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August 26, 2015

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

2014AP2741-CRNM State of Wisconsin v. Brentford G. Taylor, Jr.
(L.C. #2013CM361)

Before Kessler, J.[1]

Brentford G. Taylor, Jr., pled no contest to the misdemeanor charge of entry into a locked vehicle, contrary to WIS. STAT. § 943.11 (2013-14). He now appeals from the judgment of conviction and the order denying his *pro se* motion for sentence modification. Taylor's postconviction/appellate counsel, Kathilynne A. Grotelueschen, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Taylor has not filed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

a response. We have independently reviewed the record and the 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.

Taylor was charged with the misdemeanor offense of entry into a locked vehicle. According to the complaint, police were dispatched to H & R Block where they saw that the rear window of a vehicle in the parking lot had been broken. Police found a red brick on the ground in the parking lot along with broken glass inside the rear cargo area.

The vehicle, which was owned by an employee of H & R Block, had a television in the cargo area. The employee told the police that a citizen came inside H & R Block and told him that a vehicle was being broken into. When the employee went outside, he saw Taylor inside his vehicle. He could see that Taylor's legs were on the passenger seat and the rest of his body was crouched down on the driver's seat.

Taylor entered a plea agreement with the State pursuant to which he pled no contest to the charge in this case. In exchange, the State agreed to dismiss and read in a retail theft charge that was pending in another case. Pursuant to the agreement, the State would recommend a House of Correction sentence with restitution.

The circuit court conducted a thorough plea colloquy and specifically inquired as to the basis for Taylor's no-contest plea:

> THE COURT: Now, [defense counsel], can you give me a brief statement about why it's a no[-]contest plea? This really isn't

> an ***Alford*** plea under the guise of a no[-]contest plea, correct, he's pleading no contest?[2]
>
> [DEFENSE COUNSEL]: Judge, as you can see from the plea form, Mr. Taylor's been diagnosed as a paranoid schizophrenic since 1996. On top of that he also has anxiety issues. He, on the day in question, he actually informs me he was on his way from Walgreens and his medications had just been changed. He apparently had taken the old medication and then on top of that took the new medication. It also looks from the police reports like he may have self-medicated with alcohol somewhere in between there. So there was a combination of Xanax and Risperdal combined with alcohol, and Mr. Taylor has no recollection at all of his being found inside of the vehicle.

The circuit court accepted Taylor's no-contest plea and subsequently imposed a sentence of two hundred fifty days at the House of Correction, consecutive to any other sentence, with release privileges for the Day Reporting Center.

The no-merit report concludes there would be no arguable merit to assert that: (1) Taylor's plea was not knowingly, voluntarily, or intelligently entered; (2) the circuit court erroneously exercised its sentencing discretion; or (3) the circuit court erred when it denied Taylor's motion for sentence modification. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. We have also considered whether Taylor's trial counsel was ineffective for failing to pursue an intoxication defense. We briefly discuss these issues below.

We begin with the no-contest plea. There is no arguable basis to allege that Taylor's plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the circuit court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The circuit court conducted a thorough plea colloquy addressing Taylor's understanding of the plea agreement and the charge to which he was pleading no contest, the penalties he faced, and the constitutional rights he was waiving by entering his plea. *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 circuit court confirmed that Taylor had reviewed the crime's elements, which were included with the plea questionnaire and addendum. The circuit court told Taylor that it was not bound by the parties' recommendations, and it reiterated the maximum sentence and fine that could be imposed. Additionally, the circuit court confirmed that the prescription medications Taylor was taking were not interfering with his ability to understand what was happening. Taylor informed the court that he was not disputing the facts that were set forth in the complaint, but stated that he did not have an independent recollection of what actually happened.

Based on our review of the record, we conclude that the plea questionnaire/waiver of rights form, the addendum with attached elements of the offense of entry into a locked vehicle, Taylor's conversations with his trial counsel, and the circuit court's colloquy complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Taylor's no-contest plea.

The addendum to the plea questionnaire and waiver of rights form, which Taylor signed, specifically advised him that by pleading, he was "giving up any defenses such as insanity, self-defense, intoxication, alibi, coercion or necessity." Notwithstanding, this court has independently considered whether Taylor's trial lawyer should have raised the defense of

involuntary intoxication on Taylor's behalf. Our consideration of this claim is limited because claims of ineffective assistance by trial counsel must first be raised in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court normally declines to address such claims in the context of a no-merit review if the issue was not raised postconviction in the circuit court. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether a claim on this basis has sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

The effects of prescription drugs may form the basis for an involuntary intoxication defense where they are taken according to prescription. *See* ***State v. Gardner***, 230 Wis. 2d 32, 40, 601 N.W.2d 670 (Ct. App. 1999); WIS. STAT. § 939.42.[3] According to Taylor's trial counsel, it appears that in addition to *not* taking his medications according to their prescriptions, Taylor added alcohol to the mix. Based on the record before us, there would be no arguable merit to pursuing this issue.

[3] Effective April 18, 2014, WIS. STAT. § 939.42 was revised to eliminate voluntary intoxication as a defense to criminal liability. *See* 2013 Wis. Act 307, §§ 2-4. The statute now reads:

> **Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:
>
> **(1)** Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.
>
> **(2)** Negatives the existence of a state of mind essential to the crime.

Sec. 939.42 (eff. Apr. 18, 2014).

We have also considered whether trial counsel performed ineffectively by not pursuing a defense of voluntary intoxication, which was an allowable defense under the version of the statute in effect at the time Taylor entered his plea. In Wisconsin, at that time, voluntary intoxication was a defense to a charged crime only when it "[negates] the existence of a state of mind essential to the crime." WIS. STAT. § 939.42(2) (2011-12).

To prove entry into a locked vehicle, the State would have had to show: 1) Taylor intentionally entered the locked and enclosed portion or compartment of the vehicle of another; 2) Taylor intentionally entered without the consent of a person authorized to give consent; 3) Taylor knew that the vehicle belonged to another person and knew that the entry was without consent; and 4) Taylor entered the vehicle with intent to steal. *See* WIS JI—CRIMINAL 1426. Based on the allegations set forth in the complaint, there was circumstantial evidence that Taylor had sufficient mental awareness to throw a brick through the rear window of the vehicle presumably to steal the television inside. The applicable jury instruction provides that when deciding about intent and knowledge, "You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's *acts*, words, and statements, if any, and *from all the facts and circumstances in this case bearing upon intent and knowledge*." (Emphasis added.) Again, based on the record before us, we conclude that there would be no arguable merit to pursuing this issue.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that 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, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit 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 circuit 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 circuit court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The circuit court explained to Taylor that it would have considered the crime to be a moderate to lower-level offense in terms of seriousness were it not for the fact that Taylor had a pending retail theft case at the time it was committed. The circuit court also considered court dates Taylor missed while this case was pending in concluding that the underlying offense was aggravated. Additionally, the circuit court accounted for Taylor's "significant" criminal record, a number of which were theft-type cases. While sympathetic to Taylor's efforts to deal with his mental health issues, the circuit court nevertheless concluded that the need to protect the community was a key concern. The circuit court further sought to motivate Taylor not to engage in other criminal conduct, to address his rehabilitative needs, and to punish him.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the circuit 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. The circuit court

sentenced Taylor to two hundred fifty days in jail with Huber privileges for the Day Reporting Center. The sentence was ordered to run consecutively to any other sentence Taylor was serving. The circuit court further found that Taylor was entitled to sixty-two days of sentence credit and ordered that Taylor pay $250 in restitution to the owner of the vehicle he had broken into. This sentence was within the limits of the maximum sentence of nine months in jail that could have been imposed.

We further agree with postconviction/appellate counsel that there would be no basis to challenge the circuit court's decision to deny Taylor's *pro se* postconviction motion asking the circuit court to modify his sentence to ninety days, a time-served disposition.[4] Taylor claimed that two days after he was sentenced in this case, he was informed that he was no longer eligible to participate in the Day Reporting Center's programming due to an extradition warrant from Ohio. According to Taylor, no one had any idea that this new factor (i.e., his Ohio parole violation and the related proceedings) existed during or before his sentencing.

A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court may modify a defendant's sentence upon a showing of a new factor. ***Id.***, ¶35. The analysis is two-

[4] While we agree with counsel's ultimate conclusion that this issue is without arguable merit, we note in passing that to the extent she argues that a new factor must frustrate the purpose of the original sentence, this is a nonstarter. Such analysis is not necessary to establishing a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶48, 333 Wis. 2d 53, 797 N.W.2d 828 ("We conclude that frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor."), *abrogating* ***State v. Michels***, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989).

pronged. *See* ***id.***, ¶36. One prong requires the defendant to show by clear and convincing evidence that a new factor exists. ***Id.*** This presents a question of law. ***Id.*** The other prong requires the defendant to show that the new factor justifies sentence modification. *See* ***id.***, ¶37. This determination rests in the circuit court's discretion. ***Id.*** Because the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence, a court need not address both prongs of the analysis if the defendant fails to prevail on one of them. ***Id.***, ¶ 38.

In this case, the circuit court concluded in its order denying the motion for sentence modification that "[t]he fact that the Defendant has been determined ineligible for the DRC [i.e., Day Reporting Center] does not change the other sentencing goals [it had identified], and the Court believes the sentence of 250 days … is necessary to accomplish the other sentencing goals." Additionally, the court noted that "the fact that the Defendant has an outstanding arrest warrant from the State of Ohio does not eliminate the sentencing goals of community protection, deterrence and punishment." As for claims by Taylor that he was not receiving adequate treatment for his mental health, the court found that the administrators of the facility where Taylor was incarcerated were responsible for providing him with a appropriate care for any physical and/or mental health issues and that Taylor's claims in this regard did "not change the sentencing goals or change the [c]ourt's decision regarding the sentence necessary to accomplish those goals." *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (court has additional opportunity to explain sentence when resolving postconviction motion).

There would be no arguable merit to challenging the circuit court's conclusion. Taylor's Ohio parole violation and the related proceedings—including his ineligibility for the Day Reporting Center—do not constitute a new factor because this information was not highly

relevant to the imposition of his sentence. The sentencing transcript demonstrates that while the circuit court crafted a sentence that would have afforded Taylor the opportunity to participate in programming through the Day Reporting Center, the fact that he was not ultimately allowed to do so is not a new factor that justifies sentence modification.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Kathilynne A. Grotelueschen is relieved of further representation of Taylor in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals