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May 24, 2016

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

2015AP1616-CRNM State of Wisconsin v. Jose A. Nery (L.C. # 2014CF348)

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

Jose A. Nery appeals from a judgment of conviction, entered upon his guilty pleas, on one count of first-degree recklessly endangering safety and one count of possession of tetrahydrocannabinols (THC). Appellate counsel, Michael J. Backes, has filed a no-merit report,

pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Nery was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude that, subject to the modification of the judgment as described herein, there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment as modified.

On October 24, 2013, Nery, in an ongoing gang and drug-related dispute with J.S. and A.S., called A.S. and told him that he (Nery) was on his way to shoot-up A.S.'s residence. When Nery arrived at the house, he began shooting from his car, despite noting the presence of a third person standing outside with J.S. and A.S. One bullet hit the third person, R.B., in the arm. Other shots went through one neighbor's door and another neighbor's car. Police responded to a call about a drive-by shooting; J.S. identified Nery as the shooter and gave a description of Nery's car, a light blue Chrysler Sebring that A.S. had recently sold to Nery's mother.

Officers went to Nery's home and found the light blue Sebring out back. Spent .38-caliber bullet casings were recovered near the car. In the house, police found Nery and his friend, Mark Rojas. When Rojas was informed why he was being taken into custody, he volunteered that he did not shoot the gun, he merely hid it. Rojas then led police to the weapon, a .38-caliber revolver. While searching Nery's room, police found seven bags of marijuana totaling more than eighty-eight grams, along with a digital scale.

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

On October 28, 2013, the State filed a juvenile delinquency petition against Nery, who was about sixteen years and ten months old at the time of the shooting. The petition charged Nery with first-degree recklessly endangering safety, as party to a crime, with a dangerous weapon; possession with intent to deliver 200 grams or less of THC; and possession of a dangerous weapon by a person under age eighteen. On November 6, 2013, the State petitioned for waiver of the juvenile court's jurisdiction, alleging that because Nery would turn seventeen in January 2014, "there is limited time left for treatment, supervision, and incarceration in the juvenile system[.]" After a hearing, the juvenile court concluded that "it is contrary to the best interest of the juvenile or the public for the" juvenile court to hear the case, and it granted the motion.

A criminal complaint filed in February 2014 charged Nery with one count of first-degree reckless injury and one count of possession with intent to deliver THC, both felonies. Pursuant to a plea agreement, Nery pled guilty to the endangering-safety charge and a reduced misdemeanor charge of possession of THC. The circuit court imposed seven years' initial confinement and three years' extended supervision for the felony and a concurrent six months' imprisonment for the misdemeanor. Nery appeals.

The first issue counsel raises is whether there was error in the waiving of juvenile jurisdiction. Counsel concludes there is "no basis upon which to argue that [waiver] was improperly sought or granted." While we agree with this conclusion, we also note that Nery's valid guilty pleas constitute a waiver of any challenge to the juvenile court's jurisdiction. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 763, 457 N.W.2d 562 (Ct. App. 1990). Accordingly, there is no arguable merit to a challenge to the juvenile court's waiver of jurisdiction.

Counsel next addresses whether there is any basis for challenging Nery's guilty pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Nery 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), in which he acknowledged that his attorney had explained the elements of the offenses. The jury instructions for each offense, listing the elements of the charges, were attached to the plea form and initialed by Nery. The form correctly acknowledged the maximum penalties Nery faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

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. The circuit court's colloquy, along with the plea questionnaire and waiver of rights form, addendum, and attached jury instructions, appropriately advised Nery of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. *See also* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (listing circuit court duties when taking a plea). There is no arguable merit to a challenge to the plea's validity.

Counsel next discusses whether the circuit court erroneously exercised its sentencing discretion and imposed an unduly harsh and unreasonable sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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 determine which objective or objectives are of

greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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. *See* ***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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that Nery's primary offense was committed under "pretty aggravated circumstances:" it was part of an ongoing dispute related to drugs, it was planned, it was carried out despite the presence of a bystander, and it posed an extreme danger to human life. Though the circuit court noted that Nery had cooperated with the police and the presentence investigation report author, and that Nery had accepted responsibility for his actions, it also noted that the need to protect the public was very high. The circuit court also described additional factors, including additional mitigating factors. Ultimately, our review of the record satisfies us that the circuit court considered no improper factors and adequately exercised its discretion in imposing this sentence.

The maximum possible sentence Nery could have received was thirteen years' imprisonment. The sentence totaling ten years' imprisonment is well 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 so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion in setting a term of imprisonment.

The final issue counsel addresses is whether Nery could seek sentence modification. Counsel notes he is unable to allege that the circuit court relied on inaccurate information, *see* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1, and there is no new factor that could be alleged, *see* ***State v. Harbor***, 2011 WI 28, ¶57, 333 Wis. 2d 53, 797 N.W.2d 828. Counsel also notes that there is no other basis, like a breach of the plea agreement by the State, that would form the basis for a sentence modification motion. We note, however, that there is an issue with the DNA surcharges imposed in this matter.

Under the law in effect at the time Nery committed his crimes in October 2013, a circuit court sentencing a defendant for a felony conviction could impose a $250 DNA surcharge as an exercise of discretion unless the crime was one for which the surcharge was mandatory. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The law did not permit or require imposition of a DNA surcharge for misdemeanor sentences.

In July 2013, the legislature repealed the discretionary surcharge under WIS. STAT. § 973.046(1g) (2011-12) and revised § 973.046(1r) to require the circuit court to impose a $250 surcharge for each felony conviction and a $200 surcharge for each misdemeanor conviction. *See* 2013 Wis. Act 20, §§ 2353-55. The mandatory surcharges were first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes. *See* ***id.***, § 9426(1)(am). The circuit court thus imposed a $250 DNA surcharged for the felony conviction and a $200 DNA surcharge for the misdemeanor conviction, believing them both to be mandatory.

Subsequently, this court, in ***State v. Elward***, 2015 WI App 51, 363 Wis. 2d 628, 866 N.W.2d 756, held that the mandatory $200 DNA surcharge for misdemeanor convictions was an unconstitutional *ex post facto* punishment when imposed at sentencing hearings after January 1, 2014, for crimes committed before that date.[2] *See* ***id.***, ¶¶2, 7. We will therefore vacate the $200 misdemeanor surcharge.

A similar *ex post facto* concern initially appears to exist with the felony surcharge because it was imposed as a mandatory charge rather than as a part of the circuit court's sentencing discretion. However, there is ultimately no such arguably meritorious challenge to be raised here. The record is clear that this is Nery's first adult criminal conviction and, thus, it will be his first time providing the sample and paying the felony surcharge. This issue is therefore currently controlled by ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981-CR), which held there is no *ex post facto* violation from the imposition of a single mandatory surcharge when the surcharge has not previously been paid.

Alternatively, the remedy for the *ex post facto* imposition of the mandatory surcharge would be to apply the law in effect at the time of Nery's offenses, when imposing the DNA surcharge for most felony convictions was discretionary. *See* WIS. STAT. § 973.046(1g) (2011-12); ***Cherry***, 312 Wis. 2d 203, ¶5. Here, the record supports a discretionary imposition of the surcharge: this will be Nery's first time providing a DNA sample, and the circuit court

[2] Part of the reason for this holding is that the legislature set the starting date for the collection of DNA specimens from misdemeanants as April 1, 2015. *See* ***State v. Elward***, 2015 WI App 51, ¶2, 363 Wis. 2d 628, 866 N.W.2d 756; *see also* WIS. STAT. § 973.047(1f) (2015); 2013 Wis. Act 20, § 9426(1)(bm).

determined there was a particularly high need to protect the public in this case. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347-48, 340 N.W.2d 498 (1983) (this court may search the record for reasons to support a discretionary decision); ***State v. Ziller***, 2011 WI App 164, ¶12, 338 Wis. 2d 151, 807 N.W.2d 241 (imposition of DNA surcharge part of sentencing discretion; defendant has burden to show imposition of surcharge unreasonable). Accordingly, there is no arguable merit to a challenge to imposition of the felony DNA surcharge in this matter.

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

Upon the foregoing, therefore,

IT IS ORDERED that, upon remittitur, the judgment of conviction shall be modified to vacate the $200 misdemeanor surcharge.

IT IS FURTHER ORDERED that the judgment, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved of further representation of Nery in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals