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DISTRICT II

October 12, 2016

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

2016AP1098-CRNM State of Wisconsin v. Lawrence Graves (L.C. #2014CF825)

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

Lawrence Graves appeals judgments convicting him of first-degree recklessly endangering safety with use of a dangerous weapon, carrying a concealed weapon, obstructing an officer, and possession of a controlled substance. Graves's counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967), concluding that no grounds exist to challenge the convictions. Graves received a copy of the report and was advised of his right to file a response but has not done so. Upon consideration of

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

the no-merit report and an independent review of the record as mandated by *Anders* and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgments, as modified consistent with this opinion. *See* WIS. STAT. RULE 809.21.

Graves and two companions unsuccessfully tried to sell stolen Xanax pills to a gas station clerk. As they left the store, three men approached them and accused the Graves trio of stealing the pills from a friend of theirs. A fracas ensued. Graves drew a gun and pointed it at one of the accusers. Uninvolved persons were nearby when he drew the gun and waved it around, including one with minor children. Graves twice tried to shoot but the gun did not go off. Graves, who is wheelchair bound, resisted police attempts to pat him down. They removed Graves from the chair to search for the gun. They located it in some nearby grass.

Graves initially was charged with two counts of first-degree recklessly endangering safety with use of a dangerous weapon, and one count each of carrying a concealed weapon, obstructing an officer, and possession of a controlled substance. One reckless endangerment count later was dismissed and the Information alleged a new charge, attempted first-degree intentional homicide.

Pursuant to a plea agreement, Graves entered guilty pleas to the remaining reckless endangerment charge and to carrying a concealed weapon, obstructing an officer, and possession of a controlled substance; the attempted homicide charge was dismissed and read in at sentencing. The circuit court sentenced Graves to four years' confinement and four years' extended supervision for the reckless endangerment charge, nine months in jail for carrying a

concealed weapon, nine months in jail for the obstruction charge, and thirty days in jail for the possession charge, the sentences to be served concurrently. This no-merit appeal followed.

We agree with appellate counsel's analysis and conclusion that Graves could not succeed on a motion to withdraw his plea. The record establishes that he knowingly, intelligently, and voluntarily pled guilty. Before accepting the plea, the court established that Graves understood the elements of the crimes charged, the potential punishments, the effect of the read-in charge, that he waived his rights to a jury trial, confrontation, and protection against self-incrimination, and that the court was not bound by the terms of the plea agreement. The court inquired about his ability to understand the proceedings and the record independently establishes that he did understand and that he freely accepted the plea bargain. The court also determined that an adequate factual basis existed for the charges and, finally, advised Graves of potential negative immigration consequences. *See* WIS. STAT. § 971.08(1)(c). The court complied with the requirements set forth in § 971.08(1), *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), ensuring a knowing, intelligent, and voluntary plea.

The no-merit report also accurately considers the court's exercise of its sentencing discretion. A trial court properly exercises that discretion if the sentence is not excessive and the court relies on proper factors. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Here, the court considered appropriate sentencing factors, placing particular weight on the seriousness of using a gun, especially when untrained; Graves' recognition of the harm a gun can cause, having been the victim of gun violence himself; and the clear need for public protection. *See State v. Larsen*, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). It emphasized that only through good fortune was no one killed or seriously injured, including the

two young children on the scene. It also recognized as a mitigating factor that Graves had no juvenile or criminal record.

Graves faced maximum terms totaling nineteen years' imprisonment and \$45,500 in fines. Under any reasonable view, an eight-year sentence is not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas*, 70 Wis. 2d at 185.

We note that the judgments of conviction misidentify the dismissed-and-read-in count as first-degree recklessly endangering safety, a violation of WIS. STAT. § 941.30(1), rather than attempted first-degree intentional homicide, a violation of WIS. STAT. § 940.01(1)(a). We therefore remand this matter to the circuit court with directions to modify the judgments of conviction to reflect that Count 1 of the information, dismissed and read in at sentencing, was attempted first-degree intentional homicide, a violation of § 940.01(1)(a).

Our independent review of the record discloses no other potentially meritorious issue for appeal. We therefore accept the no-merit report, order that the judgment of conviction be modified, and as modified, affirm the judgment.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are modified to reflect that Count 1, dismissed and read in at sentencing, was attempted first-degree intentional homicide, a violation of WIS. STAT. § 940.01(1)(a); as modified, the judgments are summarily affirmed pursuant to

WIS. STAT. RULE 809.21 and the cause is remanded for entry of corrected judgments of conviction.

IT IS FURTHER ORDERED once the amended judgments of conviction are entered Attorney Malinda Jane Eskra is relieved of further representing Graves in this matter. *See* WIS. STAT. RULE 809.32(3).

*Diane M. Fremgen
Clerk of Court of Appeals*