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November 23, 2015

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

2015AP445-CRNM State of Wisconsin v. Robert Lee Taylor
(L.C. #2014CF1045)

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

Robert Lee Taylor appeals from an amended judgment of conviction for one count of strangulation and suffocation (a felony), and one count of criminal trespass to a dwelling (a misdemeanor), both as domestic abuse, contrary to WIS. STAT. §§ 940.235(1), 943.14, and 968.075(1)(a) (2013-14).[1] Taylor's postconviction/appellate counsel, Dustin C. Haskell, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Taylor 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. 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.

The criminal complaint charged Taylor with one felony and six misdemeanors related to a March 18, 2014 incident at the home of the mother of his child. The criminal complaint alleged that police were called to the home after the child called 911 to report that Taylor was choking the child's mother. Taylor fled the home when police arrived and then returned later the same day, after the police had left. Taylor was charged with one felony: strangulation and suffocation, as domestic abuse. Taylor was charged with five misdemeanors as domestic abuse: battery, two counts of criminal trespass to dwelling, and two counts of intentionally contacting a victim in violation of a court order. He was also charged with one misdemeanor count of obstructing an officer.

Taylor entered a plea agreement with the State pursuant to which he pled guilty to both the felony count of strangulation and suffocation and one misdemeanor count of criminal trespass. The five remaining counts were dismissed and read in. The State agreed to recommend "a prison sentence," leaving the length of that sentence to the trial court's discretion.

The trial court conducted a plea colloquy with Taylor, accepted Taylor's guilty pleas, and found him guilty. At sentencing in August 2014, the trial court imposed thirty months of initial confinement and thirty-six months of extended supervision for the felony and a concurrent sentence of nine months for the misdemeanor. The trial court ordered Taylor to pay the DNA surcharges, which it called "mandatory." The amended judgment of conviction reflects that Taylor was ordered to pay a $250 DNA surcharge for the felony case and a $200 DNA surcharge

for the misdemeanor case. This is consistent with WIS. STAT. § 973.046(1r), which was made applicable by 2013 WI Act 20, §§ 2355, 9426 to sentences imposed after January 1, 2014.[2]

After sentencing, the Department of Corrections contacted the trial court to inquire about the amount of sentence credit granted, noting that Taylor's probation in a prior case was revoked on May 1, 2014. It also questioned whether the trial court intended Taylor's new sentences to be served consecutive to or concurrent with his revocation sentence. In response, the trial court issued an order clarifying that its intention at sentencing was that Taylor's sentences would be served "concurrent with each other and with 12CF004456 but consecutive to any other sentence." The trial court also recalculated the amount of sentence credit, finding that Taylor was entitled to credit from the date of his arrest until the date of revocation (which the sentencing transcript indicates was the date Taylor began serving his revocation sentence). The trial court ordered that the judgment of conviction be amended to reflect that Taylor had forty-three days of sentence credit on both of his new sentences.

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[2] There has been litigation in the court of appeals about the mandatory DNA surcharges being applied to felony and misdemeanor convictions where the defendant is sentenced after January 1, 2014, but committed the crimes prior to that date. *See*, *e.g.*, ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756 (misdemeanors); ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758 (felonies). Because Taylor's crimes were committed after January 1, 2014, the *ex post facto* issue identified in ***Elward*** and ***Radaj*** is not at issue here. Further, although Taylor was ordered to pay the DNA surcharge in his misdemeanor case prior to April 1, 2015, the date that those who commit misdemeanors are required to provide a DNA sample, *see* WIS. STAT. § 165.76(1)(as), this court has previously recognized that "[n]othing in [the DNA surcharge statute] requires a DNA sample to be collected before the court can order the payment of the surcharge." *See* ***State v. Jones***, 2004 WI App 212, ¶7, 277 Wis. 2d 234, 689 N.W.2d 917 (discussing the DNA surcharge provisions in § 973.046(1g), an earlier version of the DNA surcharge statute that gave trial courts discretion to impose the DNA surcharge). Based on those statutes and cases, we have not identified an issue of arguable merit with respect to the imposition of the two DNA surcharges in this case.

The no-merit report analyzes two issues: (1) whether Taylor's guilty plea was knowingly, intelligently, and voluntarily entered; and (2) whether the trial court erroneously exercised its sentencing discretion. The no-merit report also agrees with the trial court's revised calculation of Taylor's sentence credit. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report, including counsel's determination that the trial court's recalculation of the proper sentence credit was accurate and consistent with ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985). We independently conclude that pursuing those issues would lack arguable merit and will briefly discuss them below.

There is no arguable basis to allege that Taylor's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the printed jury instructions for the two crimes, as well as an addendum that identified additional issues that Taylor was forfeiting, such as a challenge to his arrest. The trial court conducted a plea colloquy that addressed Taylor's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *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 trial court referenced the guilty plea questionnaire that Taylor completed with his trial counsel, noting that the jury instructions attached to the form contained the elements of each crime. The trial court confirmed with Taylor that he knew the trial court was free to impose the

maximum sentences, and it reiterated the maximum sentences and fines that could be imposed. The trial court also discussed with Taylor the constitutional rights Taylor was waiving, such as his right to a jury trial.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, attached jury instructions, Taylor's conversations with his trial counsel, and the trial court's colloquy appropriately advised Taylor of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary.

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

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

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its extensive comments discussed Taylor's prior criminal history, which included a juvenile battery adjudication, two domestic abuse convictions (involving the same victim as in this case), convictions for disorderly conduct, criminal trespass to dwelling, manufacture or delivery of cocaine as party to a crime, and others. The trial court stated that Taylor has had "revocations and reconfinements [which demonstrate] an inability to follow the rules and to abide by the law and to respect people." The trial court also discussed the recent crimes, recognizing the impact of the crimes on Taylor's child, who witnessed them. The trial court recognized the seriousness of strangulation, noting that when Taylor put his hands around the victim's neck and squeezed, he could have killed her. The trial court did give Taylor credit for entering his pleas and taking responsibility for his actions, but the trial court said: "This has to be a prison sentence. It has to send a message to … [Taylor] that [he] can't keep doing this."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While it imposed the maximum sentence of nine months for the misdemeanor and nearly a maximum sentence for the felony, the trial court ordered that the two sentences be served concurrently with each other and Taylor's revocation sentence. Further, the plea agreement, which provided that five additional misdemeanors would be dismissed and read in, reduced Taylor's exposure by forty-five months. We are satisfied there would be no merit to assert that Taylor's sentences were unduly harsh or unconscionable.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell 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