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August 24, 2015

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

2015AP695-CRNM State of Wisconsin v. Commosie Deshawn Thompson
(L.C. #2014CF650)

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

Commosie Deshawn Thompson appeals a judgment convicting him of second-degree reckless homicide. Attorney Michael S. Holzman filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Thompson filed a response. Attorney Holzman then filed a supplemental no-merit report, to which Thompson filed a second response. After considering the no-merit reports

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

and the responses, and after conducting an independent review of the record, we conclude that there are no issues of arguable merit that Thompson could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be any basis for arguing that Thompson did not knowingly, intelligently and voluntarily enter his guilty plea. In order to ensure that a defendant is knowingly, intelligently and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

During the plea hearing, the prosecutor stated the plea agreement on the record and the circuit court explained to Thompson that it was not required to follow the recommendation of either the prosecutor or Thompson's lawyer, and could sentence Thompson up to the maximum term of fifteen years of initial confinement followed by ten years of extended supervision. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

The circuit court conducted a colloquy with Thompson during which it explained the crime to him and informed him of the maximum penalties he faced by entering a plea. Thompson informed the court that he understood. The circuit court personally reviewed the constitutional rights Thompson was waiving with him on the record. The circuit court informed Thompson that if he was not a citizen of the United States of America, he could be deported if he pled guilty to the crime. *See* ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1.

The circuit court ascertained that Thompson had reviewed the plea questionnaire and waiver-of-rights form with his attorney and that he had signed it. The circuit court asked both Thompson personally and Thompson's lawyer whether they had gone over the elements of the offense together, which were listed in an addendum to the plea questionnaire. Thompson's lawyer said he had reviewed the elements with Thompson and was satisfied that he understood them. Thompson also personally acknowledged that he reviewed the elements of the offense with his lawyer and knew what the State would have to prove to convict him. The plea questionnaire addendum informed Thompson that he was waiving the right to raise defenses to the charge by pleading guilty.

The circuit court asked Thompson whether he had reviewed the criminal complaint and whether the facts alleged in the complaint could serve as the basis for the plea. Thompson's lawyer stipulated that the complaint provided a factual basis for the plea, but pointed out that Thompson disagreed with some of the statements attributed to him and disagreed that there was "bad blood" between Thompson and the victim. Based on the circuit court's thorough plea

colloquy with Thompson, and Thompson's review of the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion when it imposed ten years of initial confinement and six years of extended supervision on Thompson. In framing its sentence, the circuit court concluded that the seriousness of the crime mandated that Thompson spend time in prison. The circuit court reasoned that Thompson presented a danger to the community and needed to be punished. The circuit court also noted mitigating circumstances: the victim, who had the gun, was shot while Thompson was attempting to disarm him and Thompson accepted responsibility for his actions. The circuit court considered appropriate factors in deciding what length of sentence to impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

The no-merit report and Thompson's response address whether there would be arguable merit to a claim that Thompson received ineffective assistance from his trial lawyer. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have

been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

In the no-merit report, Attorney Holzman states that Thompson informed him that he believed his trial lawyer was ineffective because: (1) he did not get the prosecutor to reduce the charges to negligent homicide; (2) he did not interview witnesses who might have helped him; and (3) he did not obtain GPS records from the phones of people who gave statements adverse to him to determine if they were, in fact, at the scene of the crime. Thompson also addresses this separately in his response. These arguments would not have arguable merit on appeal because a plea of guilty, knowingly and understandingly made, waives all non-jurisdictional arguments and defenses, including claimed violations of constitutional rights. ***State v. Asmus***, 2010 WI App 48, ¶3, 324 Wis. 2d 427, 782 N.W.2d 435. The record establishes that Thompson knew that he was waiving his right to raise potential arguments on his behalf and defenses when he entered his plea.

Moreover, Thompson's trial lawyer negotiated with the prosecutor to reduce Thompson's initial charge from first-degree reckless homicide while armed, to second-degree reckless homicide, which significantly reduced Thompson's prison exposure. While Thompson may have hoped that the charges would be further reduced, his lawyer effectively negotiated on Thompson's behalf to reduce Thompson's prison exposure. Turning to the unidentified witnesses Thompson suggests might have helped him, he has not explained what they would have said that would have made a difference given the charge against Thompson and the circumstances of this case. Finally, we agree with the no-merit report that Thompson's claim that GPS phone records might have shown that persons who made statements adverse to him

were not at the scene would not have arguable merit because it is based on nothing more than speculation and, as explained above, Thompson waived his right to make this argument when he entered his plea.

In his response, Thompson contends that his trial lawyer should have objected to the fact that his initial appearance was held before a court commissioner, rather than a judge, because this is a "capital case." A "capital case" is a criminal proceeding in which the death penalty is a potential punishment. This is not a capital case because Wisconsin does not allow death to be imposed as a criminal punishment. While the legal basis for Thompson's argument is not explained, he may be incorrectly relying on case law or statutes from jurisdictions where the death penalty may be imposed. In Wisconsin, however, there is no legal requirement that initial appearances be conducted by circuit court judges and they are routinely conducted by court commissioners. There would be no arguable merit to this claim.

Thompson next argues in his response that he received ineffective assistance from his trial lawyer because he did not challenge the State's request for $250,000 bail during the initial appearance. Thompson's lawyer stated during the initial appearance that it would be an exercise in futility to address bail at that point *because Thompson was on a hold for violating his probation*. This meant that Thompson was being held in custody for violating the conditions of probation in a prior case and would not have been released, regardless of the bail conditions set by the court commissioner. Thompson's lawyer's statement that Thompson was not going to challenge the bail determination at that point was based on his accurate assessment that challenging bail would have had no practical effect. Moreover, the court commissioner noted

that the bail issue could be revisited in the future. There would be no arguable merit to this claim.

Thompson contends in his response that he told his lawyer during the initial appearance that the police did not read him his ***Miranda***[2] rights, but his lawyer said that it did not matter whether he had been read his ***Miranda*** rights in terms of his eligibility for bail. Again, Thompson's lawyer's analysis was correct. An alleged ***Miranda*** violation had no relevance to Thompson's continued incarceration because Thompson was being held for violating his probation in a different case. Thompson's lawyer's actions are not grounds for a claim of ineffective assistance of counsel. There would be no arguable merit to this claim.

Thompson next argues that his lawyer ineffectively represented him by waiving his right to a preliminary hearing. The record undermines Thompson's claim. The circuit court conducted a colloquy with Thompson personally and Thompson stated that he wished to waive his right to a preliminary hearing. To the extent that Thompson is attempting to argue that his lawyer's *advice* to waive the preliminary hearing was flawed, Thompson's argument would lack arguable merit because there are sound strategic reasons for a lawyer to advise a client to waive a preliminary hearing. Moreover, Thompson's assertion that the charges would have been dismissed if a preliminary hearing had been held is not grounded in the facts and circumstances of this case: according to the criminal complaint, two people identified Thompson as the person who shot the victim, causing his death. There would be no arguable merit to this claim.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Thompson argues that his lawyer coerced him into accepting a plea agreement by threatening him with a sixty-year plus sentence if he went to trial. Thompson's lawyer's explanation to Thompson that he could potentially receive a very lengthy sentence if he went to trial on the charge of first-degree reckless homicide while armed with a dangerous weapon was accurate; Thompson faced a potential sentence of sixty-five years. Thompson's lawyer did not coerce him by providing him with information about the circumstances he faced so that Thompson could make a decision that was in his best interest. Moreover, during the plea hearing, in response to questioning from the court, Thompson said that he was entering the plea of his own free will and no one had threatened him or forced him to plead guilty. There would be no arguable merit to this claim.

Thompson next contends in his response that he received ineffective assistance of counsel because his lawyer did not make sure that he was produced for a status conference on March 13, 2014. He argues that "he has the right to be present at every proceeding where he is on trial for his life." The Wisconsin Statutes do not require that defendants be present for status conferences. *See* WIS. STAT. § 971.04(1). And, as we explained earlier, Thompson was not "on trial for his life" because this is not a capital case. There would be no arguable merit to this claim.

Thompson next contends in his response that he received ineffective assistance of counsel because his lawyer did not file any motions. Thompson's lawyer did, in fact, file pre-trial motions. His lawyer moved to exclude evidence of any prior criminal acts or misconduct by Thompson, moved to exclude evidence of his prior convictions, moved to prohibit the prosecution from calling any witnesses that had a criminal record without disclosing that record

to defense prior to trial, moved to exclude all witnesses from the courtroom, and moved to prohibit the State from being allowed to introduce the fact that Thompson was on probation at the time of the alleged offense. The circuit court did not rule on the motions because Thompson chose to plead guilty, rather than proceed to trial. Because Thompson's lawyer filed motions on his behalf in preparation for trial before Thompson decided to plead guilty, there would be no arguable merit to this claim.

Thompson next contends that he received ineffective assistance of counsel because his lawyer did not challenge the restitution order of $12,545, even though his lawyer knew that he would be imprisoned and would not have the means to pay this amount of restitution. He contends that he should have been sent to prison or fined, but not both. This argument lacks arguable merit for several reasons. First, restitution is not a fine. Second, there is no legal basis for Thompson's claim that a defendant should be imprisoned or fined, but not both. Third, Thompson has pointed to nothing that suggests that the medical and burial expenses claimed by the victim's family were not justified. There would be no arguable merit to this claim.

Thompson next argues that he received ineffective assistance of counsel because the circumstances of the crime did not fit the charge. He contends that his actions in causing the victim's death were negligent, not reckless. Criminally reckless conduct means "the conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that [his] conduct created the unreasonable and substantial risk of death or great bodily harm." WIS JI—CRIMINAL 1060 (4/2002) (some formatting altered). Thompson admits that he approached the victim, who was sitting in a car, attempted to disarm the victim, who had a gun, and then ended up shooting

the victim, killing him. The actions Thompson admits he took satisfy the definition of criminally reckless conduct. More importantly, Thompson *agreed* that his actions were consistent with the elements of the crime at the plea hearing. There would be no arguable merit to this claim.

Thompson next contends in his response that the prosecutor engaged in misconduct. We have reviewed various statements by the prosecutor with which Thompson takes issue, but we conclude that these statements were not improper and did not constitute prosecutorial misconduct. There would be no arguable merit to this claim.

Thompson's no-merit response presents a detailed and thorough explanation to this court regarding the reasons why he believes his conviction should be overturned. Although we have not separately addressed each of the nearly forty potential issues he raises in the response, many of which are based on the same or similar legal theories, we have carefully considered each of Thompson's arguments. However, we conclude that they do not present arguably meritorious grounds for an appeal; as previously explained, the primary problem for Thompson is that he waived his right to raise non-jurisdictional defenses and arguments when he decided to plead guilty to the reduced charge of second-degree reckless homicide. *See* ***Asmus***, 324 Wis. 2d 427, ¶3 (a plea of guilty, knowingly and understandingly made, waives all non-jurisdictional arguments and defenses, including claimed violations of constitutional rights). Our independent review of the record also reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Michael S. Holzman of further representation of Thompson.

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

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of any further representation of Thompson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals