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July 28, 2017

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

2015AP2430-CRNM State of Wisconsin v. Aerion C. King (L.C. # 2013CF5282)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Aerion King appeals a judgment convicting him of robbery with the use of force, as a party to the crime, and armed robbery. Attorney Michael Backes has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[1] *see also*

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

Anders v. California, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses King's pleas and sentences, as well as a competency issue that was raised and then withdrawn. King was sent a copy of the report, and has submitted a response asserting that he has "no problem with" his pleas, but challenging his sentences as unduly harsh and based upon inaccurate or incomplete information. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for counsel to pursue a plea withdrawal claim if King does not wish to do so.[2] As counsel observes, the plea agreement resulted in the dismissal of multiple other charges, substantially reducing King's prison exposure, and we note that those dismissed charges would be reinstated if King withdrew his pleas.

Second, we see no arguable basis for counsel to challenge King's competency, given the results of the competency report and King's withdrawal of his challenge to competency.

A challenge to King's sentences would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record"

[2] We note that the circuit court did not ascertain during the plea colloquy whether King understood that DNA surcharges would be imposed for each count of conviction. It is an open question whether multiple mandatory DNA surcharges constitute a "punishment" that must be included in the range of penalties at a plea colloquy. *See* ***State v. Odom***, Appeal No. 2015AP2525-CR (certification pending). Therefore, it would not be frivolous to move for plea withdrawal if King could assert that he was unaware that multiple surcharges would be imposed and that he would not have entered his pleas if he had been aware of surcharges. However, since only a defendant can make the decision to withdraw a plea, if King does not wish to withdraw his plea counsel cannot raise the issue, regardless whether it would have arguable merit.

in order to overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that King was afforded an opportunity to comment on the PSI and to address the court, both personally and through counsel. The PSI agent chronicled King's criminal history and poor institutional adjustment; his history of foster care, strained familial relationships, and contacts with Child Protective Services; his limited education and employment, resulting in financial problems, including housing instability; his past membership in a gang and continuing association with antisocial people; and his own antisocial personality traits and need for cognitive therapy. The PSI agent then recommended a combined 13 to 15 years of initial confinement and 20 years of extended supervision. King acknowledged that a prison term was appropriate, and his attorney asked for a term not to exceed 5 years. King stated that he had learned that "no matter what I might go through, if I don't have a place to sleep, whatever, there is no excuse to commit any crimes, anything, to do anything wrong."

The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court pointed out that King was facing 35 years of initial confinement and 20 years of extended supervision, and that the high recommendation from the PSI agent reflected how serious the offenses were. The court viewed the fact that King had repeatedly punched one of the robbery victims to instill fear as an aggravating factor. With respect to King's character, the court emphasized King's continuing pattern of committing violent offenses, although the court gave King some credit for accepting responsibility. The court identified the primary goals of the sentencing in this case as punishment and protection of the public, and concluded that a substantial prison term was

necessary. The court observed that although the seriousness of the offenses might warrant the sentences recommended by the PSI agent, the court had more hope that King could turn his life around.

The court then sentenced King to consecutive terms of 4 years of initial confinement and 5 years of extended supervision on each of the two counts of conviction. The court also awarded 292 days of sentence credit, ordered restitution in the amount of $384 as stipulated by the parties, and imposed the mandatory DNA surcharges and other standard costs and conditions of supervision. The court determined that King was not eligible for the challenge incarceration program or substance abuse program because he did not have any significant substance abuse issues and one of the offenses involved the use of a firearm.

The components of the bifurcated sentences imposed were within the applicable penalty ranges, and the total imprisonment period constituted about a third of the maximum exposure King faced. *See* WIS. STAT. §§ 943.32(1)(a) (classifying robbery with use of force as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of 10 years of initial confinement and 5 years of extended supervision for a Class E felony); 943.32(2) (classifying armed robbery as a Class C felony); and 973.01(2)(b)3. and (d)2. (providing maximum terms of 25 years of initial confinement and 15 years of extended supervision for a Class C felony) (all 2011-12 Stats.).

King now asserts that his sentences were unduly harsh because his juvenile delinquency adjudications did not involve violent offenses, the firearm used in one of the offenses was a BB gun rather than a "real gun," his codefendants were not sent to prison, his mental health needs cannot be adequately addressed in prison, and the court was not fully apprised of the hardships

King had endured, including being homeless, having been in foster care since birth without knowing who his parents were, and having been sexually abused.

We first note that King denied to the PSI writer that he had ever been sexually abused, and the other information that King mentions was in fact before the court. If King wanted to emphasize any of that information more prominently, he was given the opportunity to do so. In any event, there is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). That is particularly true when taking into consideration the amount of additional sentence exposure King avoided on the read-in offenses.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Attorney Michael Backes is relieved of any further representation of Aerion King in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals