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April 11, 2017

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

2016AP797-CRNM State v. Derrick John Whitmore
2016AP798-CRNM (L. C. Nos. 2014CF189, 2015CF24)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Derrick Whitmore has filed a no-merit report concluding no grounds exist to challenge Whitmore's fourteen convictions arising from two circuit court cases. Whitmore was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967),

we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

The State charged Whitmore with the following twenty-eight crimes: party to the crimes of attempting to flee a traffic officer, first-degree reckless endangerment, and two counts of operating a motor vehicle without the owner's consent, all as a repeater, and all except one of the operating without consent counts with an enhancer for use of a dangerous weapon; one count of felon in possession of a firearm, as a repeater; five counts of party to the crime of criminal damage to property; eight counts of party to the crime of burglary; three counts of party to the crime of theft (special facts); six counts of party to the crime of misdemeanor theft; and one count of party to the crime of arson of property other than a building.

Whitmore pleaded no contest to party to the crimes of attempting to flee a traffic officer and first-degree reckless endangerment, both with use of a dangerous weapon; two counts of party to the crime of operating a motor vehicle without the owner's consent; felon in possession of a firearm; eight counts of party to the crime of burglary; and party to the crime of arson of property other than a building. As part of the plea agreement, the State dismissed the repeater enhancer and the use of a dangerous weapon allegation from the operating without the owner's consent count. The State also agreed to dismiss and read in the remaining counts and join in defense counsel's recommendation for an aggregate sentence of thirty years, consisting of fifteen years' initial confinement and fifteen years' extended supervision. Out of a maximum possible one-hundred-forty-five and one-half year sentence, the court imposed consecutive and

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

concurrent sentences totaling twenty-one years' initial confinement followed by twenty-eight years' extended supervision.

The records disclose no arguable basis for challenging the effectiveness of Whitmore's trial counsel. To establish ineffective assistance of counsel, Whitmore must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Whitmore must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pleaded] guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Any claim of ineffective assistance must first be raised in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Our review of the records and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

The records disclose no arguable basis for withdrawing Whitmore's no contest pleas. The circuit court's plea colloquy, as supplemented by plea questionnaire and waiver of rights forms that Whitmore completed, informed Whitmore of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no contest pleas. The circuit court confirmed that Whitmore understood the court was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and advised Whitmore of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the circuit court found that a sufficient factual basis existed in the criminal complaints to support the conclusion that Whitmore committed the crimes charged. The records show the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The no-merit report questions whether the circuit court erred by insisting Whitmore "admit to the read-in offenses," contrary to ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. The issue in ***Straszkowski*** was whether a defendant is required to admit guilt before the circuit court may consider read-in offenses at sentencing. ***Id.***, ¶¶4, 5. Our supreme court counseled that "[i]t is a better practice for prosecuting and defense counsel and circuit courts to omit any reference to a defendant admitting a read-in crime, except when the defendant does admit guilt, and simply to recognize that a defendant's agreement to read in a charge affects sentencing ...." ***Id.***, ¶93. The supreme court held: "[N]o admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed ...." ***Id.***, ¶97. Here, the circuit court stated during the plea colloquy:

> I want to talk to you about these read-in offenses []. Read ins are accompanied by several conditions and I want to make sure you understand them. First, you [would] acknowledge responsibility for those dismissed, but read in charges. Second, you would agree that I can consider those read in charges when I impose sentences on the counts you pled to. Third, you accept responsibility for any restitution relating to those read in charges, and as a result the State can never again prosecute you for those particular counts, do you understand those conditions?

The circuit court then listed the read-in counts, asking "[D]o you acknowledge responsibility for that charge?" Whitmore answered, "Yes, sir" for each count. Even assuming that "acknowledging responsibility" is the same as "admitting guilt," the no-merit report concludes it is not plausible for Whitmore to assert he would have foregone the benefit of the plea agreement had he known he was not required to admit to the read-in offenses. Ultimately, there is no arguable merit to support a plea withdrawal motion because the records do not establish that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Duychak***, 133

Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Whitmore entered his no contest pleas with knowledge of the effect of the read-in offenses, including knowledge that the circuit court could consider the read-in charges when imposing sentence; that the circuit court could impose restitution on the read-in offenses; and that the State was prohibited from future prosecution of the read-in offenses. *See* ***Straszkowski***, 310 Wis. 2d 259, ¶93.

The records disclose no arguable basis for challenging the sentences imposed. Before imposing sentences authorized by law, the court considered the seriousness of the offenses; Whitmore's character, including his "atrocious" criminal history; the need to protect the public; and the mitigating factors Whitmore raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court determined that anything less than confinement would unduly depreciate the seriousness of the offenses. It cannot reasonably be argued that Whitmore's sentences are so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

There is likewise no arguable merit to challenge the circuit court's consideration of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment. The court properly utilized COMPAS consistent with our supreme court's decision in ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749. The record shows COMPAS was not "determinative" of the sentence imposed. It merely informed the circuit court's assessment of other, independent factors. Finally, there is no arguable merit to a claim that Whitmore's sentence should be modified as he has identified no new factor justifying sentence modification. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989).

Our independent review of the records discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Philip J. Brehm is relieved of further representing Whitmore in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals