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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:

2015AP565-CRNM State of Wisconsin v. Clifford Beasley (L.C. #2014CF244)

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

Clifford Beasley appeals from a judgment of conviction, entered upon his guilty pleas, of one count of attempted robbery of a financial institution, two counts of burglary, and one count of operating a motor vehicle without the owner's consent, all as party to a crime. Appellate counsel, Daniel P. Murray, has filed a no-merit report, pursuant to ***Anders v. California***, 386

U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Beasley was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal with respect to Beasley's plea or sentence. There is an error regarding the imposed mandatory DNA surcharges, so we modify the judgment of conviction as described herein and, as modified, we summarily affirm the judgment.

On December 28, 2013, two individuals entered a bank, one of them standing lookout and one approaching a teller with a note. The teller later reported to police that the end of the note said, "or everyone is going to die." The teller refused to turn over any money and instead activated the bank's alarm. The robbers fled. This robbery was investigated as one of a possible series of robberies perpetrated by a group of people who had been at Lincoln Hills together.[2] From the bank's surveillance cameras, police obtained a still image of the robber who approached the teller. Though his lower face was covered, the robber had a distinctive tattoo between his eyebrows.

On January 7, 2014, S.H.'s Chevrolet Trailblazer was stolen. When it was recovered a day later, there were various documents in the vehicle that did not belong to S.H. Among the

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

[2] It was ultimately determined that this robbery was not part of that particular crime spree.

items was a job application bearing Beasley's name and other information. Police looked Beasley up in the system and recognized the distinctive tattoo between his eyebrows.

Police took Beasley into custody, and he admitted to activity that formed the basis of six charges in this case: the December 28, 2013 attempted robbery; a December 17, 2013 burglary of S.H.'s home; taking and driving S.H.'s Trailblazer without her consent; a second burglary on January 17, 2014; taking and driving a Toyota Camry without the owner's consent on January 19, 2014; and a third burglary on January 20, 2014. Beasley was evaluated for competency to stand trial and, though the first evaluation was inconclusive, an in-patient evaluation ended with the examiner concluding Beasley did not lack substantial mental capacity to proceed. Beasley did not challenge that conclusion.

In exchange for Beasley's guilty pleas to the first four offenses, the State agreed to dismiss and read in the remaining two charges and to recommend a prison sentence with the length left to the circuit court's discretion. The circuit court conducted a plea colloquy and accepted Beasley's guilty pleas. It originally gave Beasley sentences totaling nine years' initial confinement and nine years' extended supervision. However, it called the parties back the same day and altered its sentence a total of eight years' initial confinement and five years' extended supervision, explaining that the original sentence was "more than enough" time to achieve sentencing objectives, hence the downward modification.[3]

[3] The circuit court gave a more detailed explanation to the parties off the record, but ultimately, the State had no objection to the modification.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Beasley's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Beasley's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Beasley completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. Attached to the plea form were all relevant jury instructions which Beasley initialed. The form correctly acknowledged the maximum penalties Beasley faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also 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. It noted that Beasley was being treated for schizophrenia but verified that Beasley understood the proceedings. It appropriately reviewed the elements of the offenses and possible penalties with Beasley. It reviewed the constitutional rights Beasley was waiving with his pleas. It explained that the read-in offenses could be considered at sentencing and that restitution for those offenses could be ordered. It also went through the complaint with Beasley and verified that it could use the complaints as the factual basis for the pleas.

The plea questionnaire and waiver of rights form and addendum, along with the court's colloquy, appropriately advised Beasley of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for

ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether 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. At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *See* ***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. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that Beasley did not have a great family background, but cautioned Beasley that was something he could not change but, rather, had to work through. He noted that Beasley had rehabilitative needs to be addressed, both alcohol or drug treatment, as well as mental health issues. The circuit court noted that punishment was also important as Beasley's offenses were aggravated; his record started in 2012 with juvenile adjudications and then, while barely eighteen, he was involved in six felonies in less than a month. Some of his victims were people that Beasley or his co-actor knew and who tried to help Beasley or his co-actor in the past.

The maximum possible sentence Beasley could have received was fifty-one years' imprisonment. The sentence totaling thirteen years' imprisonment is well 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 is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[4]

The circuit court noted Beasley would have to pay all mandatory costs, surcharges and assessments. Thus, the judgment of conviction reflects $1000 for the DNA analysis surcharge. *See* WIS. STAT. § 973.046(1r)(a) (requiring a $250 surcharge for each felony conviction). When that rule took effect on January 1, 2014, it was applicable for all sentences imposed on or after January 1, 2014, without regard to when the offense was committed. *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am).

This court recently concluded that such application of the mandatory DNA surcharge is an *ex post facto* violation when applied to defendants who commit a crime before, but are sentenced after, January 1, 2014. *See* ***State v. Radaj***, 2015 WI App 50, ¶¶1, 35, __ Wis. 2d __, __ N.W.2d __. There is, however, no *ex post facto* issue when the crimes *and* the sentencing occur after January 1, 2014. *See* ***id.***, ¶7. We therefore direct that upon remittitur, the judgment of conviction be modified to reflect $500 for the DNA analysis surcharge, not $1000. The surcharge was not mandatory for counts one or two, as they were committed in December 2013.

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

[4] Beasley stipulated to restitution.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment of conviction is modified and, as modified, summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel P. Murray is relieved of further representation of Beasley in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals