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May 13, 2016

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

2015AP286-CRNM State of Wisconsin v. Salvatore Slies (L.C. #2010CF194)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Salvatore Slies appeals a judgment of conviction entered on his plea to one count of stalking contrary to WIS. STAT. § 940.32(2) (2007-08),[1] and a judgment of conviction imposing sentence, following revocation of probation, for convictions on eight counts of violating a harassment restraining order contrary to WIS. STAT. § 813.125(7). Attorney Donald Lang[2] filed a

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

[2] Attorney Catherine Malchow was subsequently substituted as Slies' counsel.

no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Counsel's no-merit report addresses the validity of Slies' plea and the validity of his sentence and concludes that there would be no arguable merit in challenging either. Slies filed a response that challenges the finding that Slies remained competent at the time of the plea. Slies also argues that the elements were not met as to the stalking charge. Upon our independent review of the record, no-merit report, and responses, we conclude that the judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

BACKGROUND

Slies was charged in November 2010 in connection with harassing phone, fax, and e-mail messages directed at C.M. over a period of two years. Slies had met C.M., a male dental student, when Slies was treated at a dental clinic. Defense counsel requested a competency exam, and a doctor concluded that Slies was not presently competent to proceed. A subsequent supplementary report concluded that Slies would likely regain competency if treated. The circuit court found Slies incompetent and ordered outpatient treatment. Following appropriate hearings, the court subsequently ordered further inpatient treatment and involuntary medication. In September 2012, based on a psychiatrist's report with which defense counsel agreed, the court concluded that Slies had regained competency. In October 2012, Slies entered no-contest pleas and was sentenced. Pursuant to the plea agreement, the stalking charge was subject to a five-year diversion agreement; the circuit court approved the agreement and did not impose a sentence on that count. Two counts of violating a harassment injunction were dismissed and read in. On eight counts of violating a harassment injunction, the circuit court entered a

judgment of conviction with a withheld sentence, concurrent terms of three years' probation, and 270 days of condition time.

Six months later, the State filed a motion to vacate the diversion agreement on the grounds that Slies had mailed items to the same victim in violation of the agreement. In October 2013, the circuit court granted the motion to vacate the agreement. After the issue of Slies' competence was again raised, and a competency exam was again ordered, a January 2014 report concluded that Slies was competent. On April 1, 2014, the circuit court concluded that Slies was competent to proceed with sentencing on both sets of charges. On the eight counts of violating a harassment injunction, the circuit court ordered time served. On the stalking charge, the circuit court sentenced Slies to eighteen months of initial confinement and two years of extended supervision.

DISCUSSION

We first review the circuit court's threshold determinations of competence because they are fundamental to the voluntariness of the plea. "[F]ailure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." ***Drope v. Missouri***, 420 U.S. 162, 172 (1975). We will not reverse the circuit court's decision on a defendant's competence unless it was clearly erroneous. ***State v. Byrge***, 2000 WI 101, ¶46, 237 Wis. 2d 197, 614 N.W.2d 477. "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***Doersching v. State Funeral Dirs. & Embalmers Examining Bd.***, 138 Wis. 2d 312, 332-33, 405 N.W.2d 781 (Ct. App. 1987).

The findings of competence in September 2012 and April 2014 are based on reports of doctors, which were not disputed by Slies or trial counsel, as well as the circuit court's own observations of Slies' demeanor in court. Slies argues that his trial counsel "has never been a mental health professi[o]nal," and therefore trial counsel's observation on the date of sentencing that Slies was "extremely sharp today and he is with it" was improper. However, that statement was made at the plea hearing approximately one month after the finding of competency, and Slies affirmed to the circuit court that he was having no difficulty understanding on the day of the plea hearing. The court's findings of competency are not clearly erroneous, and this record does not suggest the presence of any issue of arguable merit in regard to those determinations.

We next turn to the validity of the plea.[3] A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as evidence that the plea was coerced, uninformed, or unsupported by a factual basis, that counsel provided ineffective assistance, or that the prosecutor failed to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

There is no indication of any such defect here. The circuit court conducted a colloquy during the plea hearing in which the court explored with Slies his understanding of the charges

[3] The resolution of the multiple counts on October 18, 2012, resulted in a judgment of conviction on the eight counts of violating a harassment injunction, and prosecution of the stalking charge was stayed. As noted in a previous order in this case, we are not aware of any published decision that has decided whether convictions are appealable while other counts in the same case are deferred. At this point, we do not regard it as frivolous to argue that Slies could not have appealed the 2012 misdemeanor convictions, and therefore both the plea and sentencing for those convictions are currently before us. We have proceeded with a review of the record accordingly.

against him and the elements of the charges. The court confirmed directly with Slies that he acknowledged and understood the constitutional rights he would be waiving. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court also stated the maximum penalties Slies was facing for each of the offenses, and confirmed that Slies understood them. The court inquired into Slies' ability to understand the proceedings and the voluntariness of his decision. The court was presented with a plea questionnaire signed by Slies and ascertained on the record that Slies had gone over the plea questionnaire with counsel and understood it. Finally, the court found that the criminal complaint established a factual basis for the plea. *See* WIS. STAT. § 971.08(1)(b). There is no issue of arguable merit to challenging the knowing, voluntary, and intelligent nature of the plea.

We note that at the plea hearing, in light of the recurring questions about competence, trial counsel also made a record about the consideration of a plea of not guilty by reason of mental disease or defect, commonly referred to as an NGI plea. The decision regarding a plea of NGI "ultimately belongs to the defendant." ***State v. Francis***, 2005 WI App 161, ¶23, 285 Wis. 2d 451, 701 N.W.2d 632. "[C]ounsel has no right to act contrary to the defendant's expressed wishes [with respect to entering an NGI plea]." ***Id.***

Regarding an NGI plea, trial counsel stated to the circuit court, "I would like to add we have previously discussed filing an amended plea of not guilty by reason of mental defect. When my client was in his right frame of mind, we discussed what could happen if he was found guilty but not guilty by reason of mental defect. He did not wish to pursue that." Slies stated, "That's correct." When the court observed that such a plea could mean "more than nine months institutionalized," trial counsel responded, "That was [Slies'] concern." Because the decision to

enter an NGI plea is the defendant's alone, there is no arguable merit to any claim of error by the circuit court or counsel related to Slies' decision to forego an NGI plea.

Slies' argument that there would be arguable merit to challenging the sufficiency of the complaint must be rejected. He argues that the complaint was insufficient because the State did not allege facts that satisfy the elements of the stalking charge. This argument, however, was waived by his no-contest plea. In order to contest jurisdiction, a defendant must object to the sufficiency of the complaint prior to entering a plea. ***Day v. State***, 52 Wis. 2d 122, 124-25, 187 N.W.2d 790 (1971). The "rule of waiver … applies equally well to a defect in or to an objection to the sufficiency of the complaint." ***Id.*** (citations omitted). Even if we were to reach the argument, we would find it without any basis. The elements that were hand-written on the plea questionnaire Slies signed were correct. Slies focuses on a slight misstatement of the elements during the plea colloquy, when trial counsel omitted the words "to fear" and stated that defendant's conduct would have to "cause the victim bodily injury or death to themselves or a member of their family." It is clear in the context of this record that counsel merely misspoke, that the correct elements were presented on the plea questionnaire, and that the correct elements were considered with regard to the charges.

Finally, with regard to the sentences imposed, we note that appellate review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). "There is a strong public policy against interfering with the sentencing discretion of the circuit court …." ***State v. Kuechler***, 2003 WI App 245, ¶7, 268 Wis. 2d 192, 673 N.W.2d 335. We will affirm if the record shows that the circuit court examined the facts and stated its reasons for the sentence

imposed, using a demonstrated rational process. ***Id.*** at ¶8. To overturn a sentence, a defendant must show some unreasonable or unjustifiable basis for the sentence in the record. ***Id.*** This case involved a sentencing on October 18, 2012, and April 1, 2014. The record shows that the circuit court considered the standard sentencing factors and explained their application to this case. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. At the sentencing hearings, the court considered the gravity of the offenses, Slies' character, his rehabilitative needs, and the safety needs of the community. Slies was afforded the opportunity to address the court prior to sentencing, and he did so. The sentences imposed were within the applicable penalty ranges. Accordingly, in light of the proper standard of review, any challenge to Slies' sentence would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Upon the foregoing,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Catherine Malchow is relieved of any further representation of Salvatore Slies in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals