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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

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To:

Hon. David L. Borowski
Milwaukee County Courthouse
901 N. 9th Street
Milwaukee, WI 53233

James A. Rebholz
Rebholz & Auberry
1414 Underwood Avenue, Suite #400
Milwaukee, WI 53213

John Barrett, Clerk
Milwaukee County Courthouse
821 W. State Street, Room 114
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Assistant District Attorney
Milwaukee County Courthouse
821 W. State Street
Milwaukee, WI 53233

Dominique Howard Thomas #596939
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2014AP2658-CRNM State of Wisconsin v. Dominique Howard Thomas
(L.C. #2011CF5648)

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

Dominique Howard Thomas pled guilty to the charge of first-degree reckless homicide as a party to a crime, contrary to WIS. STAT. §§ 940.02(1), 939.05 (2011-12).[1] He now appeals from the amended judgment of conviction and the order denying his motion for sentence modification. Thomas's postconviction/appellate counsel, James Rebholz, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32.

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

Despite receiving extensions of time to do so, Thomas has not filed a response. We have independently reviewed the record and the no-merit report as mandated by ***Anders***, and we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

BACKGROUND

Thomas was charged with first-degree intentional homicide with the use of a dangerous weapon as a party to a crime. According to the complaint, police found the deceased victim lying facedown in an alley. The victim had suffered two gunshot wounds.

A co-defendant, Deangelo Webster, told police that he and others were at "Man-Man's" home for a barbeque on the day of the homicide. Man-Man was later identified as Thomas. Webster told police that Thomas saw the victim walking and shouted that the victim was wearing Thomas's jacket. According to Weber, Thomas then stated, "[t]his is my alley," and the victim argued back. Thomas subsequently gave out the command to "pop that motherfucker." Webster understood this to mean that Thomas wanted him and a man known as "Tavo," who was also at the barbeque, to shoot the victim. After seeing Tavo shoot at the victim, Webster pulled a handgun from his waistband and fired two shots at the victim.

The complaint further relayed that Thomas corroborated Webster's version of events during his own statements to police. Thomas told police there were two shooters, one of whom was Webster and the second of whom was Tavo. Thomas told police that he was "'just party to a crime. I'm the one that said shoot.'"

Thomas entered a plea agreement with the State, which reduced his exposure from the lifetime sentence for first-degree intentional homicide. He pled guilty to the amended charge of first-degree reckless homicide as a party to a crime. In exchange, the State agreed to recommend that Thomas serve fifteen to twenty years of initial confinement with extended supervision left up to the court. The agreement left Thomas free to argue as to the length of his sentence. The circuit court accepted Thomas's plea and imposed a twenty-five year sentence.

The no-merit report concludes there would be no arguable merit to assert that: (1) Thomas's plea was not knowingly, voluntarily, or intelligently entered; (2) Thomas's trial counsel was ineffective for failing to litigate a motion to suppress; (3) the circuit court erroneously exercised its sentencing discretion; or (4) the circuit court erred when it denied Thomas'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 briefly discuss these issues below.

DISCUSSION

We begin with the guilty plea. There is no arguable basis to allege that Thomas's plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form and an addendum, 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 Thomas's understanding of the plea agreement and the charge to which he was pleading guilty, 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 Thomas had reviewed the crime's elements, which were included with the plea questionnaire and addendum.[2] The circuit court told Thomas that despite the parties' recommendations, it could sentence him to the maximum sentence. The parties stipulated that the facts in the complaint could serve as a basis for the plea.

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 first-degree reckless

[2] This court notes that while the jury instruction for first-degree reckless homicide was attached to the plea questionnaire and addendum, there was no jury instruction detailing party-to-a-crime liability. However, after hearing that Thomas's trial counsel had explained the elements of the offense and was satisfied that Thomas understood, the circuit court confirmed:

> [The court:] Mr. Thomas, you discussed the elements of this offense—
>
> [Thomas:] Yes, sir.
>
> [The court:] —with your attorney; is that right?
>
> [Thomas:] Yes, Your Honor.
>
> [The court:] And you're admitting that as party to a crime, you engaged in a first-degree reckless homicide, meaning you participated as party to a crime with other individuals, first of all, causing the death of [the victim]; you caused the death with criminally reckless conduct, and your conduct and the circumstances of your conduct showed utter disregard for human life; is that correct?
>
> [Thomas:] Yes, Your Honor.

We conclude that with these comments, when considered in the context of the plea colloquy as a whole, the circuit court sufficiently addressed the concept of party-to-a-crime liability with Thomas during the plea colloquy such that he understood the nature of the crime with which he was charged. *See* WIS. STAT. § 939.05(2)(a)-(c) (defining a party to a crime as a person who directly commits the crime; a person who intentionally aids and abets the commission of a crime; or a person who is a party to a conspiracy with another to commit the crime).

homicide, 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 Thomas's guilty plea.[3]

We have also considered whether trial counsel performed ineffectively by not litigating a motion to suppress, which he had filed on Thomas's behalf and was set to be heard on the morning of trial. 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 record reveals that Thomas's trial counsel filed a motion to suppress Thomas's statements arguing that Milwaukee detectives violated his constitutional rights by continuing to interrogate him after he invoked his right to counsel. At a status hearing in September 2012, the

[3] When it moved to amend the charge against Thomas to first-degree reckless homicide as a party to the crime, the State advised the circuit court that it would be filing an amended information to this effect. However, there is no amended information in the record. Notwithstanding this omission, by entering his guilty plea to the amended charge, a plea which we have concluded was knowing, intelligent, and voluntary, Thomas waived all nonjurisdictional defects in the proceeding and all nonjurisdictional defenses to the charges, including claims of constitutional violations arising prior to entry of the plea. There is no basis for Thomas to withdraw his plea because the State did not file an amended information to the reduced charge. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991) ("A plea of guilty or no contest, when knowingly and voluntarily made, waives all nonjurisdictional defects and defenses."); *see also* ***State v. Webster***, 196 Wis. 2d 308, 316-19, 538 N.W.2d 810 (Ct. App. 1995) (failure to properly file an amended information is a procedural defect that does not deprive the circuit court of subject matter jurisdiction, and is thus subject to waiver).

parties advised the court that they were working on a resolution; consequently, the case was adjourned. Fifteen days later, the circuit court granted the State's motion to amend the information to first-degree reckless homicide as a party to a crime. At that same hearing, Thomas pled guilty to the amended charge—without having litigated the suppression motion.

First, we agree with counsel's assessment that the evidence presented at the preliminary hearing in this case and the State's proffer at the plea hearing was sufficient for Thomas to have been found guilty beyond a reasonable doubt at trial even if his inculpatory statement had not been admitted. Based on the record before us, there would be no arguable merit for Thomas to allege that "'but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *See* ***State v. Burton***, 2013 WI 61, ¶50, 349 Wis. 2d 1, 832 N.W.2d 611 (citation omitted). Additionally, Thomas knew that he was giving up his right to challenge the statements he made when he signed the addendum to the plea questionnaire and waiver of rights form. The addendum made clear that by pleading guilty prior to the court's decision on his suppression motion, Thomas was giving up his right to challenge, among other things, "the constitutionality of any police action such as the police stopping me, arresting me, … taking a statement from me, or having any witness identify me."

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 noted that this was "not a maximum sentence case" given Thomas's very limited prior record, Thomas's age, and the fact that he pled guilty. Additionally, the circuit court acknowledged that the homicide was the result of a spur-of-the-moment type decision; it was not premeditated. The circuit court, however, went on to explain that it was frustrated by the behavior that led to this case and stressed that the community needs to be protected from shootings of this nature. It emphasized that Thomas needed to be punished but also noted that Thomas would still be relatively young when he was released from prison (he was twenty-two years old at the time of sentencing) and would have the opportunity to be a productive citizen.

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***. The circuit court sentenced Thomas to seventeen years of initial confinement and eight years of extended supervision. This sentence was within the limits of the maximum sentence that could have been imposed.

Lastly, we have considered whether the circuit court erred when it denied Thomas's motion for sentence modification.[4] In the motion, Thomas argued the circuit court erred when it relied on the State's perception of Thomas's role in the homicide; specifically, he argued that the prosecution and the court "looked at his culpability too harshly." Thomas pointed out that the sentence the circuit court imposed on him "was virtually identical to the sentences imposed on his co-defendants, even though Thomas had no gun, had not fired a weapon and had also been 'scared' in the alley during his encounter with [the victim]." According to Thomas, the circuit court relied on "the State's substantially unsupported assumption" that he ordered his co-defendants to shoot the victim.

As the circuit court pointed out when it issued its decision and order denying Thomas's motion, the substance of the motion was one seeking resentencing because it was based on the circuit court's purported reliance on inaccurate information at sentencing, not sentence modification. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether this due process right has been denied is a constitutional issue that this court reviews *de novo*. *See* ***id.***

"[I]n a motion for resentencing based on a circuit court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." ***Id.***,

[4] Thomas also moved the circuit court to vacate the DNA surcharge. The circuit court granted this portion of Thomas's motion.

¶¶2, 31. If the defendant shows that the sentencing court actually relied on inaccurate information, the burden shifts to the State to establish that the error was harmless. ***Id.***, ¶3.

In its decision, the circuit court explained that it did not rely on inaccurate information in sentencing Thomas, highlighting the following:

> Webster told police that Thomas commanded he and [the other co-defendant] to "pop that motherfucker!" and that is what prompted him and [the other co-defendant] to shoot the victim. That was Webster's perception of the command, and this is a ***fact*** set forth in the complaint which is ***supported*** by Webster's statement to police (and [Thomas]'s ultimate statement to police)—not an unsupported assumption.

The circuit court further emphasized that it had considered multiple factors at sentencing, beyond the command given by Thomas to shoot the victim. *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 that resentencing is not warranted.

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 James Rebholz is relieved of further representation of Thomas in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals