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DISTRICT I

July 20, 2016

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

2015AP2134-CRNM State of Wisconsin v. Shakur T. Jurden (L.C. # 2013CF3074)

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

Shakur T. Jurden appeals from a judgment of conviction, entered upon his guilty plea, on one count of second-degree reckless injury. 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] Jurden 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

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

report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

At around 10 a.m. on June 24, 2013, J.S. made arrangements to buy a gun from Jurden for $250. According to J.S., when Jurden arrived a short time later to sell the gun, he pointed a gun in J.S.'s face and demanded, "Give me that shit!" Presumably, this was a demand for J.S. to surrender the cash he had brought for his purchase. When J.S. turned to flee, Jurden fired the gun. Police responded to a shooting call and found J.S. on the ground with a gunshot wound to the neck. He was unconscious but breathing and was transported to the hospital, where he underwent surgery. A detective visited J.S. at the hospital a few days later, and J.S. identified Jurden from a photo array.

On July 2, 2013, "Barry T. Martin" was apprehended in an unrelated shooting case. When "Martin's" fingerprints were processed during booking, they revealed he was actually Jurden. Jurden was interviewed regarding J.S., but he denied knowledge of the shooting. He told a detective that he left his house between 10 a.m. and 10:30 a.m. on the morning of the shooting because he had to work at 11 a.m. Jurden said he had no idea why J.S. would identify him as the shooter.

Jurden was charged with one count of first-degree reckless injury with a dangerous weapon. *See* WIS. STAT. §§ 940.23(1)(a) & 939.63(1)(b). An amended complaint later added a charge of possession of a firearm by a person adjudicated delinquent for a felony. *See* WIS. STAT. § 941.29(2)(b). Jurden had prior adjudications for attempted armed robbery as party to a crime, operating a motor vehicle without the owner's consent, and robbery with the use of force.

Jurden agreed to enter a plea. In exchange for his guilty plea to a reduced charge of second-degree reckless injury, the State would drop the dangerous weapon enhancer and dismiss and read in the firearm charge. The State would also give a sentencing recommendation of five years' initial confinement and five years' extended supervision, while Jurden would be free to argue the sentence length.

Following Jurden's plea hearing, but prior to sentencing, he sent a *pro se* letter to the circuit court, seeking to withdraw his plea. Because the letter made allegations against his appointed attorney's performance, she moved to withdraw, and a successor was appointed. Successor counsel filed a formal motion to withdraw Jurden's guilty plea, alleging two reasons for the withdrawal: (1) Jurden had "lost confidence" in his first attorney; and (2) he thought he was pleading to second-degree recklessly endangering safety, not second-degree reckless injury. Following a hearing at which both the original trial attorney and Jurden testified, the circuit court denied the motion. At sentencing, the circuit court imposed the ten-year sentence recommended by the State.

DISCUSSION

I. The Plea

Appellate counsel first addresses whether Jurden "should have been allowed to withdraw his plea of guilty or challenge the plea process before the circuit court." This section of the no-merit report discusses both the plea hearing and the plea withdrawal motion.

A. The Plea Hearing

Our review of the record—including the plea questionnaire, waiver of rights form and addendum, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. We thus agree with counsel that there is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Jurden's plea was anything other than knowing, intelligent, and voluntary, at least based on the face of the plea hearing record.

B. The Plea Withdrawal Motion

In the no-merit report, appellate counsel concludes there is "no support whatsoever upon which to shore up [Jurden's] claims" about losing confidence in his attorney or thinking he was pleading to a different offense. However, the standard of review requires us to consider whether there is any arguable merit to a challenge to the circuit court's discretionary decision denying the motion.

When made prior to sentencing, a motion to withdraw a guilty plea should be freely allowed if there is a fair and just reason for the withdrawal unless the State will be substantially prejudiced. *See* ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24. The defendant has the burden to prove, by a preponderance of the evidence, that he has a fair and just

reason.[2] *See* ***id.***, ¶32. A "fair and just reason" has never been precisely defined, but it must be something other than the desire to have a trial or belated misgivings about the plea. *See* ***id.***, ¶¶31-32. Whether the defendant has shown a fair and just reason is left to the circuit court's discretion. *See* ***State v. Timblin***, 2002 WI App 304, ¶20, 259 Wis. 2d 299, 657 N.W.2d 89.

In his motion, Jurden claimed he had "lost confidence" in his original attorney, but he did not believe he could get a new attorney. He also stated that he thought he was pleading to second-degree reckless endangerment rather than second-degree reckless injury.

At the evidentiary hearing, Jurden's original trial attorney testified first. She explained that she had discussed with Jurden the original first-degree reckless injury charge and its penalties, plus all of the penalties for lesser-included offenses, namely, second-degree reckless injury and first- and second-degree reckless endangerment. She also detailed some of the negotiations with the State. The State had initially offered a reduced charge of second-degree reckless injury while armed, with prison recommended but the length of the sentence left to the circuit court's discretion. Counsel countered, asking the State if it would agree to dismiss the enhancer. The State agreed on the condition that it would recommend the ten-year sentence. There were never negotiations involving a reckless endangerment charge. Trial counsel also testified that the only second opinion Jurden ever requested was his mother's.

[2] The circuit court told the State that it would have the burden of showing that Jurden entered a knowing plea. However, that burden does not apply in a pre-sentence plea withdrawal situation. Rather, it applies in post-sentencing situations where a defendant has made a satisfactory preliminary showing for plea withdrawal based on errors in the mandated plea colloquy process. *See* ***State v. Brown***, 2006 WI 100, ¶36, 293 Wis. 2d 594, 716 N.W.2d 906; ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). If the defendant fulfills the pleading prerequisites, then the burden shifts to the State to show that the plea was knowing, intelligent, and voluntary despite any deficiencies in the plea process. *See* ***State v. Lackershire***, 2007 WI 74, ¶47, 301 Wis. 2d 418, 734 N.W.2d 23.

Jurden also testified. He said he thought he heard counsel say the deal would be for second-degree recklessly endangering safety, "but it would be -- Like, the time was five in, five out, without the DA recommendation." When asked directly if he believed he pled to second-degree recklessly endangering safety, Jurden answered, "I could have been mistaken, but I thought it was reckless endangerment." He claimed he initially signed a deal for "second-degree reckless while armed, but without DA recommendation."[3] He acknowledged signing the plea questionnaire, which listed second-degree reckless injury as the pled-to offense, and he stipulated that he had reviewed the second-degree reckless injury jury instruction with his attorney.

Ultimately, at the close of testimony, the circuit court discounted Jurden's claim that he had "lost confidence" in his attorney prior to the plea hearing. It noted that Jurden had answered affirmatively when the circuit court had asked during the plea colloquy if Jurden was satisfied with counsel's performance. It also noted that counsel had reduced Jurden's overall exposure from forty years' imprisonment to twelve and one-half years' imprisonment. The circuit court rejected Jurden's claims of confusion regarding the charge, observing that while Jurden frequently equivocated with answers like, "I don't recall" or "I could have been mistaken," counsel was clear in her answers about what transpired. The plea transcript and documents were likewise straightforward in indicating Jurden pled to second-degree reckless injury.

In short, the circuit court simply did not believe Jurden's proffered reasons for plea withdrawal. "If 'the circuit court does not believe the defendant's asserted reasons for

[3] This answer did not specify whether it was second-degree reckless injury or endangering safety. However, as second-degree reckless injury, the offer would be entirely consistent with counsel's testimony about the initial offer from the State, before counsel countered in an attempt to get the "while armed" enhancer dropped.

withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" ***Jenkins***, 303 Wis. 2d 157, ¶34 (citation omitted). We therefore discern no erroneous exercise of discretion by the circuit court, so there is no arguable merit to a challenge to the circuit court's denial of the plea withdrawal motion.

II. Sentencing

A. Sentence Length

Counsel next addresses whether the circuit court "erroneously exercised its discretion by imposing an unduly harsh and unreasonable sentence."

Sentencing is committed to the circuit court's discretion. *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 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.

Here, the circuit court noted that Jurden's offense was very serious, telling Jurden he should be thankful he was not facing a homicide charge. The act did cause the court to wonder what Jurden might be capable of and gave the court concern for the community. The circuit

court believed that probation was not appropriate because it would unduly depreciate the seriousness of the offense and because Jurden had "a bit of a history." It explained that it thought the sentence it was imposing was necessary to impress the seriousness of the offense on Jurden and to deter others. The circuit court did take note of several positive factors, but also cautioned Jurden "to focus on things you can do and do differently things than what you did in this case."

The maximum sentence Jurden could have received was twelve and one-half 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). No improper factors were considered. We therefore agree with counsel's conclusion that there would be no arguable merit to a challenge to the sentencing court's discretion as "unduly harsh" or "unconscionable."

B. Sentence Modification

Counsel also addresses whether Jurden "should seek a sentence modification." Counsel notes, however, that there is no new factor on which to premise such a motion, nor is he aware of any inaccurate information. We agree with counsel on those two points. We note, however, that counsel has failed to address whether Jurden has any basis for challenging imposition of the DNA surcharge in this case.

Prior to January 1, 2014, imposition of the $250 DNA surcharge in this matter would have been committed to the circuit court's discretion. *See* WIS. STAT. § 973.046(1g) (2011-12). After that date, the surcharge became mandatory at sentencing for each felony conviction, every

time, irrespective of the date of offense. *See* 2013 Wis. Act 20, §§ 2353-55, 9426(1)(am). The offense here was committed in June 2013, but sentencing did not occur until December 2014, and it appears that the surcharge was imposed because the circuit court believed it to be mandatory; the circuit court stated simply, "I will order that you pay all applicable costs and surcharges, including the DNA assessment." This raises the specter of an *ex post facto* challenge to the mandatory surcharge. An *ex post facto* law is one that "'makes more burdensome the punishment for a crime, after its commission[.]'" ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (citation and one set of quotation marks omitted).

However, there is ultimately no arguably meritorious challenge to be raised here. The record is clear that this is Jurden's first adult criminal conviction and, thus, it will be his first time providing a DNA sample for the statewide database and his first time 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 Jurden's offense, when imposing the DNA surcharge for most felony convictions was discretionary. Here, the record supports a discretionary imposition of the surcharge: this will be Jurden's first time providing a DNA sample although it is not his first offense, and the circuit court was particularly concerned about protecting the public. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 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 the 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 the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals