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June 7, 2017

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

2016AP1059-CRNM State of Wisconsin v. Moreal Wilson (L.C. # 2014CF2782)

Before Lundsten, Higginbotham and Sherman, JJ.

Attorney John Pray, appointed counsel for Moreal Wilson, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Counsel provided Wilson with a copy of the report, and he responded to it. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our

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

independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Wilson pled guilty to one count of first-degree reckless homicide and one count of strangulation and suffocation. The court imposed a sentence on the homicide count of thirty years of initial confinement and ten years of extended supervision, and a concurrent lesser sentence on the other count.

The no-merit report addresses whether Wilson's pleas were entered knowingly, voluntarily, and intelligently. The no-merit report notes that during the plea colloquy the circuit court misstated the potential sentence on the homicide count. Instead of stating the correct maximum penalty of sixty years, the court stated that it was fifty years.

The supreme court has held that a misstatement of the potential penalty during a plea colloquy is not necessarily a defect that triggers the burden-shifting process described in ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986). The court in ***Cross*** held that "where the sentence communicated to the defendant is higher, but not substantially higher, than that authorized by law, the incorrectly communicated sentence does not constitute a ***Bangert*** violation." ***State v. Cross***, 2010 WI 70, ¶40, 326 Wis. 2d 492, 786 N.W.2d 64. The court also stated that when the defendant is told the sentence is *lower* than provided by law, as occurred in this case, "a defendant's due process rights are at greater risk and a ***Bangert*** violation may be established." ***Id.***, ¶39.

However, when presented with such a case later, the court did not hold that a ***Bangert*** violation occurred. Instead, the court expressly acknowledged the above quotation from ***Cross***, but then focused on how the sentence the defendant *actually received* compared with what he was told. ***State v. Taylor***, 2013 WI 34, ¶34, 347 Wis. 2d 30, 829 N.W.2d 482.

In ***Taylor***, the defendant was sentenced to the same amount of time that he was erroneously told was the maximum. ***Id.*** "Thus, on this record, a failure to discuss the additional two-year repeater penalty enhancer at the plea hearing is an insubstantial defect." ***Id.*** The court did not elaborate on its reasoning for this point. However, when summarizing later in the opinion, the court noted that Taylor's actual sentence "did not exceed the six-year term" that Taylor was erroneously told. ***Id.***, ¶42.

Based on the above material, it appears that the only available interpretation of ***Taylor*** is that the court held that as long as the defendant's actual sentence does "not exceed" the erroneously stated sentence, a defect in the statement of the potential prison term during the colloquy is "insubstantial." In the present case, although Wilson was told a lower sentence than provided by law, his actual sentence did not exceed the erroneous maximum sentence he was told. Accordingly, we conclude that it would be frivolous to argue that the court's ten-year error in Wilson's potential sentence was a defect in the plea colloquy.

Other than that error, the plea colloquy sufficiently complied with the requirements of ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Wilson was waiving, and other matters. The record shows no other ground to withdraw the plea. There is no arguable merit to this issue.

In Wilson's response to the no-merit report, he argues that he acted in self-defense. He asserts that his defense counsel "manipulated" him into a "bum-deal." However, Wilson does not state any facts to describe how this manipulation occurred, or describe what counsel may have said or done that was improper. The record itself does not show facts from which it could

be concluded that counsel acted improperly. Wilson has not shown that there is arguable merit to this issue.

The no-merit report addresses whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Finally, Wilson has filed a motion for appointment of counsel, on the ground that his existing attorney filed a no-merit report. This is not grounds for appointment of a different attorney.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Pray is relieved of further representation of Wilson 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