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May 18, 2016

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

2014AP1717-CRNM State of Wisconsin v. Jose A. Serra (L.C. # 2009CF487)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Jose Serra appeals from a judgment convicting him of possessing body armor as a convicted felon contrary to WIS. STAT. § 941.291(2)(a) (2009-10)[1] and from an order denying his postconviction motion seeking sentence credit. Serra's appellate counsel filed a no-merit report

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

pursuant to WIS. STAT. RULE 809.32 (2013-14) and ***Anders v. California***, 386 U.S. 738 (1967).[2] Serra received a copy of the report and has filed a response. Upon consideration of the report, Serra's response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment and order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Serra's no contest plea was knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; (3) whether sentence modification is warranted due to the presence of new factors; (4) whether Serra is entitled to additional sentence credit; and (5) whether Serra received effective assistance from his trial counsel. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest plea, Serra answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Serra's no contest plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Serra signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App.

[2] This is Serra's second WIS. STAT. RULE 809.32 no-merit appeal. In ***State v. Serra***, No. 2013AP489-CRNM, unpublished op. and order (WI App Feb. 12, 2014), we rejected appellate counsel's no-merit report and required further circuit court proceedings under RULE 809.30 to determine if sentence (continued)

1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The record reveals that Serra admitted his prior conviction for purposes of his status as a repeat offender. WIS. STAT. § 973.12(1). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Serra's no contest plea.

During the plea colloquy, the circuit court did not discuss the possibility of restitution being imposed in the dismissed and read-in offenses (DRIs).[3] The court told Serra that it could consider the DRIs at sentencing, but the court did not mention that it could impose restitution in the DRIs. Such restitution requests were later made at the sentencing hearing. Initially, Serra's counsel stated that he wanted a restitution hearing. Moments later, counsel stated, "Your honor, he's just indicated to me he'll stipulate to those [restitution] amounts." The court then ordered restitution totaling $1000 in favor of victims in two of the DRI cases.

In ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, the court stated that the circuit court should advise the defendant that it may consider DRIs when imposing sentence, may require a defendant to pay restitution on a DRI, and the State cannot prosecute a DRI in the future. Even if the circuit court should have warned Serra that restitution could be

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credit is due. Further proceedings were held, and the circuit court determined that sentence credit was not due. This no-merit appeal follows.

[3] Restitution in DRI cases is allowed under the restitution statute. WIS. STAT. § 973.20(1g), (1r) (2009-10).

imposed in the DRIs, Serra stipulated to the restitution amounts and waived a restitution hearing. We conclude that no issue with arguable merit arises relating to the imposition of restitution.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Serra to a ten-year term consecutive to a sentence Serra was then serving. In fashioning the sentence, the court considered the seriousness of the offense, Serra's character, need for treatment and rehabilitation, history of prior juvenile and adult offenses, previous failure on supervision, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The circuit court properly considered the DRIs. No new factors are suggested to this court that would warrant sentence modification. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

We turn to the question of sentence credit. In February 2014, we dismissed Serra's first no-merit appeal, ***State v. Serra***, No. 2013AP489-CRNM, unpublished op. and order (WI App Feb. 12, 2014), because appellate counsel did not satisfy us that a sentence credit claim would lack arguable merit. Serra filed a motion seeking sentence credit. At the postconviction motion hearing addressing sentence credit, the circuit court made detailed findings on the question of whether additional sentence credit is due. Serra received multiple consecutive sentences arising from multiple offenses, revocations of supervision, and reconfinements. The court found that sentence credit was not due because Serra received appropriate credit on earlier sentences or

other periods of incarceration. Where consecutive sentences are involved, sentence credit is allowed only on one consecutive sentence. ***State v. Boettcher***, 144 Wis. 2d 86, 95, 100, 423 N.W.2d 533 (1988). We agree with appellate counsel that no issue with arguable merit arises in relation to the circuit court's determination that no additional sentence credit is due.

Serra contends that the item found during the execution of a search warrant was not body armor. Body armor is "any garment that is designed … to prevent bullets from penetrating through the garment." WIS. STAT. § 941.291(1)(a). Certain convicted felons may not possess body armor. Section 941.291(2). The criminal complaint, which was the factual basis for Serra's plea, described the item, which was clearly body armor, and alleged that Serra identified the item as his. This issue lacks arguable merit for appeal.

The no-merit report addresses whether Serra received ineffective assistance from his trial counsel. We normally decline to address an ineffective assistance of trial counsel claim if the claim was not raised in a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

Counsel's no-merit report relates Serra's concerns about the assistance he received from Attorney Douglas Pachulki, who represented him through the plea hearing and then withdrew. Serra, who had prior felony convictions, did not receive the "no possession of body armor"

notice required by WIS. STAT. § 973.0335,[4] and counsel did not challenge the lack of notice. As discussed below, these issues lack arguable merit for appeal.

After he entered his no contest plea, Serra, with the assistance of successor counsel, filed a presentence motion to withdraw his plea due to ineffective assistance of Pachulki. Serra complained about counsel's failure to seek dismissal of the WIS. STAT. § 941.291(2) body armor charge because Serra did not receive the WIS. STAT. § 973.0335 body armor warning at a prior sentencing. In his testimony at the plea withdrawal hearing, counsel stated that he considered whether the absence of a body armor warning in a prior case would preclude the body armor charge in the current case, but he did not find any case so holding.

State v. Phillips, 172 Wis. 2d 391, 493 N.W.2d 238 (Ct. App. 1992), persuades us that the notice issue lacks arguable merit for appeal. ***Phillips*** held that a defendant could be charged with possession of a firearm as a felon even if the defendant never received the "no firearms" warning in a previous case because the criminal liability statute did not mandate the notice, i.e., notice was not an element of the crime. ***Id.*** at 394-96. Similarly, WIS. STAT. § 941.291(2), the criminal liability statute for possessing body armor, does not mandate notice as an element of the crime. No prejudice arose from counsel's failure to make the notice argument.

Serra complains that Pachulki did not communicate with him or prepare his case. Serra and counsel both testified at the plea withdrawal hearing. Counsel testified that he communicated with Serra when Serra was in the county jail on his multiple other cases. Counsel

[4] WISCONSIN STAT. § 973.0335 requires a court to inform a defendant sentenced or placed on probation for an enumerated violent felony that he or she may not possess body armor as set forth in WIS. STAT. § 941.291.

did not call Serra or visit him in prison where Serra was reconfined after his extended supervision was revoked. Counsel testified that he and Serra knew that the State would only accept a body armor plea. Serra faced two additional felonies and three misdemeanors, which were to be dismissed and read in under the plea agreement. Serra, a veteran of the plea entry process due to numerous prior offenses, testified about a lack of communication and his confusion regarding the DRIs. However, Serra did not tell his counsel he was confused.

The circuit court concluded that Serra did not meet the applicable "fair and just" reason standard for plea withdrawal. *See* ***State v. Lopez***, 2014 WI 11, ¶2, 353 Wis. 2d 1, 843 N.W.2d 390 (citation omitted). The court found that the plea colloquy was careful and thorough, Pachulki was credible and Serra was not, Serra's responses at the colloquy contradicted his claim that he did not understand the proceedings or that counsel did not advise him adequately, and there was no evidence of attorney-client conflict. The court found that Serra was aware that he might have an argument about the body armor warning, but he chose to waive that argument and plead no contest to get the benefit of the DRIs. The court concluded that Serra's change of heart was not a fair and just reason to withdraw his plea. No issue with arguable merit arises from these complaints about Pachulki.

Serra complains that his trial counsel did not tell him he could challenge the search warrant for lack of probable cause. Trial counsel testified at the plea withdrawal hearing that he and Serra discussed whether to challenge the warrant, which was partially based on a confidential informant. Counsel decided that a motion to suppress would lack merit. We agree that the search warrant was supported by probable cause. This issue lacks arguable merit for appeal.

In his response to counsel's no-merit report, Serra raises additional ineffective assistance of trial counsel claims. He contends that Pachulki was ineffective because he did not take sufficient time to prepare the case, failed to appear or participate, failed to maintain Serra's innocence, failed to communicate, failed to research or interview witnesses (without identifying any witnesses who should have been contacted), failed to investigate particular evidence (without identifying which evidence should have been investigated), failed to file a motion to exclude evidence (without identifying which evidence would have been the subject of such a motion), failed to ascertain Serra's comprehension of the proceedings (the circuit court found Serra not credible when he claimed he did not understand the proceedings), and failed to address Serra's mental health issues.

Pachulki's representation was addressed at the plea withdrawal hearing and the circuit court made findings about the representation and Serra's lack of credibility. No issue with arguable merit arises from Serra's complaints about Pachulki's representation.

The balance of Serra's ineffective assistance allegations are not sufficient to require appellate counsel to file a WIS. STAT. RULE 809.32(1)(f) supplemental no-merit report. RULE 809.32(1)(f) requires a supplemental no-merit report if counsel "is aware of facts outside the record that rebut allegations made in the" response to counsel's no-merit report. Serra does not identify witnesses who should have been contacted, does not describe evidence that should have been investigated, and does not describe the evidence trial counsel should have tried to exclude. Serra's allegations lack sufficient detail to permit appellate counsel to determine whether any facts outside the record would rebut Serra's allegations. Therefore, we address the allegations no further.

Finally, Serra complains that he was deprived of medication before the plea hearing. Serra's plea questionnaire indicated that he had ingested medication for bipolar issues in the twenty-four hours preceding the plea colloquy. During the colloquy, the circuit court asked about the medications and their effect. Serra indicated that the medications kept him calm, which he was during the colloquy, and they did not impair his ability to understand the proceedings or make decisions. Serra did not tell the circuit court that he had been deprived of medication prior to the plea hearing. This issue lacks arguable merit for appeal.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and the postconviction order, and relieve Attorney Jon LaMendola of further representation of Serra in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Jon LaMendola is relieved of further representation of Jose Serra in this matter.

Diane M. Fremgen
Clerk of Court of Appeals