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May 22, 2017

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

2016AP564-CRNM State of Wisconsin v. Tynell D. McCoy (L.C. #2013CF002351)
2016AP565-CRNM State of Wisconsin v. Tynell D. McCoy (L.C. #2013CF004998)

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

In these consolidated appeals, Tynell D. McCoy appeals from judgments entered after he pled guilty to armed robbery with threat of force as a party to a crime in Milwaukee County Case No. 2013CF2351 and to felony murder as a party to the crime in Milwaukee County Case

No. 2013CF4998.[1] *See* WIS. STAT. §§ 943.32(2), 939.05, 940.03 (2013-14).[2] McCoy also appeals from an order that denied in part a postconviction motion to vacate two DNA surcharges.[3] McCoy's postconviction and appellate lawyer, Mark S. Rosen, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. McCoy did not respond. After independently reviewing the records and the no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgments of conviction and the order. *See* WIS. STAT. RULE 809.21.

Case No. 2013CF2351

McCoy was charged with armed robbery as a party to a crime arising out of an incident that occurred on April 28, 2013. According to the complaint, on that date, police officers were dispatched to investigate an armed robbery complaint. A woman told the officers that she and two of her friends were approached by two men while the women were playing basketball. The women tried to ignore the men. As the three left the basketball court and walked to the home of one of the women, the two men approached them again. One of the men pulled a firearm from

[1] As stated in our prior order rejecting the no-merit report, the text of the complaint and information in Case No. 2013CF4998 charged McCoy with felony murder while committing armed robbery as a party to a crime. The plea questionnaire and waiver of rights form provides that in Case No. 2013CF4998, McCoy pled guilty to felony murder as a party to a crime. However, there is no reference to party to a crime in the judgment of conviction in Case No. 2013CF4998. This error is clerical. Courts may correct clerical errors at any time. ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. To date, the judgment has not been corrected. Upon remittitur, the circuit court shall direct the clerk of circuit court to enter a corrected judgment of conviction reflecting McCoy's conviction for felony murder as a party to a crime.

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

[3] The Honorable David Borowski entered the judgments of convictions. The Honorable M. Joseph Donald entered the order resolving McCoy's postconviction motion.

behind his leg. The man with the gun instructed the women to get inside the building and told them to enter a vacant apartment. The man with the gun then told one of the women to remove her gold teeth and her diamond studded earrings. The men also took a cellular phone and demanded apartment keys from another woman.

On May 14, 2013, a police officer was dispatched to investigate a shots-fired complaint. The complainant stated that two men were together outside a residence when one of them fired a sawed-off shotgun in the air and then ran inside. During the investigation, McCoy and Jerron Washington were arrested. Police officers executed a search warrant for the residence and found several items, including a rifle and a gold dental overlay.

According to the complaint, one of the robbery victims told an officer the rifle was similar to the firearm that was used when she was robbed. The woman also said that the gold teeth were hers and that they were fitted for her mouth. Two of the women identified McCoy in a photo array as the man with the gun during the robbery.

Case No. 2013CF4998

McCoy was subsequently charged with felony murder while committing armed robbery and first-degree recklessly endangering safety, both as a party to a crime. According to the complaint, the events leading to the charges took place on April 17, 2013, eleven days prior to the armed robbery detailed above. On that date, police officers responded to a shooting at a home in the City of Milwaukee. Upon arrival, an officer found a man who had suffered gunshot wounds to his leg and elbow sitting on the front porch of a home. In the basement, another officer found a man who had been shot to death.

At the hospital, the victim told police that three men with guns came into the kitchen of his home. His cousin was with him at his residence. As his cousin struggled with one of the men over a gun, the two rolled down the stairs into the basement. Eventually all of the men ended up in the basement. The victim heard two or three shots and felt a pain in his leg before falling to the floor. When he got up, he saw his cousin convulsing. The victim ran to the porch where police found him.

Police officers recovered a light colored baseball cap at the crime scene. The victim told police that one of the men who was responsible for the shootings was wearing the cap. DNA testing revealed that Jerron Washington was the major male contributor. The other profile in the baseball cap came from McCoy.

The complaint further relayed that Washington made an incriminating statement that implicated McCoy and another man in the events that led to the shootings.

The two cases were consolidated in the circuit court. McCoy ultimately pled guilty to felony murder as a party to a crime in Case No. 2013CF4998 and to armed robbery as a party to a crime in Case No. 2013CF2351. The circuit court accepted the pleas and imposed concurrent sentences: in 2013CF4998, twelve years of initial confinement and eight years of extended supervision; and in 2013CF2351, five years of initial confinement and five years of extended supervision.

Counsel previously filed a no-merit report, which we rejected after concluding that an issue of arguable merit existed as to whether the circuit court's decision to order two separate DNA surcharges resulted in an *ex post facto* violation. Counsel then filed a postconviction motion challenging the imposition of a DNA surcharge in each case. The postconviction court

vacated the DNA surcharge in Case No. 2013CF4998 but denied McCoy's request that it vacate the DNA surcharge in Case No. 2013CF2351. Therefore, McCoy is now responsible for one $250 DNA surcharge.

In the no-merit report presently before us, counsel addresses whether there would be any arguable merit to an appeal on three issues: (1) the validity of McCoy's pleas; (2) the circuit court's exercise of sentencing discretion; and (3) the postconviction court's order denying in part McCoy's motion to vacate the two DNA surcharges. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursuing these issues on appeal.

Plea

Counsel first addresses whether McCoy has an arguably meritorious basis for challenging his pleas on appeal. At the combined plea hearing, McCoy pled guilty to felony murder as a party to a crime in Case No. 2013CF4998 and to armed robbery as a party to a crime in Case No. 2013CF2351. Additionally, McCoy agreed to testify against one of his co-actors in the case that resulted in the felony murder charge and to be jointly and severally responsible for reasonable restitution. In exchange, the State made a global sentencing recommendation of ten to twelve years of initial confinement, leaving the time on extended supervision to the circuit court's discretion. The State moved to dismiss and read-in the charge of first-degree recklessly endangering safety as a party to a crime.

To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). McCoy completed two separate plea questionnaire and waiver of rights forms, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The relevant jury instructions were attached to the forms. The

forms listed, and the court explained, the maximum penalties McCoy faced. The forms, along with addendums, further specified the constitutional rights that McCoy was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted plea colloquies, 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.

There would be no arguable merit to challenging the validity of McCoy's guilty pleas.

Sentencing

The second issue counsel discusses is the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that 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, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit 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 it may consider several subfactors. ***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* ***Gallion***, 270 Wis. 2d 535, ¶41.

After listening to the sentencing remarks, including those from McCoy and his mother, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny.

The circuit court began by explaining that punishment and deterrence were two of its foremost goals in sentencing McCoy. It took note of McCoy's cooperation in the cases involving his co-actors and gave him credit for accepting responsibility and pleading guilty. The circuit court also acknowledged that McCoy had no prior criminal record. However, the circuit court went on to find that McCoy's decision to commit a second armed robbery shortly after the first, which had resulted in felony murder, was an aggravating factor.

In Case No. 2013CF4998, the circuit court sentenced McCoy to twelve years of initial confinement and eight years of extended supervision. The maximum sentence he could have received was fifty-five years. *See* WIS. STAT. §§ 940.03 (2013-14), 943.32(2) (2013-14), 939.50(3)(c) (2013-14). In Case No. 2013CF2351, the circuit court sentenced McCoy to five years of initial confinement and five years of extended supervision, to run concurrently. The maximum sentence he could have received was forty years. *See* §§ 943.32(2) (2013-14), 939.50(3)(c) (2013-14).

There would be no arguable merit to a challenge to the circuit court's sentencing discretion and the severity of the sentence.

DNA Surcharge

Lastly, counsel addresses whether the postconviction court correctly decided his motion challenging the imposition of a DNA surcharge in each of McCoy's cases.

In its decision, the postconviction court vacated the DNA surcharge imposed in 2013CF4998 after concluding that it constituted an *ex post facto* violation. In so doing, the postconviction court acknowledged that while McCoy's cases did not fit neatly within the parameters of ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, the holding in that case controlled. The postconviction court explained: "Again, the court perceives no difference for *ex post facto* purposes between charges filed in one case and charges filed in separate cases when a person is sentenced for those offenses at the same time, as here."

The postconviction court further concluded that requiring McCoy to pay a single DNA surcharge in Case No. 2013CF2351 was permissible under ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, which was subsequently affirmed by our supreme court. *See* ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. The record reflects that McCoy had no prior criminal history; therefore, he would not have provided a prior sample or previously paid the surcharge. *See* ***id.***, ¶3 (A single $250 DNA surcharge does not constitute punishment so as to violate the prohibitions against *ex post facto* laws.).

There would be no arguable merit to a challenge to the circuit court's imposition of the DNA surcharge in Case No. 2013CF2351.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments of conviction and the order partially denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved of further representation of McCoy in these matters. *See* WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Clerk of Court of Appeals