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April 6, 2017

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

2016AP1864-CRNM State of Wisconsin v. Lawrence Lewis, III (L.C. # 2015CF4277)

Before Brennan, P.J., Brash and Dugan, JJ.

Lawrence Lewis, III, appeals from a judgment of conviction, entered upon his guilty plea, on one count of possession of a firearm by a felon. Appellate counsel, Jason D. Sanders, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT.

RULE 809.32 (2015-16).[1] Lewis 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.

Police received a phone call from a nightclub manager, stating that there was a male, holding a black semi-automatic gun, seated in a gray four-door Chrysler 300 parked in front of the club. The manager provided the car's license plate number. Police responded and found a car matching the description. As police approached the car, Lewis got out. Lewis was detained. The manager then informed police that he saw Lewis put the gun under the passenger seat, which is where police recovered a Glock .40-caliber semi-automatic firearm with an extended-capacity magazine. Police subsequently confirmed the vehicle belonged to Lewis. Because Lewis had a prior felony conviction, he was charged with one count of possession of a firearm by a felon.

Lewis filed a motion to suppress statements, based at least in part on a claimed ***Miranda*** violation.[2] However, he withdrew the motion to enter a plea agreement. In exchange for his guilty plea to the charged offense, the State agreed to recommend a sentence of thirty months' initial confinement and thirty months' extended supervision while standing silent on whether that sentence should be concurrent or consecutive to any other sentence. The State also agreed not to file any other charges stemming from this incident. Lewis appeals.

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

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). The motion claimed that Lewis, having been detained in handcuffs, was in custody when police asked him whether he was a felon and he responded affirmatively.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Lewis's guilty plea and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging Lewis's guilty plea as not knowing, intelligent or voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He 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 offense. The jury instructions for possession of a firearm by a felon were attached and initialed by Lewis. The plea questionnaire correctly acknowledged the maximum penalties Lewis faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271. The circuit court also conducted the plea colloquy required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Ultimately, the plea questionnaire and waiver of rights form and addendum, the jury instructions, and the circuit court's colloquy appropriately advised Lewis of the elements of his offense and the potential penalties he faced and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

Counsel suggests in the no-merit report that the sole potential basis for a plea withdrawal motion "is the possibility that Lewis's suppression motion might have successfully suppressed

some or all of the evidence against him."[3] Such a challenge would have to come as a claim of ineffective assistance of trial counsel, as appellate counsel correctly notes that a valid guilty plea waives any nonjurisdictional defects and defenses, including constitutional challenges. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994).

While the suppression motion upon which a defendant actually obtained a ruling can be challenged on appeal notwithstanding a guilty plea, *see* WIS. STAT. § 971.31(10), the circuit court, during the plea colloquy, confirmed Lewis understood he was foregoing any challenges to the constitutionality of police actions by entering his plea. Accordingly, we conclude there is no arguable merit to a claim of plea withdrawal premised on a failure to proceed with the motion to suppress.

The other issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence. *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

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[3] In support of his analysis, counsel cites to ***State v. Horton***, No. 2010AP971, unpublished slip op. (WI App Jan. 24, 2012), for the proposition that "the use of unheard suppression motions as a part of the plea negotiation has explicitly been denied as a basis for any hypothetical ineffective assistance of counsel claims Lewis might hypothetically seek."

While counsel correctly cites WIS. STAT. RULE 809.23(3)(b) as the rule governing citation of unpublished opinions, the rule only permits citation of an unpublished opinion "that is authored by a member of a three-judge panel or by a single judge[.]" ***Horton*** is an unpublished *per curiam* opinion, and a "per curiam opinion … is not an authored opinion for purposes of" the rule, *see* WIS. STAT. RULE 809.23(3)(b), and should not have been cited.

We note, however, that this error by counsel has no impact on our resolution of this appeal.

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 various 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* ***id.***

Our review of the record confirms that, although its sentencing comments were brief, the circuit court appropriately considered only relevant sentencing objectives and factors and considered no improper factors. The five-year sentence imposed is well within the ten-year 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 court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jason D. Sanders is relieved of further representation of Lewis in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals