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DISTRICT I

February 23, 2016

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

2015AP1052-CRNM State of Wisconsin v. John A. Eggars
(L.C. #2012CF6097)

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

John A. Eggars appeals from a judgment entered after he pled guilty to attempted armed robbery as a party to a crime, *see* WIS. STAT. §§ 943.32(2), 939.32, & 939.05 (2011-12), and

from an order denying his postconviction motion for resentencing.¹ Eggars's postconviction and appellate lawyer, Russell D. Bohach, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Eggars did not respond. After independently reviewing the record and the no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction and the order. *See* WIS. STAT. RULE 809.21.

Eggars was originally charged with felony murder arising out of a string of crimes that took place during the early morning hours of December 17, 2012. According to the complaint, on that date, Eggars and his co-actors drove around the city of Milwaukee committing a series of robberies, some of which were armed robberies. Eventually, they saw a man that Eggars knew, Ronald Collins. Eggars called Collins over to the vehicle and Collins got in. One of Eggars's co-actors shot Collins as they attempted to rob him.

The parties ultimately reached a plea agreement. The State filed an amended information charging Eggars with attempted armed robbery as a party to a crime. In exchange, Eggars pled guilty. Additionally, the State agreed to recommend ten years of initial confinement but would not make a specific recommendation as to extended supervision. For his part, Eggars agreed to provide testimony against the other individuals involved in the crimes. The circuit court accepted Eggars's plea and sentenced him to nine years of initial confinement and six years of

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

The Honorable David L. Borowski presided over the plea and sentencing hearings and entered the judgment of conviction. The Honorable Daniel L. Konkol entered the order denying Eggars's postconviction motion.

extended supervision. The circuit court concluded Eggars was not eligible for either the Challenge Incarceration Program or the Substance Abuse Program.

Eggars subsequently filed a postconviction motion seeking resentencing. He argued that the circuit court did not sufficiently explain its reasoning for denying him eligibility for the Challenge Incarceration Program and the Substance Abuse Programs. The postconviction court denied the motion.

In his no-merit report, counsel addresses whether there would be arguable merit to an appeal on two issues: (1) the validity of Eggars's plea; and (2) the circuit court's exercise of sentencing discretion. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursuing these issues on appeal. Additionally, we will discuss the circuit court's imposition of the DNA surcharge and the denial of Eggars's postconviction motion.

Plea

Counsel first addresses whether Eggars has an arguably meritorious basis for challenging his plea on appeal. To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Eggars completed a plea questionnaire and waiver of rights form. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The form listed the maximum sentence Eggars faced, and the circuit court confirmed that Eggars understood. The form, along with an addendum, further specified the constitutional rights that Eggars was waiving with his plea. *See Bangert*, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, *Bangert*, and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683

N.W.2d 14. There would be no arguable merit to challenging the validity of Eggars's guilty plea.

Sentencing

The next issue the no-merit report discusses is the circuit court's exercise of sentencing discretion. We agree 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. *Gallion*, 270 Wis. 2d 535, ¶41.

In sentencing Eggars, the circuit court accounted for the fact that Eggars had accepted responsibility by pleading guilty and had cooperated with law enforcement by testifying against his co-actors. The circuit court, however, was concerned by Eggars's criminal history. The circuit court remarked on Eggars's inability "to stay away from crime and criminal activity," noting "this victim maybe doesn't die except for your association with him." Stressing that it

needed to protect the public, the circuit court pointed out that Eggars's involvement in this crime spree contributed to the "war zone" in the community.

The circuit court sentenced Eggars to nine years of initial confinement and six years of extended supervision. The circuit court could have sentenced Eggars to twelve and one-half years of initial confinement and seven and one-half years of extended supervision. *See* WIS. STAT. §§ 943.32(1)(a) & (2), 939.32, 973.01(2)(b)3. & (d)2. Ultimately, the circuit court sentenced Eggars to less time than was recommended by the State. Eggars's sentence is within the range authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, *see Ocanas*, 70 Wis. 2d at 185. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

We have also considered the circuit court's imposition of the DNA surcharge. Eggars committed the crime in 2012. When he committed his crime, imposition of a \$250 DNA surcharge for a felony conviction was a matter of discretion for the sentencing court. WIS. STAT. § 973.046(1g) (2011-12). The surcharge statute was amended in 2013, and WIS. STAT. § 973.046(1r)(a) now requires that a convicted felon pay a mandatory \$250 surcharge per felony conviction for sentences imposed on or after January 1, 2014. *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). Eggars was sentenced on June 6, 2014. The circuit court ordered the DNA surcharge at sentencing, stating: "The defendant has to provide a DNA sample. He has to pay the DNA surcharge."

There is no indication in the record that Eggars would have provided a prior sample or paid the surcharge. While he had a lengthy criminal history, the majority of Eggars's offenses

took place in Florida and California. Eggars’s sole Wisconsin conviction as an adult was for battery in 2010, a misdemeanor offense. As such, it would not have warranted the discretionary imposition of a DNA surcharge. Although the surcharge was not mandatory when Eggars committed this crime in 2012, the single mandatory surcharge applicable to sentences imposed after January 1, 2014, is not an unconstitutional *ex post facto* violation. See *State v. Scruggs*, 2015 WI App 88, ¶19, 365 Wis. 2d 568, 872 N.W.2d 146. Eggars is a defendant situated like Scruggs—giving a DNA sample for the first time and required to pay the mandatory surcharge. Under *Scruggs*, imposition of the mandatory DNA surcharge is not an *ex post facto* violation. Its imposition does not present an issue of arguable merit.²

Postconviction Motion

After a lengthy explanation for how it arrived at Eggars’s sentence, the circuit court stated that Eggars was not eligible for the Challenge Incarceration or Substance Abuse Programs. In his postconviction motion seeking resentencing, Eggars argued that the circuit court failed to adequately explain its rationale for not allowing him to participate in those programs. Before denying the motion, the postconviction court reviewed the sentencing transcript and explained that based on the circuit court’s “comments throughout the sentencing proceeding, it was clear that [the court] did not intend for the defendant to have the possibility of being release[d] early.”

As counsel points out, *State v. Owens*, 2006 WI App 75, 291 Wis. 2d 229, 713 N.W.2d 187, holds that while the circuit court must state whether an individual is eligible or ineligible for

² We have also considered whether the issues presented in *State v. Loomis*, No. 2015AP157-CR (WI App Sept. 17, 2015) (certification granted Nov. 4, 2015), are applicable in this case. We conclude that they are not.

these programs, the court is not required to “completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the ... determination.” *Id.*, ¶9. Here, the overall sentencing rationale supported the circuit court’s decision to deny Eggars eligibility to the programs. There would be no arguable merit to further pursuit of this issue.

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 Russell D. Bohach is relieved of further representation of Eggars in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals