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December 5, 2016

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

2016AP1162-CRNM State of Wisconsin v. Kevin Lendell Thomas (L.C. # 2013CF5129)

Before Kessler, Brennan and Brash, JJ.

Kevin Lendell Thomas appeals from a judgment of conviction, entered upon his guilty pleas, on one count of substantial battery as party to a crime and one count of second-degree recklessly endangering safety. Thomas also appeals from an order that denied in part a postconviction motion to vacate two DNA surcharges. Appellate counsel, Christopher M. Glinski, 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] Thomas 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 there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

On November 3, 2013, J.L. went to Club 2C to speak to its owner, a friend of his. There, J.L., who is a corrections officer, was spotted by Thomas, a former inmate J.L. had supervised. Thomas shouted "police ass" and "fuck boy" at J.L., to which J.L. responded that he was not the police. Thomas punched him in the side of the head, then other patrons started striking J.L. Thomas dragged J.L. around the club by his dreadlocks and continued punching him. The duo ended up outside the club, but not before Thomas picked up a gun from somewhere in the club. J.L. had sustained bruising, a laceration behind his ear, blurred vision, and popped blood vessels in his eye, among other injuries.

Meanwhile, on the other side of the club, J.C. took a gun from his pants and went outside, waving the gun around. Thomas separated himself from J.L. once they were outside, approached J.C., and began to argue. Kamallah Brelove, who was charged as Thomas's co-actor, approached J.C. from behind and disarmed him with force. Thomas chased J.C. to the street, shooting him in the leg. J.C. and Thomas were unacquainted.

Thomas was charged with substantial battery as party to a crime for the assault on J.L., possession of a firearm by a felon, and first-degree recklessly endangering safety with a dangerous weapon for shooting J.C. Thomas agreed to plead guilty to substantial battery as

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

party to a crime and to a reduced charge of second-degree recklessly endangering safety with the dangerous-weapon enhancer dismissed. The felon-in-possession charge would be dismissed and read in. The circuit court accepted the pleas and imposed consecutive sentences totaling five and one-half years' imprisonment and five and one-half years' extended supervision.

Counsel identifies three potential issues: whether bindover was proper, whether there is any basis for a challenge to the validity of Thomas's guilty pleas, and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

Bindover is permitted if the evidence at the preliminary hearing sufficiently establishes probable cause that a felony has been committed and that the defendant was probably the person who committed it. *See* WIS. STAT. § 970.03(1). The felony can be any felony. *See* ***Bailey v. State***, 65 Wis. 2d 331, 343, 222 N.W.2d 871 (1974).

At the preliminary hearing in this case, the State introduced certified records from Thomas's prior, unreversed felony conviction. It then called a detective to testify. The detective stated that she had reviewed surveillance video from Club 2C that clearly showed Thomas holding a gun. This is sufficient evidence to permit an inference that Thomas had probably committed possession of a firearm by a felon, a Class G felony contrary to WIS. STAT. § 941.29(2)(a). Additionally, Thomas's guilty pleas waived any challenge to the bindover. *See* ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980); *see also* ***State v. Webb***, 160 Wis. 2d 622, 636, 467 N.W.2d 108 (1991) (defendant claiming error at preliminary hearing must seek relief before trial). There is no arguable merit to a challenge to the bindover.

There is no arguable basis for challenging whether Thomas's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Thomas 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 to which he was pleading. The applicable jury instructions were attached and initialed by Thomas. The plea questionnaire correctly acknowledged the maximum penalties Thomas faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

The circuit court also 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. In particular, it confirmed that Thomas was able to proceed despite tooth or jaw pain that was making it difficult for him to speak. Although the circuit court did not expressly review Thomas's constitutional rights with him, it noted that they had each been marked off on the plea form and confirmed that Thomas had reviewed each of those rights with counsel, understood the rights, and had no questions about those rights. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794.

Ultimately, the plea questionnaire and waiver of rights form and addendum, the attached jury instructions, and the circuit court's colloquy appropriately advised Thomas 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 his pleas were knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing 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.

Our review of the record satisfies us that the circuit court properly exercised its discretion in setting the length and structure of Thomas's sentences. It determined appropriate sentencing objectives, including punishment and community protection. It noted that Thomas had an undesirable behavior pattern, committed an unprovoked attack against J.L., armed himself mid-fight, and had no apparent "beef" with J.C., so it was still unclear why Thomas shot him. The circuit court also noted that Thomas had been well-behaved and cooperative in court and that he had shown remorse. The circuit court went on to explain why it was rejecting probation—there was a high need to protect the public, which would be accomplished by removing him from the community—and that it was making the sentences consecutive rather than concurrent because the offenses were both separate from each other and from prior offenses.

The maximum possible sentence Thomas could have received was thirteen and one-half years' imprisonment. The sentence totaling eleven 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 circuit court's discretion in setting the sentences.

The no-merit report does not address the imposition of the DNA surcharges in this matter. Under the law in effect at the time Thomas committed his crimes in November 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. In July 2013, the legislature repealed the discretionary surcharge under § 973.046(1g) and revised § 973.046(1r) to require the circuit court to impose a $250 surcharge for each felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55. The mandatory surcharge was first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes of conviction. *See* ***id.***, § 9426(1)(am). Thus, in this case, two mandatory DNA surcharges of $250 each were imposed.

However, in ***State v. Radaj***, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758, this court held that the mandatory $250 DNA surcharge, imposed on a per-count basis, was an unconstitutional *ex post facto* punishment as applied to defendants sentenced for multiple felonies after January 1, 2014, for crimes committed before that date. Thus, Thomas moved to vacate his two surcharges as *ex post facto* violations under ***Radaj***.

The circuit court granted the motion in part,[2] vacating one of the two surcharges under ***Radaj*** but concluded that a single mandatory surcharge is not an *ex post facto* violation under ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016).

But implicit in ***Scruggs*** is the fact that Scruggs had not previously provided a sample or paid the surcharge. *See* ***id.***, ¶13 (small size of surcharge indicates it is intended as an administrative charge to pay for sample collection costs). Thomas's motion indicates that he would have previously provided a DNA sample after his 2011 felony conviction, though he does not allege that he previously paid the attendant surcharge. We thus consider whether there is any arguable merit to challenging the remaining surcharge in this case.

If Thomas has not previously paid the surcharge, then this case is clearly controlled by ***Scruggs***. Alternatively, the remedy for an *ex post facto* violation of the mandatory surcharge would be to apply the law in effect at the time of Thomas's offenses, when imposing the DNA surcharge for his two felony convictions would have been discretionary. *See* ***Cherry***, 312 Wis. 2d 203, ¶5. Here, the record supports a discretionary imposition of the surcharge even if it has been previously paid: the circuit court determined that there was a great need to protect the public in this case from Thomas's ongoing, undesirable pattern of behavior, and it is not unreasonable to shift that ongoing cost to Thomas from 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

[2] The Honorable J.D. Watts had accepted Thomas's pleas and imposed sentence, including the surcharges. The Honorable Frederick C. Rosa entered the order on Thomas's postconviction motion.

N.W.2d 241 (imposition of surcharge is part of sentencing discretion; defendant has burden to show imposing surcharge is unreasonable). Accordingly, there is no arguable merit to a challenge to the imposition of the single felony 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 and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christopher M. Glinski is relieved of further representation of Thomas in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals