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DISTRICT I

September 22, 2015

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

| | |
|----------------|---|
| 2015AP971-CRNM | State of Wisconsin v. Brian Demarco Mitchell (L.C. #2012CM3734) |
| 2015AP972-CRNM | State of Wisconsin v. Brian Demarco Mitchell (L.C. #2013CF4179) |

Before Kessler, Brennan and Bradley, JJ.

Brian Demarco Mitchell appeals from judgments of conviction, entered upon his guilty pleas, on one count of carrying a concealed weapon and one count of possession of a firearm by a person subject to a domestic abuse injunction. Appellate counsel, Colleen Marion, 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 Mitchell was advised of his right to file a response, but has not responded.

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

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. We therefore summarily affirm the judgments.

In Milwaukee County Circuit Court case No. 2012CM3734, Mitchell was charged with carrying a concealed weapon, a misdemeanor. On July 9, 2012, police had initiated a traffic stop because of suspected counterfeit temporary license plates and illegally tinted windows. During a consensual search of the vehicle, officers found a loaded gun between the driver's seat and the center console. In Milwaukee County Circuit Court case No. 2013CF4179, Mitchell was charged with one count of possession of a firearm by a person subject to a domestic abuse injunction, a felony. While in jail for other offenses, Mitchell made an outgoing call on the monitored jail phone line, asking someone to go to his house and retrieve his "heat" from under a dresser. Using this call, police obtained a search warrant for the residence and recovered the gun under the dresser, along with a copy of a domestic abuse injunction listing Mitchell as respondent and containing a firearm restriction. In between these two cases, Mitchell accrued twelve misdemeanor charges in three cases.²

Mitchell ultimately agreed to resolve his cases with a plea agreement. In exchange for his guilty pleas to the concealed-carry charge and to the felony firearm possession charge, plus payment of restitution, the State would seek to dismiss and read in the twelve other misdemeanor charges and recommend twelve months' time in the House of Correction as a global sentence. The circuit court accepted Mitchell's plea and dismissed the twelve other misdemeanors, but

² These charges included possession of tetrahydrocannabinols, entry to locked vehicles, theft, criminal damage to property, and credit card fraud.

sentenced Mitchell to two years' initial confinement and two years' extended supervision on the possession charge, with a concurrent six months' imprisonment for the concealed-carry charge.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Mitchell'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 Mitchell's pleas were knowing, intelligent, and voluntary. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Mitchell completed plea questionnaire and waiver of rights forms, *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. The forms correctly acknowledged the maximum penalties Mitchell faced for each offense and the forms, along with each form's addendum, also specified the constitutional rights he was waiving with his plea. *See Bangert*, 131 Wis. 2d at 262. Attached to the plea questionnaire was a set of jury instructions for each offense, which Mitchell reviewed with counsel.

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. Our review of the transcript satisfies us that the circuit court properly complied with its obligations for ensuring a valid plea.³ In particular, we note that the circuit court confirmed Mitchell's

³ The circuit court partially explained the effect of read-in offenses. *See State v. Straszkowski*, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. It did not expressly explain that the circuit court is allowed to impose restitution on read-in offenses; however, Mitchell stipulated to paying restitution on some of the read-ins at the start of the plea hearing, and this restitution requirement was clearly set forth as a component of the plea agreement that Mitchell approved.

understanding that the circuit court was not bound by any sentencing recommendation, and that the plea meant Mitchell was no longer pursuing a motion to dismiss that had been filed by defense counsel.⁴

The plea questionnaires, the supplemental documents counsel discussed with Mitchell, and the court's colloquy appropriately advised Mitchell 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 pleas' 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

⁴ The criminal complaint for the possession charge gave an offense date of September 2, 2013. At the start of the felony case, Mitchell challenged the charge based on that date, because documentation available at the time indicated he had not been served with the domestic abuse injunction until September 2, and the injunction gave him forty-eight hours to surrender any firearms. Defense counsel thus argued there was a forty-eight hour "safe harbor" provision and moved to dismiss the charge. The circuit court had ordered briefing because it could find no case law regarding any "safe harbor" effect of the surrender provision. However, it appears that Mitchell abandoned the motion to dismiss because it was subsequently determined that Mitchell had first been served a copy of the injunction on August 27, 2013, when he appeared late for the injunction hearing. Thus, any "safe harbor" had expired well before September 2.

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.

With respect to the concealed-carry charge, the circuit court described the offense as between mitigated and intermediate in severity. It noted that Mitchell did not appear to be using the gun to commit other crimes, but it was loaded and he had no permit for it. The possession offense was of intermediate severity—by calling someone to get the gun, presumably to hold it for Mitchell's later use, Mitchell was breaking the law and disrespecting it by trying to circumvent the injunction's restrictions. The circuit court considered multiple mitigating factors, but noted it was placing the greatest weight on protecting the public. When Mitchell's two offenses were viewed with the intervening twelve counts that were dismissed, the circuit court concluded that Mitchell, who otherwise had a minimal prior record, had gotten out of control. The circuit court determined that some prison time might help stop that behavior, and would protect the public from Mitchell's antics.

The maximum possible sentence Mitchell could have received was ten years and nine months' imprisonment. The sentence totaling four 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.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Colleen Marion is relieved of further representation of Mitchell in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals