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

2016AP1457-CRNM State of Wisconsin v. James M. Campbell (L.C. #2013CF546)

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

James M. Campbell appeals a judgment convicting him of armed robbery as party to a crime (PTAC) and an order denying his postconviction motion for resentencing. Campbell's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding that no grounds exist to

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

challenge the conviction. Campbell received a copy of the report and has filed several extensive responses. Counsel did not file a supplemental report. Upon consideration of the no-merit report, the responses, and our independent review of the record as mandated by ***Anders*** and RULE 809.32, we accept the no-merit report, as we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

An intoxicated fifty-four-year-old Campbell told his former stepson, nineteen-year-old Anton Borden, that he wanted Borden to drive him to "go get some money." Campbell took along a bandanna and a winter hat and on the way showed Borden that he had a gun. Campbell directed Borden to a certain gas station. Campbell exited the car with the hat on, his face covered by the bandanna. He walked up to the store but immediately returned to the car, as there were "too many people" inside. Campbell directed Borden to a second gas station. Borden remained in the car. Campbell went inside, saw it was vacant except for the clerk, pointed the gun at her, and demanded all of the money and a pack of cigarettes. Campbell then got in the driver's seat and the pair drove off, only to be stopped shortly after. Police found hundreds of dollars in cash on the passenger-side floorboard.

Campbell was charged with both PTAC armed robbery as a repeater and third-offense OWI, but they were charged as separate cases, 13CF546 and 13CT1149.[2] On the PTAC armed robbery, he pled guilty in exchange for dismissal of the penalty enhancer. Consistent with the

[2] In his prior two no-merit appeals, Campbell consolidated the two circuit court cases. Here, he did not. The OWI, and its 100-day sentence consecutive to his armed robbery sentence, therefore is not before us.

plea agreement, the State recommended twenty years' initial confinement (IC) plus ten years' extended supervision (ES) and the defense recommended seven years' IC and ten years' ES. The PSI recommended ten to eleven years' IC and five to six years' ES. The court imposed twenty years' IC and ten years' ES.

Counsel filed a no-merit report. Campbell filed a response in which he asserted that his first lawyer filed for judicial substitution, which Campbell did not request, to get Judge Gritton, because the lawyer and the judge were "personal friend[s]," his next defense counsel told him the court would "honor[]" the PSI recommendation, and his mental evaluation did not mention that he hears voices. Appellate counsel voluntarily dismissed the no-merit appeal. Ensuing postconviction motions were denied.

Counsel filed a second no-merit report. Campbell filed another response, alleging that he was sentenced on inaccurate information regarding Illinois convictions. Counsel likewise voluntarily dismissed that appeal and filed a postconviction motion seeking resentencing. The trial court conceded that some of the information it relied on at sentencing was inaccurate, but ruled that its sentence still stood and denied the motion.[3] This third no-merit appeal followed.

The no-merit report addresses the validity of the plea, the trial court's exercise of its sentencing discretion, and whether a new sentencing hearing is warranted either because Campbell's right to be present at sentencing may have been violated when the court had an ex

[3] The certified copy of Campbell's Illinois convictions is, at first look, confusing. The sentencing court commented that Campbell had amassed four burglary convictions. "Burglary" was listed four times but a closer reading shows he ultimately was charged with only one. Even without considering any burglaries, Campbell still had dozens of convictions spanning many years.

parte discussion with the PSI writer just before the sentencing hearing began, or because he improperly was sentenced on inaccurate information. In the main, we agree with counsel's analysis of the issues. We expand on that analysis, however, as we discuss the issues as Campbell sees them and the additional ones he raises.

Campbell advances a number of challenges to the integrity of his plea. He contends his counsel promised he would get only an eight- or ten-year sentence, that his OWI and armed-robbery sentences would run concurrently, and that he would get only a single "strike"[4] but he got two, and that the court failed to ask at the plea hearing whether his pleas were induced by threats or promises.

First, as noted, his OWI conviction and sentence are not part of this appeal. Second, when his original no-merit report was dismissed he filed a postconviction motion to withdraw his pleas addressing some of these claims; he could have raised them all. In any event, a hearing was set but Campbell affirmatively waived his right to argue the motion and withdrew it. He later moved to undo his decision and move forward with his plea withdrawal. He claimed the prosecutor had "threatened" him at the outset of the plea withdrawal motion hearing that if he succeeded, new charges involving the thwarted armed robbery of the first gas station would be filed. At the hearing on this latter motion, the court denied the motion, finding that Campbell was not coerced to plead and voluntarily waived his right to argue the plea-withdrawal motion.

[4] Under WIS. STAT. § 939.62(2m)(b)1., the "three-strikes law," the State may charge a defendant as a "persistent repeater" if he or she previously has been convicted of two or more "serious felonies." Upon conviction for a third "serious felony," § 939.62(2m)(c) provides that "the term of imprisonment … is life imprisonment without the possibility of parole or extended supervision."

Third, Campbell was expressly advised, and he expressly stated that he understood, that the court was not bound by any recommendations and could impose the maximum sentence. As with the length of the sentence, whether sentences shall be served consecutively or concurrently is entrusted to the trial court's discretion. *See* WIS. STAT. § 973.15(2)(a); ***State v. Hamm***, 146 Wis. 2d 130, 156, 430 N.W.2d 584 (Ct. App. 1988) (Stating that the same factors that apply to the length of sentence also apply to whether sentences will run consecutively.). The court had only to explain the rationale for the sentence imposed, not why it did not choose another. The court did.

Fourth, the court initially did think this was a first-strike case under the "three-strikes law," WIS. STAT. § 939.62(2m)(b)1., based in part on Campbell's claim to the court that "[t]his is my first time doing anything ever like that." In fact, the certified copy of his Illinois convictions showed a many-year history of felony convictions there. At a later hearing, the court concluded that the armed robbery was a second strike. Even if counsel opined to Campbell that his armed robbery was only a first strike, whether an out-of-state crime is comparable to a felony is a question of law. ***State v. Collins***, 2002 WI App 177, ¶15, 256 Wis. 2d 697, 649 N.W.2d 325. And if the court erred, it was harmless. Campbell was not sentenced as a persistent repeater, *see* § 939.62(2m)(b)1., (d), and he never will be unless he commits another "serious felony."

Campbell also complains that he was coerced to withdraw his plea withdrawal motion by the prosecutor's "threats" to file additional charges. The prosecutor told Campbell that, as part of the plea agreement was to not charge conspiracy or attempt to commit armed robbery in connection with the aborted first hold-up, he would resurrect the charges if Campbell withdrew his plea.

The fact that an element of compulsion exists does not necessarily render a guilty plea involuntary. ***State v. McKnight***, 65 Wis. 2d 582, 590, 223 N.W.2d 550 (1974). A threat to do a lawful act does not constitute an impermissible threat. *See* ***id.*** at 591. When an information is issued after bindover, charges may be increased or added if the new charges are not "wholly unrelated" to the evidence presented. *See* ***State v. Burke***, 153 Wis. 2d 445, 452-53, 451 N.W.2d 739 (1990). Campbell waived the preliminary hearing. The bind-over decision thus rested upon the facts alleged in the complaint. Those facts indicate that Campbell and Borden went to the first gas station to commit an armed robbery before successfully pulling off the second and the facts supported a finding of probable cause. The prosecutor thus could have added an additional count related to the facts upon which the bindover was based. "The fact that a defendant must make a choice between two reasonable alternatives and take the consequences is not coercive of the choice finally made." ***Rahhal v. State***, 52 Wis. 2d 144, 151, 187 N.W.2d 800 (1971).

Campbell also raises various challenges to the sentencing. He first contends his right to be present at sentencing was violated. At the outset of the sentencing hearing, before taking the bench, Judge Gritton summoned the PSI writer to his chambers without counsel or Campbell present. When the hearing commenced, the court did not expressly state what was discussed. Campbell says it is "obvious," however, pointing to the court's subsequent on-the-record colloquy with the agent to clarify whether the sentencing recommendation in the PSI was her own recommendation based on her knowledge and experience or instead reflected the strictures of the COMPAS[5] risk-assessment tool. The agent stated that she largely is bound by COMPAS

[5] Correctional Offender Management Profiling for Alternative Sanctions.

guidelines, regardless of whether her assessment coincides. She did not say whether she agreed or disagreed with the official recommendation.

A defendant has a statutory right to be present when sentence is imposed. WIS. STAT. § 971.04(1)(g). A defendant's presence is required as a constitutional condition of due process, however, only to the extent that his or her absence would thwart a fair and just hearing. ***May v. State***, 97 Wis. 2d 175, 186, 293 N.W.2d 478 (1980). When a conference in chambers deals solely with a question of law or procedure, the defendant's absence does not constitute a denial of due process. ***Id.***

We do not condone an ex parte conference such as occurred here without a clear statement on the record of what was discussed. But even assuming that Campbell's and/or his counsel's absence in chambers violated his statutory right to be present, he would not be entitled to resentencing. Campbell faced up to forty years' imprisonment. The State recommended thirty; the court concurred.

If the PSI author believed a sentence lower than that recommended in the PSI was more appropriate and could have recommended it, the court was not bound to follow that lower recommendation. *See* ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41 (court not bound by PSI recommendation). Further, the court clearly would not have adopted it. If she could and would have recommended a sentence higher than what the court imposed, the court already could have done it on its own, but did not. Any error, therefore, was harmless. *See* ***State v. David J.K.***, 190 Wis. 2d 726, 736, 528 N.W.2d 434 (Ct. App. 1994); *see also* ***State v. Vanmanivong***, 2003 WI 41, ¶¶34-35, 261 Wis. 2d 202, 661 N.W.2d 76.

Campbell next complains about the "astounding" disparity between his and Borden's sentences. Sentencing is a matter for the discretion of the trial court. ***State v. Stuhr***, 92 Wis. 2d 46, 49, 284 N.W.2d 459 (Ct. App. 1979). Individualized sentencing long has been a cornerstone of Wisconsin's criminal justice jurisprudence. ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. "No two convicted felons stand before the sentencing court on identical footing … and no two cases will present identical factors." ***Id.*** (citation omitted; alteration in original).

For starters, Campbell contends that he received a thirty-year sentence while Borden received only three years and nine months. This is not quite accurate. Campbell's thirty years actually represents twenty years' IC and ten years' ES. Borden's three years, nine months is only his IC. He also received six years, three months ES, for a total sentence of ten years.

Curiously, Campbell asserts that the disparity is especially unfair because Borden shot and killed someone. The victim here was not shot, let alone killed. Except for Campbell's OWI charge, he and Borden were charged identically with PTAC armed robbery. Campbell provides no support for his claim that Borden ever killed anyone anywhere or was charged with or convicted of homicide. If Borden had killed someone before this August 2013 event, he likely would have been in prison and not with Campbell. If he did it since sentencing, the court could not have considered an as-yet uncommitted crime.

Campbell also complains that his "specialized" treatment needs were ignored at sentencing. He does not specify what these needs are. He says only that, as the court knew he never has been given any type of treatment throughout his life, it was "remiss" in not considering community-based programs in lieu of prison.

The court did not ignore his treatment needs. Campbell acknowledged a long-standing drug and alcohol problem and the court made him eligible for the substance abuse program. In addition, there is record evidence that Campbell was sexually abused by a male relative for a few years beginning when he was nine or ten. Apparently because Campbell was disbelieved, he received no treatment. If that is the "specialized" treatment to which he refers, the court noted that he has had decades to seek treatment but has not done so.

Campbell also may be referring to the bladder cancer for which he is under treatment. The court considered it but did not deem it a mitigating factor because, five years after being diagnosed in 2008, Campbell "could still take this gun and go to the gas station and hold it up." After considering the relevant sentencing factors, the court concluded that the need to protect the community demanded a lengthy prison sentence. "Sentencing courts have considerable discretion as to the weight to be assigned to each factor." ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. There is no arguable merit to the sentencing issues.

Campbell next asserts that early on in the proceedings his first attorney filed for judicial substitution without his request or consent.[6] This claim is waived by Campbell's knowing and voluntary guilty plea. *See* ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980).

Finally, Campbell alleges judicial bias. When analyzing such a claim, we presume the judge was fair, impartial, and capable of ignoring any biasing influences. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. This presumption is rebuttable. ***Id.*** Judicial bias has two components. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106

[6] Campbell complains that he had "no say in the venue change." There was no change of venue.

(Ct. App. 1994). The subjective component is based on the judge's own assessment of his or her ability to act impartially. ***Id.*** The objective component asks whether there are objective facts demonstrating that the judge actually was biased. ***Id.*** at 416. The party asserting judicial bias must prove it by a preponderance of the evidence. ***Id.*** at 415.

Campbell asserts that Judge Gritton "was in cahoots" both with the PSI writer because they are personal friends and with the prosecutor, as shown by the court's denial of his motion to withdraw the withdrawal of his motion to withdraw his pleas and by the fact that Judge Gritton and the prosecutor worked together in the district attorney's office before Judge Gritton took the bench sixteen years ago. He further contends that Judge Gritton should not have sentenced him because of knowing Judge Gritton "from living in the same town," cooking at a restaurant where Judge Gritton eats, and "dealing with" Judge Gritton's daughter and her boyfriend in 2010.

Because Judge Gritton did not disqualify himself, we may presume that he believed himself capable of acting in an impartial manner and, therefore, our inquiry into the subjective test is at an end. *See* ***McBride***, 187 Wis. 2d at 415. Nothing in the record suggests that he misgauged his ability to do so. Aside from a 2005 posting, of dubious credibility, on an internet forum about years-old Winnebago County happenings, Campbell provides no evidentiary support whatsoever for his claims, nor any rationale to back his claim of bias. An appearance of partiality or that the circumstances might lead one to speculate that a judge was partial is not sufficient to prove bias. ***Id.*** at 416. Campbell thus has not rebutted the presumption of Judge Gritton's fairness and impartiality. Pursuing this issue further would lack arguable merit. Our independent review of the record reveals no other issues of arguable merit.

While a supplemental report is not required, *see* WIS. STAT. RULE 809.32(1)(f), one would have been helpful in this case. It is counsel's job when filing a no-merit report to examine the issues a defendant raises. If the issues have been resolved, he or she should advise this court of that fact.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Campbell in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals