. Out of control. And it was months and months of being out of control. And the conduct that you exhibited with [S.H.] was really terrifying for her." The court took into account that Granberry was dealing with the deaths of his parents and the fact that S.H. allowed Granberry to be in contact with her—in violation of the court's orders. Notwithstanding, the court made clear that the charges were not just about Granberry's contact with S.H., they were about "violence over and over again." The court took note of Granberry's criminal history, concluding that it reflected a pattern of Granberry's inability to control himself. The court, however, also acknowledged that Granberry had lots of good qualities and had much to offer.

When combined, the sentences on the charges totaled four years of initial-confinement time and eight years of extended-supervision time. Granberry's sentences were within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

***Ineffective Assistance***

In the no-merit report, counsel discusses whether Granberry's trial counsel was ineffective for not moving to withdraw Granberry's guilty plea pre-sentencing, when Granberry stated that he never possessed the gun.

Just as the circuit court was about to impose its sentence, the following exchange took place:

> [GRANBERRY]: … [B]efore you impose sentence. I have never possessed a firearm. That is what I kept telling him. I never seen this firearm in my life. She [S.H.] sent a paper to them,

> to the D.A. and to my lawyer, letting, you know, he never possessed my firearm.
>
> THE COURT: I took a plea, and you admitted to possessing a firearm.
>
> [GRANBERRY]: My thing, Your Honor—
>
> THE COURT: It doesn't have to be in your hands to possess it, sir.
>
> [GRANBERRY]: Okay.

Our review of the transcript from the plea hearing reveals that the circuit court explained, in detail, the elements of the felon in possession of a firearm charge to which Granberry was pleading:

> THE COURT: … Do you understand that as to [the] case ending [in] 5056, as to Count 1, if we had a trial, the [S]tate would have to prove that on or about November 17th, 2012, at 9429 West Capitol Drive, in the City of Milwaukee, that you possessed a firearm. "Firearm" means a weapon which acts by the force of gunpowder. "Possess" means you knowingly had actual physical control of a firearm, and the [S]tate would have to prove you had been convicted of a felony before November 17th, 2012, that remains of record and unreversed. Do you understand that is what the [S]tate would have to prove as to Count 1?
>
> [GRANBERRY]: Yes, ma'am.
>
> [GRANBERRY'S TRIAL COUNSEL]: Judge, just so I can add, in terms of the factual basis for that particular charge, I would just note that Mr. Granberry and I did also review an understanding of what is constructive possession.
>
> THE COURT: And you understand possession, an item is also in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item, you don't have to own an item in order to possess it, and possession can be shared with another person. Do you understand all those things, Mr. Granberry?
>
> [GRANBERRY]: Yes, ma'am.

Even if we were to conclude that Granberry's trial counsel's performance was deficient for not seeking to withdraw Granberry's plea before sentencing, *see* ***Strickland v. Washington***,

466 U.S. 668, 687 (1984), Granberry still would have had the burden of showing by a preponderance of the evidence that there was a fair and just reason to withdraw the plea, *see* ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). To be "fair and just," the reason must be more than a defendant's change of mind and desire to have a trial. ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991).

Here, to the extent Granberry's fair and just reason would have been his purported confusion over the element of possession, the plea hearing transcript reveals that this was carefully discussed with him. Consequently, we agree with counsel's assessment that even if counsel was ineffective for not moving for pre-sentence plea withdrawal, no prejudice occurred because the circuit court would not have granted such a motion. *See* ***Strickland***, 455 U.S. at 694 (test for prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Our independent review of the records 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 Nicholas C. Zales is relieved of further representation of Granberry in these matters. *See* WIS. STAT. RULE 809.32(3).

*Diane M. Fremgen*
*Clerk of Court of Appeals*