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

2013AP1859-CRNM State of Wisconsin v. Frederick D. Booker
(L.C. #2008CF003711)

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

Frederick D. Booker pled guilty to one count of delivering cocaine (one gram or less), contrary to WIS. STAT. § 961.41(1)(cm)1g. (2008-09).[1] He now appeals from the judgment of conviction. Booker's postconviction/appellate counsel, Michael J. Backes, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Booker filed a response and postconviction/appellate counsel filed a supplemental no-merit report. We have independently reviewed the record, the no-merit report, Booker's response, and

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

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.

BACKGROUND

According to the criminal complaint, Booker sold cocaine to a police informant in May 2008. He was arrested in June 2008 when the same informant arranged to buy additional cocaine from Booker. Booker was charged with one count of delivering cocaine based on the May 2008 sale, but he was not charged with any crime related to the June 2008 incident.

In October 2008, Booker, who was out on bail, did not appear for a scheduled status conference because he had been arrested in Georgia for an unrelated crime. A bench warrant was issued and he was extradited to Wisconsin in May 2009. He was again released on bail.

On August 17, 2009, Booker and his trial counsel, Robert E. Webb, Jr., appeared before the trial court to enter a guilty plea pursuant to a plea agreement Booker reached with the State.[2] The State agreed to recommend two years of initial confinement and two years of extended supervision, imposed and stayed, and probation with six months of condition time. The trial court conducted a plea colloquy with Booker, accepted Booker's guilty plea, and found him guilty. The matter was scheduled for sentencing at the end of September and Booker was released on bail.

On August 29, 2009, Booker was charged with several felonies, including sexual assault and felony bail jumping, based on an incident that occurred on August 24, 2009, when he was

[2] The Honorable Jean A. DiMotto accepted Booker's plea and found him guilty. While this court does not generally identify attorneys by name, we do so in this case to fully explain the subsequent history of this case, which involved the appointment of several attorneys.

out on bail. *See* ***State v. Booker***, Case No. 2009CF003989 (Milwaukee Cty. Cir. Ct.). Because of those pending charges, Webb moved to postpone the sentencing. Sentencing was subsequently delayed again based on the continuing litigation in the other case, which included a competency evaluation.[3]

In March 2010, Webb was placed on active military duty, so another attorney from the State Public Defender's Office, Danielle Shelton, was appointed to represent Booker. In April 2010, Shelton moved to withdraw based on a conflict of interest with the State Public Defender's Office and indicated that counsel from the private bar would be appointed to represent Booker.

In July 2010, the next appointed attorney, Heather Johnson, filed a plea withdrawal motion. The motion asserted that Booker wanted to withdraw his guilty plea prior to sentencing because: he was not given a copy of discovery and had not reviewed the discovery with his attorney prior to pleading guilty; he thought until the day of the plea that he would be pleading guilty to a misdemeanor; he "did not sufficiently understand the facts of his case or the difference between a misdemeanor and felony conviction at the time of his plea"; and he had "not enter[ed] his plea freely, knowingly, or voluntarily."

The State opposed Booker's motion, asserting that Booker had not shown "a fair and just reason for withdrawing his plea." The State also argued that it would be substantially prejudiced by the delay because the witnesses' memories are diminished. The State noted that Booker had waited nearly eleven months after pleading guilty to file a motion to withdraw his plea.

[3] Transcripts in this case indicate that Booker was found competent to proceed in his other case.

On August 17, 2010, the day of the scheduled motion hearing, Booker filed an affidavit in support of his motion. In that affidavit, Booker made several other allegations, including: on the day of the plea, Booker had not taken his mental health medication; he thought he would be allowed to plead guilty to a misdemeanor based on his cooperation with law enforcement concerning other matters; upon leaving he courtroom, he "immediately re-considered [his] decision and wished to withdraw [the] plea"; and Webb failed to file a motion to withdraw the plea on Booker's behalf. The trial court delayed deciding the motion based on a number of factors, including Johnson's desire to further research the medication Booker was allegedly taking at the time of his guilty plea and the fact that Booker's jury trial in the sexual assault case would take place soon.[4]

Subsequently, in late August 2010, a jury found Booker guilty of five felonies in Milwaukee County Circuit Court Case No. 2009CF003989. Some of those convictions included a repeater enhancer based on Booker's conviction in the case currently before this court. In October 2010, he was sentenced to a total of thirty-one years of initial confinement for those five felonies.

In November 2010, Johnson moved to withdraw as counsel at Booker's request. Booker indicated that he intended to retain private counsel. The trial court granted the motion, based on Booker's representation that he would be hiring counsel.

[4] The Honorable David Borowski decided the motion to withdraw Booker's plea and ultimately sentenced him.

In December 2010, Booker appeared without counsel and indicated that he wanted to proceed *pro se*. After conducting a colloquy with Booker, the trial court granted Booker's request to proceed *pro se* and appointed J. Dennis Thornton as stand-by counsel. Booker, with Thornton's assistance, subsequently asked for and was granted time to file a motion based on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), alleging that facts outside the record justified withdrawal of his guilty plea.

Before Booker filed his ***Bentley*** motion, he sought to delay the proceedings so that he could hire private counsel. After several delays, Booker told the trial court on June 3, 2011, that he had not been able to retain counsel. He asked the trial court to appoint Thornton as his attorney. The trial court agreed. Thornton subsequently filed a motion to withdraw Booker's guilty plea that provided additional legal support for Booker's previously filed plea withdrawal motion.

The motion was scheduled for a hearing on June 24, 2011. On that date, Thornton told the trial court that Booker had asked him to move to withdraw so that Booker could hire another attorney or represent himself. The trial court denied the motion, citing the extensive delay in the case and the fact that Thornton was ready to proceed. Thornton continued as Booker's attorney over Booker's objection. He called four witnesses.

Webb testified about several matters. First, Webb explained that when Booker was initially charged, he offered to provide information to law enforcement so that his charge could be reduced to a misdemeanor. Webb spoke with a prosecutor and even received a proposed written cooperation agreement, but that agreement was never executed because Booker went to Georgia and had to be extradited back to Wisconsin about seven months later. Webb said that he

explained to Booker shortly after he returned to Wisconsin that the cooperation offer was no longer good because Booker's information would be "old and stale."

Webb also testified about discovery. He acknowledged that he did not provide Booker with a copy of the discovery. Webb explained that he generally provides discovery only if a client requests it or if the client needs assistance understanding the case. Webb said he did not give the discovery to Booker in this case because "[h]e did not request it nor did I have any belief that Mr. Booker did not fully understand what was going on." Webb said that rather than going through the discovery with Booker, he told Booker what he read in the discovery and they "discussed the criminal complaint."

Webb said that he and Booker spoke about a potential plea agreement by telephone and, on the day of they plea hearing, they "spent a significant amount of time discussing what a plea would be," including thirty to forty minutes in a hallway and additional time outside in a courtyard. Webb said that Booker "really wanted to be able to get a misdemeanor out of the case," but Webb "explained to him and reiterated again that that time period [for the cooperation agreement] had passed because of the bench warrant." Webb said he went through each item on the plea questionnaire with Booker.

Webb denied Booker's claim that immediately after the plea hearing, he told Webb that he wanted to withdraw his plea. Webb added: "Mr. Booker never told me he wanted to withdraw the plea." Webb said that if Booker had done so, Webb "would have had to withdraw as being a conflict of interest" and he would not have begun representing Booker in the sexual

assault case.[5] Webb said that when he represented Booker in that new case, Booker never mentioned a desire to withdraw his plea in the drug case. Webb said he did not learn that Booker wanted to withdraw his plea until Thornton asked Webb about it, and Webb denied discussing Booker's desire for plea withdrawal with John Riley, the attorney who represented Booker in the sexual assault case from January through April 2010.

Thornton called Riley as a witness. Riley said that while he did not "specifically remember when or how [Booker] said it," he recalled Booker indicating that he wanted to withdraw his guilty plea in his drug case. Riley said he was not sure if Booker asked him to contact Webb. Riley could also not recall if he spoke with Webb about Booker's desire to withdraw the guilty plea, although he "tend[ed] to believe" he would have. Riley said he did recall speaking with the attorney who succeeded Webb as Booker's attorney on the drug case. Finally, Riley testified that Booker wanted to withdraw his plea "because of a lot of other matters," including "the enhancer situation."

Thornton also presented the testimony of Eugene Dietzler, the attorney who represented Booker in the sexual assault case from May through November 2010. Dietzler said that from early in his representation, Booker expressed an interest in withdrawing his plea in the drug case.

Thornton called as a witness the assistant district attorney who originally offered Booker a cooperation agreement. He said the agreement was never executed and that he did not know why not. He also said that Booker ultimately did not provide assistance to law enforcement.

[5] Webb represented Booker in the sexual assault case through December 2009, when the trial court granted the motion for substitution of counsel filed by Booker's privately retained counsel.

After hearing the witnesses' testimony, the trial court granted Thornton's request to continue the hearing so that Booker could attempt to find a letter from Webb concerning plea withdrawal and Thornton could contact a witness who was present on the day of the plea hearing.[6] At the conclusion of the hearing, Booker continued to tell the trial court that he wanted to hire a different attorney to represent him. The trial court said that he would not relieve Thornton from representation until Booker had retained a new attorney.

Prior to the next scheduling hearing date, Booker filed a *pro se* motion seeking to remove Thornton as his attorney. At the next hearing, Booker told the trial court that his family was in the process of hiring an attorney for him. The trial court allowed Thornton to withdraw as counsel and set the matter for a status conference before a different trial court, due to judicial rotation.[7]

On August 23, 2011, Booker appeared without counsel. He said his family was still trying to hire counsel. The trial court said that it would ask the State Public Defender's Office to appoint counsel, but Booker was still free to hire counsel. The trial court also said that the judge who heard the first part of the motion hearing would continue to preside over that hearing, given that four witnesses had already testified.

Booker did not retain counsel and attorney Richard Hart was appointed to represent him in late August 2011. Counsel made several appearances concerning scheduling, which resulted in the continued motion hearing being scheduled for November 2011. On October 31, 2011,

[6] That witness was the same woman who was subsequently the victim in the sexual assault case.

[7] The Honorable Clare L. Fiorenza presided over several scheduling hearings.

however, Hart moved to withdraw as counsel, at Booker's request. When the parties appeared before the trial court, Hart said there were things that Booker wanted him to do that he felt he "could not ethically do or had a basis to do." The State opposed the motion to withdraw. The trial court denied the motion to withdraw, explaining that Booker was "the most difficult defendant" the trial court had ever dealt with and was unlikely to be happy with a different attorney.

At Booker's request, he was allowed to offer his testimony on the motion in narrative form, as opposed to having Hart question him. Booker testified that while his drug case was pending, he always thought he would be pleading guilty to a misdemeanor, based on assistance he offered to provide to the police. He said that on the day of his scheduled plea hearing, Webb handed him a piece of paper and told him to sign it. He said the paper said "felony" and Booker did not want to plead guilty to a felony. Booker said that Webb "coerced" Booker into accepting the deal. Booker also said that as he left the courtroom after pleading guilty, he told Webb that he changed his mind and wanted to go back in the courtroom, but Webb said they would have to file a motion.

Booker said that after he was arrested for sexual assault, he again told Webb that he wanted to withdraw his guilty plea. Booker testified:

> I said, well, why don't you withdraw my plea [in the drug case] now. Because if you withdraw my plea now, then when I finish with trial [in the sexual assault case], because I'm going to trial and we can fight this, and if I am convicted, I won't be charged with the enhancers. So he said, you know, Mr. Booker, you're right. I'm going to file the motion for it. [But] Robert Webb never filed any motions.

As Booker was testifying, he became upset with Hart and once again said he wanted Hart to withdraw. The trial court ended the hearing and had Booker removed from the courtroom, noting that Booker was "being belligerent" and "borderline violent."

The motion hearing was continued to January 2012. Hart again appeared on Booker's behalf and Booker appeared by videoconference from prison. The trial court gave Hart and Booker an opportunity to speak privately in the courtroom. The trial court then continued the hearing to give them another opportunity to prepare.

Prior to the next court date, Booker filed a *pro se* motion asking the trial court to appoint new counsel for him. At the next hearing, Hart told the trial court that he was willing to continue the representation. The trial court told Booker that given the number of attorneys he had been given, he could either continue with Hart as his attorney or the trial court would "make a finding you have forfeited your right to have an attorney on this case and you are proceeding *pro se*." (Italics added.) When Booker refused to make a choice and instead complained that Hart had failed to object to a motion from the State, the trial court found that Booker had forfeited his right to counsel. The matter was scheduled for a continued motion hearing on August 17, 2012.

At that hearing, the trial court summarized the events of the previous hearing and stated: "At the end of the last court date, Mr. Booker was not only demanding that Mr. Hart be removed, but he was rather upset, somewhat belligerent, out of control. So Mr. Booker is being allowed to represent himself *pro se*." (Italics added.) Booker then asked the trial court to "proceed *pro se* with stand-by counsel," but the trial court said it would not appoint stand-by counsel. (Italics added.) The trial court explained: "[Y]ou can proceed *pro se*, recognizing that it's your choice,

it's obviously a deliberate choice. You've filed multiple written motions with the Court … request[ing] to proceed *pro se*." (Italics added.)

In response, Booker argued with the trial court about a number of issues. Ultimately, Booker's microphone was turned off so that the trial court could speak. The trial court noted that Booker had made a "'demand'" that he be allowed to represent himself. It further found:

> [T]his is one of those situations where the defendant has forfeited his right to counsel.
>
> His behavior during this hearing and the many, many, many prior hearings has been manipulative and disruptive on dozens of occasions. Mr. Booker has not been able to cooperate with any attorney assigned to him.
>
> Mr. Booker had … two attorneys ... that take appointments from the courts and the Public Defender's [O]ffice with difficult, belligerent, recalcitrant defendants that no one else, no other attorney can deal with…. Mr. Booker has refused to cooperate with either of them. Mr. Booker was warned many times over the last year to year-and-a-half about his behavior.
>
> I indicated at the last hearing, and I'm making a ruling today, that the defendant has forfeited his right to an attorney. To make appropriate findings relative to that forfeiture, first of all, the defendant has been through [multiple] attorneys….
>
> … There is no way for me to overstate the completely belligerent, disruptive, out of control, obnoxious, yelling, despicable behavior engaged in by Mr. Booker at every hearing.
>
> ….
>
> Mr. Booker has demanded repeatedly that he be allowed to represent himself. He's being granted that request.

The trial court heard brief argument on the plea withdrawal motion from Booker and the State and then made its ruling denying Booker's motion to withdraw his guilty plea. The trial court said that Booker's testimony was untruthful and "deceitful" and it found that Booker was "attempting to und[o] this conviction because of the negative [e]ffect it had on the sexual assault

case." In contrast, the trial court stated that Webb's testimony was "credible, truthful, honest and persuasive." The trial court found that Booker had not offered "a fair reason or a just reason or, frankly, any believable reason" for withdrawing his guilty plea. The trial court also found that the State "would absolutely be substantially prejudiced" if Booker was allowed to withdraw his plea.

The trial court set the matter for sentencing. Booker appeared in person, *pro se*. The only argument Booker offered was to state that he intended to appeal the trial court's ruling on the plea withdrawal motion. The trial court sentenced Booker to two years of initial confinement and two years of extended supervision, concurrent with the sentence in his sexual assault case. It also ordered Booker to provide a DNA sample and pay the DNA surcharge "if he's not already done so," noting that he "likely has in his other case." The trial court explained that the surcharge was appropriate so that Booker would bear the cost if he had not already done so.[8]

Postconviction/appellate counsel was appointed for Booker. After attempting to secure copies of telephone conversations Booker claimed he had with Webb from the jail after Booker pled guilty, counsel filed a no-merit report. The no-merit report addressed two issues: (1) whether the plea colloquy was deficient; and (2) whether the trial court erroneously denied Booker's motion to withdraw his guilty plea. We agree that there would be no merit to asserting that the plea colloquy was deficient or that the trial court erroneously denied the plea withdrawal motion, for reasons explained below. In addition, we conclude that there would be no merit to

challenging Booker's sentence or the trial court's determination that Booker forfeited his right to counsel.

DISCUSSION

We begin our analysis with the plea colloquy. There is no arguable basis to allege that Booker's guilty plea was not knowingly, intelligently, and voluntarily entered.[9] *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 was an addendum indicating that Booker had read the complaint and was giving up his right to challenge the sufficiency of the complaint and offer certain defenses. An addendum listing the elements of the crime of delivering a controlled

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[8] This is a valid reason to impose the DNA surcharge, so there would be no merit to challenge the trial court's exercise of discretion. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (One factor for trial court to consider when deciding whether to impose the DNA surcharge is "whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost.").

[9] 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). The trial court did not give this warning, but this does not provide a basis for plea withdrawal in this case. To be entitled to plea withdrawal on this basis, Booker would have 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 Booker can make such a showing.

substance was also attached. The trial court conducted a plea colloquy that addressed Booker'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.[10] *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 Booker completed with his trial counsel, noting that the form outlined numerous rights Booker was giving up by pleading guilty. The trial court confirmed with Booker that he knew the trial court was free to impose the maximum sentence, and it reiterated the maximum sentence and fine that could be imposed.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form and attached jury instructions, Booker's conversations with his trial counsel, and the trial court's colloquy appropriately advised Booker of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for

[10] In his response to the no-merit report, Booker makes several allegations concerning deficiencies in the plea colloquy. We have reviewed his allegations and find them unpersuasive. The trial court was entitled to "use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties." *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. We are satisfied that there would be no arguable merit to assert that the plea colloquy failed to pass constitutional muster.

ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Booker's guilty plea.[11]

Further, although Booker's written motions to withdraw his guilty plea suggested that facts outside the record—such as his allegation that his trial counsel coerced him—would entitle him to plea withdrawal, the trial court rejected Booker's factual allegations. Based on the testimony presented, there would be no arguable merit to challenge the trial court's credibility assessments or factual findings. *See* ***State v. Triplett***, 2005 WI App 255, ¶9, 288 Wis. 2d 515, 707 N.W.2d 881 (The weight and credibility to be given to witnesses' testimony is left to the trial court's discretion; we do not disturb credibility determinations unless they are clearly erroneous.); ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (A trial court's factual findings must be upheld unless they are clearly erroneous.).

Next, we turn to the denial of Booker's motion to withdraw his guilty plea. Our supreme court has recognized that a trial court "should 'freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been substantially prejudiced by reliance on the defendant's plea.'" ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted). To withdraw a plea before

[11] In his response to the no-merit report, Booker offers another basis for challenging the guilty plea colloquy: the trial court did not discuss a read-in offense. We are not convinced there would be any merit to an appeal based on this allegation. Booker was charged with only a single offense, and he pled guilty to that offense. While the criminal complaint provided information about a second drug sale, no second charge was issued. Neither the parties nor the plea questionnaire indicated that the plea agreement included an uncharged read-in offense. Even if that was the parties' intent, Booker has not shown that he was prejudiced by the lack of a discussion about that uncharged offense at the plea hearing. He has never been charged with the second drug crime. Further, the trial court's sentencing remarks reveal that it did not rely on the facts of that uncharged offense at sentencing, even though it could have chosen to do so regardless of whether the second drug sale was designated a read-in crime.

sentencing, the defendant must "prove by a preponderance of the evidence that he has a fair and just reason" for doing so. ***Id.***, ¶32. The phrase "'fair and just reason' has never been precisely defined." ***Id.***, ¶31. "The reason must be something other than the desire to have a trial … or belated misgivings about the plea." ***Id.***, ¶32 (citation omitted). On appeal, the trial court's "discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard," and "we apply a deferential, clearly erroneous standard to the trial court's findings of evidentiary or historical fact … [and] credibility determinations." ***Id.***, ¶¶30, 33 (internal citations omitted). "If 'the [trial] court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" ***Id.***, ¶34 (citation omitted).

In this case, there would be no arguable merit to challenge the trial court's decision to deny Booker's motion to withdraw his guilty plea. The trial court explicitly found that Booker's testimony—including that he was coerced into pleading guilty and immediately regretted his plea—was incredible. Our examination of the record does not reveal any basis to disturb the trial court's credibility determinations and factual findings. Further, the trial court also found that the State would be substantially prejudiced by the passage of time (three years) since the plea was accepted. Again, the record does not suggest that finding is clearly erroneous.

In his response to the no-merit report, Booker asserts that "evidence exist[s] as to his effort to withdraw his plea … in a phone recording of a phone call placed from the Milwaukee County Jail." He contends that immediately after pleading guilty, he wanted to withdraw his plea, contrary to the State's suggestion "that he delayed in pursuing his request." Booker's concern is unpersuasive. Even if Booker immediately regretted his decision to plead guilty, the mere desire for a trial and "belated misgivings about the plea" are not fair and just reasons to

withdraw a plea. *See* ***Jenkins***, 303 Wis. 2d 157, ¶32. Further, the trial court specifically found that Booker was motivated by a desire to withdraw his plea to avoid being charged as a repeater in the sexual assault case, and Booker's own testimony supports that finding. We are not convinced that the alleged existence of recorded conversations from the jail in which Booker allegedly indicated that he wanted to withdraw his plea—which two attorneys already confirmed in their testimony at the hearing—provides a basis to pursue an appeal or postconviction motion in this case.

The next issue we address is 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. It addressed

Booker's criminal history, which included fifteen arrests but no convictions prior to this drug case. The trial court gave Booker credit for his guilty plea, although it recognized that Booker later tried to withdraw his plea. The trial court recognized that only a small amount of cocaine was involved. It also discussed Booker's behavior after the plea was entered.

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. Ultimately, the trial court imposed a concurrent sentence, such that Booker will not serve any additional time in prison or on extended supervision after he completes his longer sentence for sexual assault, bail jumping, and other charges. Further, the trial court's imposition of a four-year sentence was well within the ten-year 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.").

Next, we consider whether there would be any merit to an appeal based on the fact that Booker did not have counsel for the final hearing on his motion to withdraw his guilty plea or at sentencing. We conclude there would be no merit to such an appeal, because Booker expressed his desire to proceed *pro se* numerous times and, moreover, there would be no merit to suggest that the trial court's decision that Booker forfeited his right to counsel was erroneous.

As detailed above, Booker on numerous occasions asked to proceed *pro se*, filed *pro se* motions, and asked that his trial attorneys be allowed to withdraw from the case. In December 2010, when Booker told the trial court he intended "to proceed *pro se*," the trial court conducted a thorough colloquy with Booker and ultimately determined that Booker was competent to

proceed *pro se*. (Italics added.) The trial court granted Booker's request to proceed *pro se*, although the trial court later reappointed Thornton to represent Booker at Booker's request. Subsequently, Booker asked to again proceed *pro se* or delay the case so that he could hire counsel. In sum, Booker expressed his desire to proceed *pro se* at several hearings, and he was ultimately allowed to do so.

To the extent that by the end of the case Booker had changed his mind and did not wish to proceed *pro se*, the record demonstrates that he nonetheless forfeited his right to counsel by his actions. There would be no basis to challenge the trial court's determination that Booker forfeited his right to counsel. Our supreme court has recognized that a defendant can be found to have forfeited his right to counsel by his actions. *See* ***State v. Cummings***, 199 Wis. 2d 721, 754-56, 546 N.W.2d 406 (1996). ***Cummings*** explained: "[U]nusual circumstances, 'most often involving a manipulative or disruptive defendant,' permit a court to find that the defendant's voluntary and deliberate choice to proceed *pro se* has occurred by operation of law." ***Id.*** at 752 (citation omitted; italics added.) ***Cummings*** recommended that trial courts, "when faced with a recalcitrant defendant," take four steps outlined by the dissent in that case "before determining that a defendant has forfeited his or her right to counsel." ***Id.*** at 756 n.18. Those steps include:

> (1) explicit warnings that, if the defendant persists in "X" [specific conduct], the court will find that the right to counsel has been forfeited and will require the defendant to proceed to trial *pro se*; (2) a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation; (3) a clear ruling when the court deems the right to counsel to have been forfeited; [and] (4) factual findings to support the court's ruling.

Id. at 764 (Geske, J., dissenting) (italics added).

The record demonstrates that the trial court in this case heeded that advice and, over the course of numerous hearings, warned Booker about his behavior. Later, the trial court found that Booker had forfeited his right to counsel and made detailed factual findings to support that ruling. The record supports the trial court's decision. There would be no arguable merit to an appeal challenging the trial court's determination that Booker forfeited his right to counsel.

Finally, we note that we have carefully reviewed Booker's response to the no-merit report. To the extent we have not already addressed a particular issue raised in that response, we have determined that Booker has not raised an issue of potential merit. Much of Booker's response makes factual assertions that were rejected in the trial court's factual findings. Booker also asserts that his conviction in his bail-jumping case was improper, but that case is not before us in this appeal. Finally, Booker argues that he is innocent of the drug charge, but he told the trial court at the plea hearing that the allegations in the complaint were accurate. There would be no merit to pursuing any of the issues Booker raises in his response.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved of further representation of Booker in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals