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September 23, 2015

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

2014AP1718-CRNM State of Wisconsin v. Jesse Williams (L.C. # 2013CF467)

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

Jesse Williams appeals from a judgment of conviction entered upon his no contest pleas to two counts of attempted battery or threat to a judge, as a repeater, contrary to WIS. STAT. §§ 940.203, 939.32(1), and 939.62(1)(b) (2013-14).[1] Williams's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Williams received a copy of the report, was advised of his right to file a response, and

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

has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we modify the judgment[2] and summarily affirm the judgment as modified because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Williams was charged with two counts of battery or threat to a judge, as a repeater. According to the complaint, as to count one, Williams mailed a handwritten letter to Sheboygan county circuit court Judge S. stating:

> I going to kill you for what you did to me. I have someone waiting at your car right now. That going to kill you. And I have someone at your home that going to kill your family.

The letter was addressed to Judge S. at the Sheboygan county courthouse. When interviewed, Williams admitted sending the letter because he believed Judge S. had sentenced him in connection with a prior WIS. STAT. § 940.203(2) conviction.[3]

Count two alleged that several months later, police were dispatched to the Sheboygan county courthouse in response to the receipt of another threatening letter addressed to Circuit Court Judge L. The letter stated:

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[2] We observe a minor discrepancy between the trial court's oral pronouncement finding Williams not eligible "for either the Challenge Incarceration Program or Earned Release Program[,]" and the written judgment, which does not reflect any finding concerning program eligibility. This appears to be a clerical error which may be corrected in accordance with the actual determination by the sentencing court. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶15, 17, 239 Wis. 2d 244, 618 N.W.2d 857. "[T]he circuit court may either correct the clerical error in the sentence portion of [the] written judgment of conviction or may direct the clerk's office to make such a correction." ***Id***., ¶5.

[3] It is undisputed that a different judge actually presided at Williams's prior sentencing hearing, though the proceeding took place in Judge S.'s courtroom.

> Judge [L.] I going to kill you for what you did. I someone at your car right now that going to kill you and I going to kill your family to (sic).

Both letters included Williams's signature and inmate number, and the envelopes indicated that they were sent from his prison institution.

Williams, by counsel, moved to dismiss the complaint as insufficient to support the charges. On December 6, 2013, the parties appeared for a hearing on the motion, and the State filed an amended complaint adding the WIS. STAT. § 939.32 "attempt" modifier to both counts. Trial counsel argued that the facts in the complaint failed to support an inference that Judge S. was "acting in an official capacity"[4] because he had not actually presided over Williams's prior sentencing. Counsel further argued that the letters did not constitute punishable "true threats"[5] because Williams was incarcerated and unable to act on his threats. The trial court denied the motion, determining that the threatening letters were addressed to the judges in their official

[4] WISCONSIN. STAT. § 940.203(2) provides:

> Whoever intentionally causes bodily harm or threatens to cause bodily harm to the person or family member of any judge under all of the following circumstances is guilty of a Class H felony:
>
> (a) At the time of the act or threat, the actor knows or should have known that the victim is a judge or a member of his or her family.
>
> (b) The judge is acting in an official capacity at the time of the act or threat or the act or threat is in response to any action taken in an official capacity.
>
> (c) There is no consent by the person harmed or threatened.

[5] "A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest … or other similarly protected speech." ***State v. Perkins***, 2001 WI 46, ¶29, 243 Wis. 2d 141, 626 N.W.2d 762.

capacity at the courthouse, and relying on the jury instruction's explicit statement that the person making the threat need not have the ability to carry it out. WIS JI—CRIMINAL 1240B.

After a recess, the court was informed that an agreement had been reached and the parties went back on the record for plea and sentencing. Pursuant to the parties' agreement, Williams entered pleas of no contest to both counts of attempting to threaten a judge, and the parties jointly recommended that the trial court impose on each count a two and one-half year bifurcated sentence consisting of one year of initial confinement and eighteen months of extended supervision. As part of the agreement, the parties jointly recommended that the sentences run consecutive to each other and to any previously imposed sentence. The trial court accepted Williams's pleas as knowing and voluntary and imposed the parties' jointly recommended sentence which, in the aggregate, totaled five years, with two years of initial confinement and three years of extended supervision.

The no-merit report addresses whether there is any basis for a challenge to the validity of Williams's no contest pleas and whether the trial court appropriately exercised its sentencing discretion. We agree with appellate counsel's conclusion that these issues lack arguable merit.

The record shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court confirmed that Williams could read and write English, was not suffering from an emotional or psychological problem, and was not under the influence of any drugs or alcohol. The trial court correctly informed Williams of the potential

penalties[6] and ascertained Williams's understanding of the plea agreement and that the court was not bound by its terms or the parties' joint sentencing recommendation. Williams confirmed that he signed and reviewed with his attorney the completed plea questionnaire filed with the court. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (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). The court recited the constitutional rights waived by the entry of a no contest plea and asked if Williams had reviewed and understood that portion of the plea form. Williams confirmed that he understood his constitutional rights and wished to waive them by pleading no contest.

Though the trial court did not recite the offense elements and they were not listed on the plea form, Williams stated he had reviewed the elements with his attorney and that he understood them. Additionally, the no-merit report states that appellate counsel cannot allege that Williams did not understand the offense elements. *See* ***State v. Brown***, 2006 WI 100, ¶¶36-37, 293 Wis. 2d 594, 716 N.W.2d 906 (in order for a plea to be unknowing and involuntary, it is necessary that the defendant did not understand the information that should have been provided by the trial court). Williams has not filed a response and we accept counsel's representation.

We also conclude that there is no arguably meritorious challenge to the trial court's factual basis finding. *See* WIS. STAT. § 971.08(1)(b); ***Bangert***, 131 Wis. 2d at 262 (trial judge

[6] Trial counsel pointed out that the maximum penalty listed on the completed plea form was incorrect in that it failed to account for Williams's conviction as a repeater. Counsel informed the court that she had discussed the correct maximum penalty with Williams. Williams informed the court that he was aware of the error and knew and understood the correct maximum penalty. The court ascertained that Williams wished to leave his pleas intact and proceed to sentencing.

should determine whether defendant's conduct constitutes charge to which he or she pled) (citation omitted). When a trial court finds a sufficient factual basis to support a plea, we will not upset that finding "unless it is contrary to the great weight and clear preponderance of the evidence." ***State v. Higgs***, 230 Wis. 2d 1, 11, 601 N.W.2d 653 (Ct. App. 1999). Williams informed the trial court that he read both criminal complaints and agreed that the court could "rely on the facts in those documents as essentially true and correct in support of" his pleas. We have reviewed the trial court's factual basis finding in light of Williams's motion to dismiss and determine that the facts in the complaint sufficiently support his no contest pleas.

We also agree with appointed counsel's conclusion that the trial court properly exercised its discretion at sentencing. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered the seriousness of the offense, 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. Furthermore, the trial court imposed the parties' jointly recommended sentence. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved). Williams is judicially estopped from asserting that his agreed-upon sentence is excessive, ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998), and regardless, the sentence actually imposed was less than half of the maximum available to the court,[7] *see* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (there is a

[7] On each conviction, Williams faced a maximum bifurcated sentenced of seven years, with up to five and one-half years of initial confinement and one and one-half years of extended supervision. *See* WIS. STAT. §§ 940.203(2), 939.62(1)(b), and 939.32(1m)(a)2. & (b).

presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, orders the judgment modified to reflect the trial court's oral pronouncement concerning Williams's program ineligibility, affirms the judgment as modified, and discharges appellate counsel of the obligation to represent Williams further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that upon remittitur, the judgment shall be modified as described herein.

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

IT IS FURTHER ORDERED that Attorney Katie R. York is relieved from further representing Jesse Williams in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals