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

2015AP533-CRNM State of Wisconsin v. Herbert L. Anderson
(L.C. #2014CF1565)

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

Herbert L. Anderson pled guilty to two counts of armed robbery, contrary to WIS. STAT. § 943.32(2) (2013-14).[1] He now appeals from the amended judgment of conviction. Anderson's postconviction/appellate counsel, Mark S. Rosen, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Anderson filed a response. Following our initial review of the case, we directed counsel to file a supplemental no-merit

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

report addressing Anderson's claims related to ineffective assistance of counsel. Anderson then filed a supplemental response.[2] We have independently reviewed the record and the submissions as mandated by ***Anders***, and we conclude there are no arguably meritorious issues. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

I. BACKGROUND

Anderson was charged with two counts of armed robbery and one count of possession of a firearm by a felon. According to the complaint, on April 11, 2014, two patrolling officers were flagged down by a citizen who told them that an armed robbery was underway at a nearby restaurant. The officers went to the restaurant and saw Anderson, who fled. A foot chase followed. At one point, Anderson pulled his left hand out of his left pants pocket and a handgun fell to the ground. Anderson then turned a corner, reached into his sweatshirt, and dropped a bag. When the police eventually caught up to Anderson, he told them that he was just trying to get enough money to get a car.

Witnesses told police that a masked man entered the restaurant holding a handgun and jumped over the restaurant counter. One witness, a cashier, told police that she opened the register, took out money, and put it in the man's bag. When the cashier was unable to open a second register, the man went to the manager's office door and threatened to kill the cashier. The manager opened the office door and told the man she could not open the safe. As the man was walking toward the door, the police came in.

[2] Although a supplemental response is not contemplated by WIS. STAT. RULE 809.32, Anderson moved for permission to file a response. The motion is granted and the supplemental response has been reviewed.

The money that was taken was recovered in a tote bag that was on Anderson's flight path. A handgun matching the description of the one used during the robbery was also recovered on Anderson's flight path.

Anderson admitted to the robbery and corroborated the details provided by the witnesses when he made a statement to police.

After additional investigation, police determined that the circumstances of the robbery matched those of another robbery that had occurred the day before. Anderson admitted his involvement in this robbery as well.

Additionally, the complaint alleged that Anderson had previously been convicted of five counts of armed robbery.

Anderson entered a plea agreement with the State. He pled guilty to two counts of armed robbery. In exchange, the State asked the circuit court to dismiss and read in the count of felon in possession of a firearm. The State further requested that the circuit court impose a consecutive sentence but did not make a specific recommendation as to the length. The agreement left Anderson free to argue as to the length of his sentence. The circuit court accepted Anderson's pleas and imposed two consecutive twelve-year sentences.

The no-merit report concludes there would be no arguable merit to assert that Anderson's pleas were not knowingly, voluntarily, or intelligently entered or that the circuit court erroneously exercised its sentencing discretion. 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. In addition, we will discuss two issues raised by Anderson in his response. Namely, whether his trial counsel was ineffective for not objecting that Anderson's right against self-incrimination was violated during his sentencing hearing and for not seeking a mental health evaluation for Anderson to determine if he was competent.

II. DISCUSSION

A. *Pleas*

We begin with the guilty pleas. There is no arguable basis to allege that Anderson's pleas were 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 Anderson'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 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 Anderson had reviewed the crime's elements, which were included with the plea questionnaire and addendum. The circuit court told Anderson 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 pleas. The circuit court did not—during its colloquy—specifically ascertain whether any promises, agreements, or threats were made in connection with Anderson's pleas. The signed plea questionnaire,

however, did ensure that Anderson's pleas were entered of his own free will.[3] Additionally, Anderson confirmed for the circuit court that his pleas were made freely, voluntarily, and intelligently.

Based on our review of the record, we conclude that the plea questionnaire/waiver of rights form, the addendum with attached elements of armed robbery, and the circuit court's colloquy complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. There would be no basis to challenge Anderson's guilty pleas.

B. ***Sentencing***

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

[3] The plea questionnaire includes the following language:

Voluntary Plea

(continued)

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. We note that at the outset of the sentencing hearing, the parties clarified the negotiations were that the State would recommend a consecutive sentence as to the revocation sentence Anderson was serving at the time—not necessarily consecutive as to each count of armed robbery.

In its remarks, the circuit court pointed out that a judge who had sentenced Anderson in a prior case was "very, very lenient" with the hope that Anderson would have started moving his life in the right direction. The circuit court expressed its frustration that instead of doing this, Anderson left prison on extended supervision and committed the underlying offenses. The circuit court concluded that Anderson had not learned anything from his prison experience. As a mitigating factor, however, the circuit court found that Anderson presented "a very unusual mixed bag of character," noting:

> Good work ethic, actually had good habits during the initial reporting stages [while on extended supervision]; even when you had a bad thing to report you took it upon yourself to do that. You don't have an AODA alcohol problem, you don't have a mental health problem at least that's of record.

> I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement.

The circuit court emphasized that it was Anderson who chose a life in prison for himself, explaining that it had a responsibility to protect society and to punish him so that he and others are deterred.

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***. On one count of armed robbery, the circuit court sentenced Anderson to twelve years in prison, comprised of six years of initial confinement and six years of extended supervision, consecutive to the revocation sentence Anderson was serving at the time. On the second count of armed robbery, the circuit court imposed the same sentence, to run consecutively. This sentence was within the limits of the maximum sentence that could have been imposed: namely, fifty years of initial confinement and thirty years on extended supervision for the two counts. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c), 973.01(2)(b)3. & (2)(d)2.[4]

C. Ineffective Assistance

In his response, Anderson asserts that his trial counsel was ineffective for not objecting that his right against self-incrimination was violated and for not seeking a mental health evaluation for Anderson to determine if he was competent. Our consideration of this claim is limited because claims of ineffective assistance by trial counsel must first be raised in the circuit

[4] The circuit court held that Anderson was not eligible for the Challenge Incarceration Program (CIP) due to the fact that a gun was used. The court stated: "I am gonna tell you here today that as far as this determinative sentence is concerned, the fact that a gun was used—and it was definitely used—you are not eligible for the Challenge Incarceration Program also known as Boot Camp." Although the use of a dangerous weapon is not an automatic disqualifier from CIP, we infer in this remark the circuit court's exercise of discretion. *See* WIS. STAT. §§ 973.01(3m) & 302.045(2); *see also* ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112 (Program eligibility lies within the circuit court's discretion.).

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.

To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. This standard applies at sentencing as well as to trials. *See, e.g.*, ***State v. Pote***, 2003 WI App 31, ¶¶33-36, 260 Wis. 2d 426, 659 N.W.2d 82.

Anderson takes issue with his trial counsel's reference to the revocation summary related to his prior case during the sentencing hearing in this matter. In her remarks to the circuit court, trial counsel stated:

> And I think the revocation summary shows that for the most part when he was released back in the community he engaged in pro-social activity; he reported, as was required; he was employed either at Midwest Medical—excuse me—Midwest Metal

> Warehouse or Southwest Metal Finishing for the most part. There was no positive drug test and no other violations.

The sentencing transcript reveals that the circuit court had before it the presentence investigation report and the revocation summary related to Anderson's prior case. This information was provided by Anderson's trial counsel.

As far as we can discern from Anderson's response, he is unhappy with trial counsel's reference to the revocation summary because it contains information relevant to the underlying armed robberies. The information he seemingly takes issue with is set forth in the description section of the revocation summary and reads as follows:

> On 04/11/14, Mr. Anderson was arrested for armed robbery. In a statement taken 04/17/14, Mr. Anderson admitted to committing an armed robbery, 04/10/14 at Burger King and then an armed robbery, on 04/11/14, at Popeye's restaurant. He stated on both occasions he had a 9mm handgun in his hand. When police came in the Popeye's he was still in the process of robbing the store and fled on foot. He stated he went about a block and stopped.

Anderson asserts that this was information he was compelled to give to his extended supervision agent and that it was used at sentencing in violation of his Fifth Amendment right against self-incrimination. He submits that his trial counsel should have objected to the use of this information and cites ***State v. Evans***, 77 Wis. 2d 225, 227-28, 252 N.W.2d 664 (1977) (holding that statements or the fruits of statements made by a probationer to his probation agent or in a probation revocation hearing in response to questions which are the result of pending charges or accusations of particular criminal activity may not be used to incriminate the probationer in a subsequent criminal proceeding), *abrogated by* ***State v. Spaeth***, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769.

On the record before us, we cannot conclude that Anderson was prejudiced by his trial counsel's efforts to present positive information about her client to the court. Anderson entered guilty pleas, and by doing so, agreed that the facts in the complaint were true. This is also what he admitted to doing in the portion of his statement he gave to his agent during the revocation process, which is set forth above. He falls short of showing ***Strickland*** prejudice.

While Anderson focused on the use of the revocation summary at sentencing, he also brought to light a potentially larger issue as to the timing of his statements to his extended supervision agent and to the police officers more generally. With his supplemental report, counsel submitted a police report reflecting that Anderson made incriminating statements during two interviews with police that took place on April 11, 2014. The revocation summary relays that Anderson made statements to his extended supervision agent on April 17, 2014. Given the sequence of events—with the statements to police preceding the statement to his extended supervision agent—this was not a situation where Anderson's statements to police should have been suppressed. *See* ***Spaeth***, 343 Wis. 2d 220, ¶¶3, 59 (concluding that defendant's compelled statement to his probation agent, his subsequent statement to police, and any evidence derived from either statement should have been suppressed).

Anderson also asserts that a mental health evaluation should have been ordered to determine if he was competent. He references comments made by the prosecutor, his trial counsel, and the circuit court during sentencing, questioning what prompted Anderson to again involve himself in armed robberies after having already served a lengthy sentence for armed robbery convictions. Additionally, Anderson has provided us with a questionnaire that was submitted by his trial counsel to the State Public Defender's office for purposes of appeal. In the

questionnaire, his trial counsel is asked whether there is anything else the appellate attorney should know about the client or the case. Trial counsel responded:

> Yes, I have not had many clients in this kind of trouble that were not able to provide me with anything much helpful or mitigating regarding their situation. Client did not want a PSI, refused to write a letter of apology to victims in [this] case, could not or would not tell me where the money he got from [the] first robbery, about $700 went (in a day's time), and [the] only reason he could give is that since he went to prison when he was 17 for 5 counts of armed robbery, it was like his development was on hold and that 17 year old was still inside of him, so when he needed a car, he did two more armed robberies. There is some kind of very troubling disconnect going on, but I could not get any insight from the client that I could present to the sentencing court that the court would view as mitigation; the last time I met with him to prepare for sentencing, he basically just sat there and looked at me like it was a waste of time. Also, he was upset that he got his ES revoked for 100% of the time available, almost 7 years, and seemed to believe that he was going to get something minimal for this second set of armed robberies.

We note that during the sentencing, the following exchange occurred:

> THE COURT: Well, you're right about this being—you know in looking at the PSI, he has neither alcohol or drug related problems, he's had no mental health problems or treatment therefor and no sexual abuse, that type of thing. He had goals and ideas, but somehow or the other they're getting, they're getting muted, shall we say.
>
> What do you want to say, Mr. Anderson?
>
> THE DEFENDANT: I understand I did wrong, [Judge], and I accept full responsibility of it.

Anderson went on to give the circuit court reasons for how he found himself once again committing robberies—but never mentioned any mental health issues. As one of the conditions of Anderson's sentence, the circuit court ordered a mental health evaluation and treatment if necessary. The court rationalized: "I mean everyone's trying to figure out what's making this

guy really, really tick. I think it's somewhat confusing. But maybe it's just because you just are a poor decision-mak[er]. It might be that."

Having reviewed the record in its entirety, we conclude that the remarks by the parties and the circuit court trying to make sense of Anderson's poor decision-making skills are not sufficient to create an issue of arguable merit as to his competency. *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 ("'Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.'") (citation omitted).

Our independent review of the record reveals no other potential issues of arguable merit.[5]

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 Mark S. Rosen is relieved of further representation of Anderson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] We note that portions of counsel's no-merit report appear to be unrelated to the underlying appeal. For instance, he identifies as an issue—but does not discuss—the circuit court's decision to grant a postconviction motion related to the DNA surcharge. There was no such motion in this case. Also, on pages seven and eight, there is a paragraph discussing an amended information charging the defendant with first-degree reckless homicide as a party to a crime. There was no such amended information in this case. These references seemingly relate to another case and perhaps were missed during counsel's editing process. We have independently reviewed the record setting aside those portions of counsel's report that are inapplicable to the matter presently before us.