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DISTRICT IV

July 29, 2015

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

2013AP1177-CRNM State of Wisconsin v. Gordon D. Hammer (L.C. # 1996CF301)

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

Gordon Hammer appeals a judgment of conviction and an order denying his postconviction motion for plea withdrawal. Attorney James Rebholz has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14)[1]; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit

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

report addresses the validity of the plea and sentence. Hammer was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

On May 5, 1997, Hammer entered a plea of no contest to one count of escape pursuant to arrest and one count of battery to law officers as a party to a crime, both Class D felonies under the statutory scheme in effect at the time. *See* WIS. STAT. §§ 946.42(3)(a), 940.20(2) (1997-98). Hammer filed a notice of intent to pursue postconviction relief. However, no appeal was filed for reasons Hammer presented to this court in his motion for extension of the time for filing a notice of appeal or postconviction motion. The State did not oppose the reinstatement of Hammer's direct appeal deadline. In an order issued October 22, 2009, we reinstated Hammer's direct appeal rights. Hammer then filed a postconviction motion to withdraw his no-contest pleas. After an evidentiary hearing, the circuit court denied the motion, and Hammer filed a notice of appeal.

In his motion for plea withdrawal, Hammer conceded that the court's plea colloquy was not defective in any manner. We agree. Hammer executed a plea questionnaire and waiver of rights form in which he acknowledged the elements of the offense, the penalties that could be imposed, the recommendation the State would make and the rights he waived by entering a no-contest plea. At the plea hearing, the circuit court ascertained that Hammer understood the form he signed, the elements of the offenses, and his constitutional rights. The court followed the procedure for accepting a no-contest plea set out in ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Our independent review of the record confirms that there is no basis to challenge whether Hammer's pleas were knowingly, voluntarily, and intelligently entered. *See* ***id.*** at 260.

We agree with counsel's assessment that there would be no arguable merit to a claim that the circuit court erred by denying Hammer's post-sentencing motion to withdraw his pleas. After sentencing, a defendant who seeks to withdraw a no-contest plea must establish by clear and convincing evidence that withdrawal of the plea is "necessary to correct a manifest injustice." ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). A plea that is not knowingly, voluntarily, or intelligently entered is a manifest injustice. ***Id.***

Hammer alleged in his motion for plea withdrawal that his pleas were not knowingly, voluntarily, and intelligently entered because his co-defendant, Travis Curtis, made threats in jail that Hammer would be injured or killed if he proceeded to a jury trial. The circuit court conducted an evidentiary hearing on the motion, at which both Curtis and Hammer testified.

Curtis testified that he made a deal with the FBI under which believed that both he and Hammer had to accept a plea deal in consideration for the government's promise not to remove Curtis's sister's children from her home. Curtis testified that he wanted Hammer to plead first so that Curtis would know whether Hammer followed through with this deal. Curtis testified that he "threatened" Hammer on May 5, 1997, in the room where they had been placed alone in the Jefferson County Justice Complex, and used "very harsh language" to make his threat. Curtis said that he would have been able to execute his threat, because he was the leader of a prison gang who would have been able to act upon the threat within the prison system. Curtis further stated that Hammer had not made any attempt to influence Curtis's postconviction testimony.

Hammer testified that, when he arrived at the justice complex on May 5, 1997, he believed he "was going to trial" because he was not a part of Curtis's deal with the FBI and did not think it had anything to do with him. Hammer also testified that Curtis told him "he was not

going to allow" Hammer to go to trial. Hammer believed the threat was real because he was aware of Curtis's determination to avoid trouble for his sister and knew Curtis could enforce the threat with "fellow gang members."

Hammer also testified regarding correspondence that he had sent to Curtis, dated September 19, 2010. The letter stated, in relevant part:

> I'm sure by now you spoke with the lawyer from the Jefferson thing, so when you write me back, I need to know the exact details what you told her. I know that we are both going to have to get on the stand at this hearing when they grant it. We need to be on the same page.

Hammer denied that the correspondence was intended to influence Curtis's testimony. Hammer further denied that the correspondence was only an attempt to get Curtis on the same page as him.

Hammer's trial counsel, John Chavez, also testified at the motion hearing. He testified that Hammer never mentioned any threats to him prior to entry of the pleas and recalled nothing that gave him pause for Hammer's entry of the pleas.

In its order denying the motion for plea withdrawal, the court noted that its decision turned on credibility and burden of proof. The court found Hammer's testimony that he was bullied or intimidated into entering his plea to be not credible. The court stated that it observed Curtis and Hammer carefully while they testified, and noted that Hammer was "short, matter of fact and conclusory" about the circumstances allegedly underlying the threat from Curtis. The court also found Hammer's explanation of being bullied or intimidated to be not credible. Rather, the court concluded that Hammer had acted "consistent with his own interests, to the exclusion of extraneous forces." Therefore, the court concluded that Hammer had failed to prove

existence of a manifest injustice by clear and convincing evidence. The court further concluded, by the greater weight of the credible evidence, "that manifest injustice does not and did not exist in this case."

Generally, it is not the province of the reviewing court to determine issues of credibility. ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). When required to make a finding of fact, the trial court determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed on appeal. ***State v. Turner,*** 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). Given that the court's decision on the plea withdrawal motion turned on its evaluation of Hammer's credibility, and that nothing else in our independent review of the record gives rise to a manifest injustice, we agree with counsel's assessment that there would be no merit to challenging the circuit court's denial of the plea withdrawal motion on appeal.

A challenge to Hammer's sentences would also lack arguable merit. The court considered the seriousness of the offenses, Hammer's character, and the need to protect the public. The court imposed the maximum sentence of five years on each count, to be served concurrently to each other, but consecutive to any sentence Hammer was then serving. *See* WIS. STAT. § 973.01(2)(b)4. (1997-98).

In imposing the sentence on the escape count, the court noted that escape is a serious offense. The court also noted that the statutes require that an escape sentence be consecutive to any sentence previously imposed. *See* WIS. STAT. § 946.42(4)(a) (1997-98). On the battery to an officer count, as a party to a crime, the court noted in imposing the maximum sentence that two witnesses had provided statements at sentencing that they had seen Hammer beating the officer.

The court stated that imposing the battery sentence concurrent with the escape sentence would not, in this case, demean the nature of the crime, given that Hammer was already serving 280 years in the Wisconsin prison system. Under these circumstances, it cannot reasonably be argued that Hammer's sentences were so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, we agree with counsel's assessment that a challenge to Hammer's sentences would be without arguable merit.

Our independent review of the record discloses no other potential issues for appeal. Therefore,

Accordingly,

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

IT IS FURTHER ORDERED that the motion to withdraw filed by James Rebholz is granted. Rebholz is relieved of any further representation of Gordon Hammer in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals