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DISTRICT II

April 26, 2017

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

2017AP42-CRNM State of Wisconsin v. Bobby Sanders, Jr. (L.C. #2014CF971)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Bobby Sanders, Jr., appeals from a judgment convicting him of robbery of a financial institution and from the order denying his postconviction motion seeking sentence modification. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Sanders was advised of his right to file a response but has not done so. After reviewing the no-merit report and the record, we conclude there are

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

no issues with arguable merit for appeal. We summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Sanders entered a bank and, keeping one hand in his sweatshirt pocket, slid a note to a bank employee. The note read: "Empty the register. No tracer and no dye packs, I have a bomb an[d] a gun, if you give me dye packs I will blow this place up." Sanders was charged with robbery of a financial institution by use of force or threat of imminent force. In exchange for his guilty plea, the State agreed to dismiss a repeater enhancer and recommend eight years' initial confinement (IC) and ten years' extended supervision (EC). The defense also recommended eighteen years but bifurcated as five years' IC and thirteen years' ES. The court followed the State's recommendation, made Sanders eligible for the Substance Abuse and Challenge Incarceration Programs after serving five years, and ordered 210 days' sentence credit. It also ordered Sanders to pay $2983 in restitution to the bank.

The department of corrections (DOC) later advised the court that the sentence credit appeared to be duplicative. After the parties briefed the matter, the court concluded the DOC was correct and filed an amended judgment of conviction granting no sentence credit. Sanders filed a postconviction motion alleging that the postsentencing loss of the 210 days' credit was a new factor justifying sentence modification. The court denied the motion after a hearing on grounds that it was not a new factor as it did not factor into the sentencing decision.

The no-merit report first addresses whether Sanders's no-contest plea was knowingly, intelligently, and voluntarily entered. Our review of the record confirms that the circuit court engaged in a thorough colloquy with Sanders that satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a), ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906,

State v. Hampton, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). In addition, a signed plea questionnaire and waiver-of-rights form was entered into the record. We agree with counsel that plea withdrawal is not necessary to correct or avert a manifest injustice due to a serious flaw in the fundamental integrity of the plea. *See* ***State v. Denk***, 2008 WI 130, ¶78, 315 Wis. 2d 5, 758 N.W.2d 775. Any challenge to the entry of Sanders's guilty plea would lack arguable merit.

The report also examines whether Sanders could argue that the court did not properly exercise its discretion at sentencing. In imposing an aggregate eighteen-year sentence, the court considered the seriousness of the offense, Sanders's character, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It noted his long criminal history, his poor choice of those with whom he associated, his repeated supervision failures, and the trauma his crime caused to the bank's customers and employees.

Sanders could have received up to a forty-year sentence and/or a $100,000 fine. The court observed that it initially was leaning more toward the PSI author's sentencing recommendation (twelve to twenty-five years' IC plus ten years' ES), but then took into account Sanders' difficult upbringing and cognitive challenges. The sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Ordering Sanders to pay $2983 in restitution was based on the bank's accounting of the amount Sanders stole and he agreed and stipulated to that amount. Besides the stipulation, Sanders has waived a challenge to the restitution order by his competent guilty plea. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). "He cannot be heard to complain of an act to which he deliberately consents." ***Id.*** at 437 (citation omitted).

The information the court relied on at sentencing was accurate, *see* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1, and the court's decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). We agree that a challenge to the sentencing decision lacks arguable merit.

Finally, the no-merit report addresses whether a challenge to the denial of his postconviction motion for sentence modification would have arguable merit. We agree it does not. First, the DOC was correct that the sentence credit was duplicative. The credit already had been applied to a previous sentence to which the sentence in this case was ordered to be served consecutively. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100-01, 423 N.W.2d 533 (1988).

Second, the credit adjustment did not constitute a new factor. At sentencing, the subject of sentence credit was addressed only briefly: defense counsel said he had calculated 210 days' credit and the prosecutor said he did not dispute the number. At the postconviction motion hearing, the court emphasized that "the credit … did not play any factor in my mind." It said its intent, due to the seriousness of the offense, was to order eight years' IC, and if Sanders "had 210 days toward that [it was] gravy" for him. The amount of sentence credit to which Sanders was entitled plainly was not "highly relevant" to the sentence imposed. ***State v. Armstrong***, 2014 WI App 59, ¶¶15-18, 354 Wis. 2d 111, 847 N.W.2d 860.

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

IT IS FURTHER ORDERED that Attorney Jeremy Newman is relieved of further representing Sanders in this matter.

Diane M. Fremgen
Clerk of Court of Appeals