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September 2, 2015

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

2014AP1393-CRNM State of Wisconsin v. James C. Brown (L.C. # 2011CF179)
2014AP1394-CRNM State of Wisconsin v. James C. Brown (L.C. # 2012CF1224)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

In these consolidated matters, James C. Brown appeals from judgments of conviction entered upon his guilty pleas to stalking and felony bail jumping, both as a repeater. Brown's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Brown received a copy of the report, was advised of his right to file a response, and has elected not to do so. In the course of our independent review

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

of the record, we observed two possible errors on the judgment. First, though the sentencing court determined that Brown was ineligible for both the Challenge Incarceration and Earned Release Programs in connection with the prison sentence ordered in Kenosha County case No. 2011CF179, this finding is not reflected on the judgment. This appears to be a clerical error and we order that upon remittitur, the judgment shall be modified to reflect the trial court's oral pronouncement. *See* ***State v. Prihoda***, 2000 WI 123 ¶15, 239 Wis. 2d 244, 618 N.W.2d 857 (where there is a conflict, the sentencing court's unambiguous oral pronouncement trumps the written judgment of conviction). Second, it appears that the sentencing court ordered Brown to pay the WIS. STAT. § 973.046(1g) (2011-12) DNA surcharge in connection with the felony conviction in No. 2011CF179. The surcharge does not appear on the judgment and we have no way to determine the reason for this omission or whether it was intentional. Because we determine that the trial court properly exercised its discretion in imposing the DNA surcharge,[2] we leave it to the trial court to decide whether to order the judgment amended to reflect imposition of the surcharge. Upon consideration of the no-merit report and an independent review of the record, we conclude that the judgments, as modified, may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

[2] Where, as here, the trial court has discretion under WIS. STAT. § 973.046(1g) (2011-12), to impose the DNA surcharge, "in exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can." ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. In addition to the trial court's stated reasons, the record suggests that Brown has never before provided a DNA sample in Wisconsin for this state's database. Requiring payment of the cost when a sample has not previously been provided is appropriate because it is a sample provided in connection with the case, as a result of the conviction; it presents an acceptable rationale for imposing the surcharge. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12.

In August 2012, pursuant to a plea agreement, Brown pled guilty to stalking as a repeater in connection with case No. 2011CF179. In exchange for his plea, the State agreed to dismiss and read in a separate misdemeanor case and to recommend probation with conditional jail time not to exceed four months. After accepting Brown's guilty plea, the trial court ordered a presentence investigation report, set the matter over for sentencing, and modified Brown's cash bail to a personal recognizance bond. Brown failed to appear for sentencing and a warrant was issued. Brown was apprehended in Missouri, extradited back to Wisconsin, and charged in Kenosha County case No. 2012CF1224 with felony bail jumping as repeater. Brown pled guilty to the new charge as part of an agreement wherein the State agreed to (1) recommend an unspecified amount of prison in the bail jumping case, and (2) leave intact its prior offer for a probation recommendation in the stalking case. The trial court ultimately imposed a five-year bifurcated sentence on the stalking conviction, with three years of initial confinement and two years of extended supervision, and ordered a consecutive one-year jail sentence on the bail jumping conviction.

The no-merit report addresses whether there is any basis for a challenge to the validity of Brown's guilty pleas, whether the trial court appropriately exercised its discretion at sentencing, and if there exist grounds for a viable sentence modification motion. We agree with appellate counsel's conclusion that these issues lack arguable merit.

The record discloses no arguable basis for withdrawing Brown's guilty pleas. The court's plea colloquies, each supplemented by a plea questionnaire/waiver of rights form that

Brown completed,[3] informed Brown of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering his guilty pleas. *See* WIS. STAT. § 971.08(1)(a) and (b); ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court discussed with Brown both charges and how his actions satisfied the essential offense elements. *See* WIS. STAT. § 971.08(1)(b). Additionally, the trial court drew Brown's attention to the repeater enhancer, verified that the predicate prior conviction was an unreversed felony, and ascertained Brown's understanding of how the repeater enhancer affected the maximum allowable sentences in each case.

Though not discussed in the no-merit report, during the plea colloquy in the bail jumping case, the trial court failed to advise Brown as required by ***State v. Hampton***, 2004 WI 107, ¶¶32, 38, 274 Wis. 2d 379, 683 N.W.2d 14, that it was not bound by the terms of any plea agreement. ***Hampton*** requires that when a trial court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court." ***Id.***, ¶32 (citation and emphasis omitted). Unlike the situation in ***Hampton*** where the defendant and State agreed to recommend a particular sentence, ***id.***, ¶16, the parties' settlement in Brown's bail jumping case did not include a sentencing recommendation or "cap" by the prosecutor. As such, Brown was not affected by the defect in the plea colloquy and any argument that he should be permitted to seek plea withdrawal under ***Hampton*** lacks arguable

[3] Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken. ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794. At both plea hearings, Brown confirmed that he had signed, reviewed, and understood the plea forms, and had no additional questions.

merit. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (no manifest injustice justifying plea withdrawal exists where the court failed to advise defendant but followed the plea agreement).

Similarly, in both cases, the trial court's plea colloquy omitted the deportation warning required by WIS. STAT. § 971.08(1)(c). *See also* ***State v. Douangmala***, 2002 WI 62, ¶31, 253 Wis. 2d 173, 646 N.W.2d 1. We note that the plea forms Brown affirmatively stated he signed and understood contain the deportation advisory. More importantly, both presentence investigation reports list Brown's birthplace as Illinois, and nothing in the record suggests that his pleas are likely to result in deportation. *See* § 971.08(2); *see also* ***Douangmala***, 253 Wis. 2d 173, ¶¶4, 25, 31. No issue of merit arises from the trial court's failure to provide the deportation warnings.

We also agree with appellate counsel's conclusion that no issue of arguable merit arises from the trial court's exercise of discretion at sentencing. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (it is well-settled that sentencing is committed to the trial court's sound discretion and our review is limited to determining whether the court erroneously exercised that discretion). In fashioning the sentence, the court considered the seriousness of the offenses, the defendant's character and history, and the need to protect the public. ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court took a recess in order to read Brown's sentencing letter and considered mitigating factors such as Brown's educational background and work history. Though it acknowledged that Brown possessed some positive character traits and was working to correct his negative behaviors through religion, the court emphasized the number and nature of Brown's prior convictions. The trial court was especially concerned by Brown's demonstrated pattern of disregarding authority and societal

rules as established by his attempts to elude police officers, repeated violations of court orders, and lack of cooperation with probation agents. The court considered both offenses to be aggravated by Brown's lengthy record of similar crimes. Explaining that various interventions, including incarceration, had failed to modify Brown's behavior, the court determined that probation would unduly depreciate the seriousness of Brown's offenses and that confinement was necessary to protect the public and to punish, rehabilitate, and deter Brown. The trial court applied the relevant sentencing factors to the facts of record and reached a reasonable, explainable conclusion. *See* ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861. Further, we cannot conclude that the sentence imposed, which was well within the statutory maximum, is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The last issue addressed in counsel's no-merit report is whether facts presented to him by Brown outside of the record might serve as grounds to challenge or modify his sentence. Brown has not filed a response refuting appellate counsel's assertions. We are satisfied that the no-merit report properly analyzes these issues as lacking arguable merit.

Finally, though not discussed in the no-merit report, we have considered whether the prosecutor's sentencing argument undercut its probation recommendation in No. 2011CF179 so as to give rise to a claim that the State materially and substantially breached the plea agreement. *See* ***State v. Williams***, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733 ("While a prosecutor need not enthusiastically recommend a plea agreement, … '[e]nd runs' around a plea agreement are prohibited[,]" and the State "may not covertly convey to the trial court that a more severe sentence is warranted than that recommended.").

We conclude that such a challenge would be without merit. First, the prosecutor's statements indicating that the victim was not in agreement with the State's probation recommendation were appropriate in light of the importance of victims' rights, and the sentencing factors to be considered by the court. ***State v. Bokenyi***, 2014 WI 61, ¶¶64, 68, 355 Wis. 2d 28, 848 N.W.2d 759. The prosecutor reminded the court that it believed its probation recommendation was appropriate, but that it considered four months of conditional jail time necessary given the facts of the case. Second, Brown's sentencing hearing encompassed two separate cases with two different recommendations. The State's remarks concerning Brown's history of violating court orders as well as the rights of other people were relevant to its recommendation for prison on the bail jumping case, where Brown absented himself from the jurisdiction and was extradited from Missouri. Third, the State was obligated to provide all relevant information to the sentencing court. ***Williams***, 249 Wis. 2d 492, ¶43 ("At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot be immunized by a plea agreement between the defendant and the State."). The prosecutor's unfavorable comments concerning Brown's character did not constitute an "end run" around the negotiated agreement in No. 2011CF179, but were made in furtherance of both its duty as an officer of the court, and its prison recommendation in No. 2012CF1224.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgments, and discharges appellate counsel of the obligation to represent Brown further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment in Kenosha County case No. 2011CF179 is modified to reflect the trial court's oral pronouncement finding James C. Brown ineligible for the Challenge Incarceration and Earned Release programs, and as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the judgment in Kenosha County case No. 2012CF1224 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved from further representing James C. Brown in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals