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January 29, 2016

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

2015AP1693-CRNM State of Wisconsin v. James D. Davis (L.C. #2012CF1264)

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

James D. Davis appeals a judgment convicting him of two counts of delivering heroin and an order denying his motion for postconviction relief. Attorney Timothy T. O'Connell filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Davis was informed of his right to file a response, but he has not done so. After independently reviewing the record and the no-

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

merit report as mandated by *Anders*, we conclude that there are no issues of arguable merit that Davis could raise on appeal. We therefore summarily affirm the judgment of conviction and order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be any basis for arguing that Davis did not knowingly, intelligently, and voluntarily enter his no-contest plea. Before accepting a plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading no contest or guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may refer to a plea questionnaire and waiver-of-rights form during the colloquy, which the defendant has reviewed and understood, thus reducing “the extent and degree of the colloquy otherwise required between the trial court and the defendant.” *State v. Hoppe*, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted). The colloquy and written plea questionnaire are designed to ensure that the defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a plea. *Brown*, 293 Wis. 2d 594, ¶35.

At the beginning of the plea hearing, Davis’s lawyer stated the plea agreement on the record: the State agreed to prosecute Davis on only the first two charges in exchange for Davis’s no-contest plea. Davis’s lawyer informed the court that he had reviewed the plea questionnaire and waiver-of-rights form at length with Davis, including the elements of the offenses, which were set forth in a criminal jury instruction attached to the questionnaire, the constitutional rights Davis was waiving by entering the plea, and the maximum penalties Davis faced. Davis’s lawyer also informed the court that both he and Davis signed the form.

The circuit court then asked Davis if he had carefully reviewed the plea questionnaire and waiver-of-rights form with his lawyer. Davis said that he had. The circuit court asked Davis whether he understood each of the constitutional rights he was waiving, as listed on the plea waiver form. Davis said that he did. The circuit court asked Davis whether he understood the elements of delivery of heroin. Davis said that he did. The circuit court reviewed with Davis on the record the maximum potential penalties he faced by entering a plea. Davis said that he understood. The circuit court asked Davis whether he had read the criminal complaint. Davis said that he had and acknowledged that the information in the complaint was factually correct.

The circuit court ascertained that Davis had enough time to discuss his case with his lawyer and that no threats or promises had been made to entice him into making a plea. The circuit court explained to Davis that it was not required to follow any plea agreement. *See State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Davis said that he understood this information. The circuit court then accepted Davis's no contest plea and found Davis guilty of the crimes charged. Based on the circuit court's thorough plea colloquy with Davis, and Davis's review of the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.²

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion when it imposed an eight-year sentence for each conviction, with five years of initial confinement and three years of extended supervision,

² The circuit court did not inform Davis that if he was not a citizen of the United States of America, he could be deported if he were found guilty of the crime. *See State v. Douangmala*, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1. Because the record shows that Davis was born in the United States and has lived here his entire life, this error has no impact on Davis's sentencing.

to be served concurrently. In framing its sentence, the circuit court focused on the seriousness of the crime, noting that a person had died as a result of a heroin overdose due in part to Davis's actions. The circuit court reasoned that Davis's criminal actions dealing drugs were a danger to the community and needed to be punished. The circuit court considered appropriate factors in deciding what length of sentence to impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion in denying Davis's postconviction motion to vacate his DNA surcharge. When Davis's counsel initially filed a no-merit appeal, we rejected the no-merit report by order of April 6, 2015, concluding that there was an issue of arguable merit regarding the circuit court's decision to impose a DNA surcharge because the circuit court had not explained why it imposed the surcharge. *See* WIS. STAT. § 973.046(1r); *State v. Cherry*, 2008 WI App 80, ¶¶5-6, 312 Wis. 2d 203, 752 N.W.2d 393. Davis's lawyer then moved for postconviction relief challenging the surcharge. The circuit court explained in its order denying the postconviction motion that it ordered Davis to provide a DNA sample and pay the DNA surcharge because it believed that Davis would be deterred from committing future criminal offenses if he knew that the State had his DNA sample, thus making it easier to identify him if he were to commit a crime. Because the circuit court explained its exercise of discretion in imposing the DNA surcharge as required by *Cherry*, there would be no arguable merit to an appellate challenge to the circuit court's decision to impose the charge.

Our independent review of the record also reveals no arguable basis for reversing the judgment of conviction and order denying postconviction relief. Therefore, we affirm the judgment and order, and relieve Attorney Timothy T. O'Connell of further representation of Davis.

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

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved of any further representation of Davis in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals