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June 6, 2017

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

2016AP309-CRNM State of Wisconsin v. Karl L. Williams
2016AP310-CRNM (L. C. Nos. 2013CF1034; 2013CF1142))

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

Counsel for Karl Williams has filed a no-merit report concluding there is no basis to challenge judgments of conviction for disorderly conduct, child abuse by recklessly causing bodily harm, and bail jumping. Williams was advised of his right to respond and he has responded. Upon our independent review of the record 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 and summarily affirm.

These consolidated cases stem from allegations Williams struck his daughter with his belt, and also that he injured his girlfriend during a domestic argument. Williams was charged with intentional child abuse, bodily harm with use of a dangerous weapon; disorderly conduct with use of a dangerous weapon; substantial battery, domestic abuse; second-degree recklessly endangering safety, domestic abuse; and three counts of bail jumping. Negotiations with the State led to a deferred-prosecution agreement in which Williams would plead guilty to amended charges of disorderly conduct while armed, domestic abuse; reckless causation of bodily harm, abuse of a child; and one count of bail jumping. The remaining charges would be dismissed and the court would withhold entry of the judgment of conviction. Upon completion of a first offender's program, Williams would be convicted of modified amended charges of misdemeanor battery and misdemeanor bail jumping. Williams entered his pleas, filed a plea questionnaire and waiver of rights form, and the circuit court approved the joint agreement. Williams was then referred to the deferred-prosecution program.

Prior to the completion of an intake interview at the deferred-prosecution program, a pending charge of substantial battery was discovered against Williams, and he was found ineligible to participate in the diversion program. The matter was returned to the circuit court for further action. Williams was notified that should the new charges be dismissed or should Williams be acquitted of the substantial battery charge, re-referral would be possible.

Williams was subsequently found not guilty of the substantial battery charge, and the circuit court was notified that Williams was again referred to the deferred-prosecution program. At the completion of the intake interview, Williams reported that he "did not feel this was the appropriate program for him," and verbalized that he would like his case to go to trial. Williams was encouraged to carefully consider the opportunity to participate in the program and to discuss

his options with his attorney. After a period of consideration, Williams reported to the deferred-prosecution program that he declined to participate. The matter was again returned to the circuit court, as voluntary participation was a "critical and integral eligibility requirement" of the deferred-prosecution program.

Approximately three months later, Williams filed a motion for plea withdrawal, contending he was coerced into pleading guilty and was not properly advised by his trial counsel of all the consequences. After a hearing at which Williams testified, the circuit court denied the motion.

Williams was thereafter adjudicated guilty of disorderly conduct; recklessly causing bodily harm to a child; and bail jumping. The circuit court imposed five days' jail, time served, on the disorderly conduct charge, and concurrent six months' jail sentences on the remaining counts, also time served.

There is no arguable issue regarding plea withdrawal. The circuit court's plea colloquy, together with the plea questionnaire and waiver of rights form that Williams signed, informed Williams of the constitutional rights he waived by entering into the plea agreement, the elements of the offenses, and the potential punishment. The court also advised Williams of the potential deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c) (2015-16).[1] Williams conceded the probable cause portion of the criminal complaint provided a sufficient factual basis supporting the convictions. The court also specifically confirmed Williams' understanding that "there are no guarantees that you'll successfully complete the First Offender's

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

program and if for some reason you should not, despite your best efforts, you would come back here, and based on the plea today, I would find you guilty and then you would be sentenced." The court reiterated that if Williams did not "complete successfully First Offender's, you could end up with a felony conviction." The court failed to advise Williams that it was not bound by the plea agreement and could impose the maximum penalties, as required by ***State v. Hampton***, 2004 WI 107, ¶¶2, 8, 274 Wis. 2d 379, 683 N.W.2d 14, but any error in that regard is harmless because the court adopted the parties' jointly recommended deferred-prosecution agreement.

In addition, the circuit court properly observed that the manifest injustice standard applied in reviewing Williams' motion for plea withdrawal. *See* ***State v. Daley***, 2006 WI App 81, ¶18, 292 Wis. 2d 517, 716 N.W.2d 146. The manifest injustice test requires a defendant to show a serious flaw in the fundamental integrity of the plea. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. It is the defendant's burden to prove manifest injustice by clear and convincing evidence.

Williams' plea withdrawal motion asserted merely his belief in his own innocence and his dissatisfaction with his trial attorney, whom Williams contended "coerced" him into accepting the deferred-prosecution agreement despite "not properly advis[ing Williams] of all of the consequences." Williams' contentions failed to rise to the level of manifest injustice as a matter of law. *See* ***Daley***, 292 Wis. 2d 517, ¶20. An assertion of innocence is not dispositive and need not be deeply pursued on a motion after the lack of successful completion of a deferred-prosecution agreement. *See* ***id.***, ¶21. Furthermore, the court inquired during the plea colloquy whether Williams was in agreement with the deferred-prosecution agreement. The court also established that Williams "had a lot of discussions" with his trial attorney, and that counsel answered Williams' questions and provided the information he needed.

The circuit court also properly observed that at no time between the February 7 plea hearing and September 10, when Williams voluntarily declined to participate in the first offender's program, did he seek to withdraw his plea. Rather, he waited until he faced the possibility of a prison sentence to cry foul. The court is entitled to consider such a delay in its determination, and Williams' postconviction position, which is contrary to his position at the plea colloquy, does not make us suspect the plea's voluntariness. *See* ***id.***, ¶¶22, 24.

The court stated it was "very troubled by this case." As the court explained:

> Judge Sumi did an excellent job of taking this plea colloquy, and, in fact, it appears to me that everybody was bending over backwards to get Mr. Williams into a program that would help address his issues and keep him clear of any convictions. And … Mr. Williams spontaneously says, "So I just want to have the chance to thank the court and to thank [trial counsel] for being by my side and taking care of me, so I just want to say thank you very much," and at pages 12 to 13, "Has anyone pressured you or promised you anything to get you to give up these rights?" The defendant: "No, ma'am." The court: "You have had a lot of discussion with [trial counsel] correct?" The defendant: "Yes, ma'am." The court: "And has he answered your questions and provided the information you need?" The defendant: " … He made sure it was in there that I was understanding everything that was going on, ma'am."
>
> What happened after that is Mr. Williams was successful in a jury trial in July of 2014 and found not guilty, and he was re-referred to the first offender's program on August 4, 2014, and I don't know what has transpired in terms of why we are here this much later to seek a plea withdrawal ten months later. I think Mr. Williams was given an extraordinarily sweet deal, and it avoided any convictions, and particularly a felony conviction.[2]

[2] Trial counsel was not called as a witness at the hearing on the motion to withdraw the plea. Williams' attorney at that hearing represented to the circuit court that she "had a chance to talk to [trial counsel and] I don't know that his testimony would change anything …. I don't think it would help our position." In a supplemental response to the no-merit report, Williams' appellate counsel states he "contacted [trial counsel, and he] felt very confident that Mr. Williams understood the significance and consequences of entering his plea at the time he entered it."

The circuit court concluded, "I do not believe he has met the burden by clear and convincing evidence that there is a manifest injustice. I think the plea colloquy clearly shows on February 7th he knew what he was doing and why. I am sorry for him that he did not take the opportunity that was being handed to him to get rid of these charges …." There was no flaw in the fundamental integrity of the plea, and there is no arguable issue concerning manifest injustice.

The record also discloses no basis for challenging the court's sentencing discretion. At the sentencing hearing, the State recommended five days' jail, time served, on the disorderly conduct charge; and concurrent six months' jail, time served, on the remaining counts. The circuit court inquired as to Williams' position with regards to sentencing, noting that it appeared "there is no additional time to be served if he is in agreement with that sentence." Williams stated his agreement. A defendant who affirmatively joins or approves a sentence recommendation cannot attack the sentence on appeal. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Our independent review of the record discloses no other issues of arguable merit. Therefore,

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

IT IS FURTHER ORDERED that attorney Brandon Kuhl is relieved of further representing Williams in this matter. *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