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DISTRICT IV

October 7, 2016

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

2015AP539-CRNM State of Wisconsin v. Eric T. Scott (L.C. # 2013CM2183)

Before Higginbotham, J.

Eric Scott appeals a judgment convicting him of receiving stolen property, as a repeat offender. Attorney John Morgan has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***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). The no-merit report addresses the validity of Scott's plea and

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

sentence. Scott was sent a copy of the report, and filed a response alleging that trial counsel provided ineffective assistance for failing to challenge discrepancies between the probable cause affidavit and the criminal complaint. Morgan then filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); ***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.

Scott entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Scott's plea, the State agreed to dismiss two forfeiture offense cases, to refrain from charging Scott with bail jumping for being in a pawn shop, and to make a joint recommendation with the defense to have the court impose and stay a sentence of one year of initial incarceration and one year of extended supervision, subject to a term of two years of probation.

The circuit court conducted a short plea colloquy, inquiring into the defendant's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring the defendant's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08;

State v. Hoppe, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. In addition, Scott provided the court with a signed plea questionnaire. Scott indicated to the court that he read the form carefully and went over it with his attorney, and he is not now claiming to have misunderstood any of the information provided on the form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint—namely, that Scott admitted to police that he had received a pair of skis from a homeless, crack-addicted man that Scott knew committed a lot of burglaries, and that Scott had taken the skis to a pawn shop where another man attempted to pawn them—provided a sufficient factual basis for the plea. Scott also admitted in open court that it was true that he "did knowingly receive stolen property that had a value of less than $2,500" and that he had a prior conviction for the purpose of the repeater allegation.

Scott told the circuit court that he had had enough time to talk to his attorney about his case and was satisfied with counsel's assistance. Scott now faults counsel for failing to challenge his arrest or to seek dismissal of the complaint based upon his claim that he was not observed holding the skis in the pawn shop. Scott asserts that this allegation conflicts with the facts set forth in the probable cause portion of the criminal complaint, which allege that it was another man who was observed attempting to pawn the skis inside of the pawn shop, and that witnesses identified Scott as having been with the other man, not of carrying the skis inside of the pawn shop. Scott contends that merely accompanying someone else who is pawning stolen property is not a crime.

We agree with counsel that any discrepancy between the affidavit of probable cause for arrest and the criminal complaint provides no arguable grounds for relief. First, the circuit court

relied upon Scott's admission as to the truth of the facts in the complaint—not the probable cause affidavit—to provide a factual basis for the plea. Second, Scott was charged with receiving stolen property, not trying to pawn it. The fact that Scott had passed the skis along to a third party to pawn does not negate any of the elements of the charged offense.

Scott has not alleged any other facts that would give rise to a manifest injustice. We therefore conclude that Scott's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Scott's sentence would also lack arguable merit because the circuit court adopted the joint recommendation of the parties by placing Scott on probation for two years with a stayed sentence of one year of initial incarceration and one year of extended supervision.

The stayed sentence was authorized for a misdemeanor charge due to the penalty enhancer for habitual criminality. *See* WIS. STAT. §§ 943.34(1)(a) (classifying receipt of stolen property valued less than $2500 as a Class A misdemeanor); § 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor); § 939.62(1)(a) (increasing maximum term of imprisonment for offense otherwise punishable by less than one year to two years for habitual criminality); § 973.01(2)(b)10. (confinement portion of bifurcated sentence cannot exceed 75% of total imprisonment).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals