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DISTRICT III

February 9, 2016

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

2015AP2034-CRNM State of Wisconsin v. Leo Steven Martell
2015AP2035-CRNM (L. C. Nos. 2012CF363, 2014CF125)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Leo Martell has filed a no-merit report concluding there is no arguable basis for Martell to withdraw his guilty pleas or challenge the sentences imposed for fleeing/eluding an officer and possession of narcotics. Martell filed a response arguing the deal he made with the assistant district attorney was for probation on the fleeing/eluding offense, and the consecutive sentences the court imposed were excessive. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no issue of arguable merit.

In circuit court case No. 2012CF363, the complaint charged Martell with one count of fleeing/eluding and one count of obstructing an officer. The complaint alleged an officer chased a motorcyclist who ultimately escaped. A description of the motorcycle eventually led police to suspect Martell, and he was invited to the police station for an interview at which he ultimately confessed. While those charges were pending, Martell was charged with another count of fleeing/eluding an officer, second-degree reckless endangerment, possession of narcotics, possession of drug paraphernalia, and four counts of felony bail jumping. The complaint alleged an officer attempted to stop Martell's car after noticing his registration had expired. Martell led the officer on a chase that reached 100 miles per hour, and involved Martell entering an oncoming traffic lane, causing other vehicles to go into the ditch. When Martell was ultimately arrested, officers found heroin and drug paraphernalia in the car.

Pursuant to a plea agreement, Martell entered guilty pleas to one count of fleeing/eluding and one count of possession of narcotics, with the remaining charges dismissed and read in for sentencing purposes. The State agreed to recommend a sentence no greater than that recommended by the presentence investigation report. The court accepted the guilty pleas and imposed the maximum consecutive sentences, totaling three years' initial confinement and four years' extended supervision.

The record discloses no arguable manifest injustice upon which Martell could withdraw his guilty pleas. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, supplemented by a Plea Questionnaire and Waiver of Rights form, informed Martell of the elements of the offenses, the potential penalties and the constitutional rights he waived by pleading guilty. The court informed Martell it was not bound by the parties' plea agreement as required by ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683

N.W.2d 14. Although the court failed to give Martell the deportation warning required by ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1, Martell's counsel states Martell could not show he is likely to be deported. Martell's response does not claim he is not a citizen and nothing in the record suggests Martell is not a citizen. The record shows the pleas were knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Except as provided in WIS. STAT. § 971.31(10),[1] entry of a valid guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. ***Id.*** at 293.

In his response to the no-merit report, Martell says the deal he made with the assistant district attorney was for probation on the fleeing/eluding charge. The plea agreement was recited in open court and the State's plea offer was attached to the plea questionnaire. The agreement only required the State to recommend a sentence no greater than that recommended in the presentence investigation report. The State complied with the plea agreement. Martell entered the guilty pleas after being informed that the court was not bound by the parties' sentence recommendations and could impose the maximum sentences. Therefore, the record does not support Martell's argument.

WISCONSIN STAT. § 971.31(10) allows a defendant to challenge an order denying a motion to suppress evidence despite having pled guilty to the offense. The court denied Martell's motion to suppress statements he made to police. The record shows no arguable basis for challenging the circuit court's rulings. At the suppression hearing, officer Edwin Collins testified he had gone to Martell's house and told him that an Amery police officer, Sheryl

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

Gehrman, wished to speak to him about an incident involving a motorcycle. Martell agreed to go to Amery, Wisconsin, to speak with Gehrman. Collins denied making any promises to Martell and testified he merely told Martell it "would be a good idea to contact [Gehrman]." Collins called Gehrman on the phone in Martell's presence to arrange a meeting time. Martell drove his motorcycle to Amery to meet with Gehrman.

Gehrman testified she met with Martell in the lobby of the police station and escorted him to another room where he elected to sit in the chair furthest from the door. She told him he was not under arrest and was free to leave. He initially denied any involvement, but upon being confronted with pictures of the suspected motorcyclist, he admitted it was him. He then described the chase, consistent with Gehrman's recollections of it. Gehrman denied making any promises or threats to Martell, or handcuffing him, and testified the interview lasted less than one hour.

Martell took the stand at the suppression hearing and stated he had taken Oxycontin, Oxycodone, and Imitrex or Samatriptan in the preceding twenty-four hours, and these drugs interfered with his ability to remember. The court expressed concern about having him testify. After Martell consulted with his attorney, his counsel informed the court that Martell would not be testifying, and instead gave an offer of proof that Martell had been on some pain killing and migraine medications at the time of his questioning by police. The State then called Gehrman in rebuttal, who testified that Martell told her at the police station that he had run out of his medications and had not taken any that day. The court denied the motion to suppress Martell's statements, finding he was not in custody when he made the statements and his statements were not involuntary because he was not under the influence of drugs when he made the statements.

Martell sought suppression of his statements on three grounds: (1) his interrogation was not recorded; (2) it was conducted in violation of his ***Miranda***[2] rights; and (3) his statements were involuntary. WISCONSIN STAT. § 968.073(2) requires officers to record custodial interrogations when the subject is suspected of a felony. However, Martell was not in custody. A person is in custody when there is a formal arrest or restraint on freedom of movement to a degree associated with a formal arrest. ***State v. Lonkoski***, 2013 WI 30, ¶27, 346 Wis. 2d 523, 828 N.W.2d 552. Because Martell voluntarily went to the police station, was told he was not under arrest and was free to go, was not handcuffed and was not threatened or coerced, he was not in custody for purposes of § 968.073(2). For the same reasons, the interrogating officer was not required to warn him of his ***Miranda*** rights. ***Lonkoski***, 346 Wis. 2d 523, ¶27. In addition, nothing in the record suggests the statements were involuntary. Coercive police activity is a necessary predicate to a finding that a confession is involuntary. ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986).

The record discloses no arguable basis for challenging the sentences. While the court imposed the maximum consecutive sentences, the court appropriately considered the seriousness of the offenses, Martell's character and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted the danger Martell's conduct created for the officers who pursued him and the general public. The court also faulted Martell for his arrogance and dismissive attitude. According to the PSI, Martell's prior record includes convictions for murder, burglary, possession of stolen property, violating a domestic no-contact order, and numerous parole violations. The court considered no improper factors and the

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

sentences are not arguably so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Andrew Hinkel is relieved of his obligation to further represent Martell in these matters. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals