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October 4, 2017

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

2016AP716-CRNM State of Wisconsin v. Rodney T. Walker (L.C. # 2013CF1033)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

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).

Rodney T. Walker appeals a judgment of conviction entered upon his no contest plea to identity theft. Walker's 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). Walker received a copy of

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

the report but elected not to file a response. However, during the pendency of this no-merit appeal, Walker filed a pro se motion in the circuit court seeking sentence credit in this case. The circuit court denied Walker's motion and his appeal was dismissed for failure to pay the filing fee. Upon our independent review of the record, we were unable to determine whether there was a potentially meritorious sentence credit issue. We ordered the circuit court to supplement the appellate record with all papers filed since the original record transmittal, and directed appellate counsel to file a supplemental no-merit report addressing sentence credit. Having considered the original and supplemental no-merit reports and based on our independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

According to the complaint, in January 2013, Walker entered a high school, stole a teacher's credit card, and made five unauthorized purchases with the card. Walker was charged with five counts of identity theft for financial gain, contrary to WIS. STAT. § 943.201(2)(a), and one count of misdemeanor theft, contrary to WIS. STAT. § 943.20(1)(a). Pursuant to a plea agreement, Walker pled guilty to one count of identify theft. The State moved to dismiss and read in the remaining five charges and agreed to recommend eighteen months' initial confinement followed by eighteen months' extended supervision, to run concurrent with any other sentence. At a June 3, 2015 plea and sentencing hearing, the circuit court imposed a bifurcated sentence comprising one year of initial confinement and two years of extended supervision to run consecutive to any other sentence. This no-merit appeal followed.

The original and supplemental no-merit reports address the potential issues of whether Walker's plea was freely, voluntarily, and knowingly entered, if the sentence imposed was illegal or the result of an erroneous exercise of discretion, and if Walker is entitled to additional

sentence credit. Our review of the record persuades us that no issue of arguable merit arises from these points.

The trial court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon Walker's signed plea questionnaire to establish his knowledge and understanding of his plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). No issue of arguable merit arises from the plea-taking procedures in this case.

In fashioning the sentence, the court considered the seriousness of the offenses, the defendant's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court considered the offense to be serious, observing that five charges were dismissed and read in and that Walker entered a school to steal the credit card. Based largely on Walker's criminal history, the court determined that his character was "not good." The court determined that a consecutive prison sentence was necessary to protect the public, stating: "I think you ought to serve time in prison and supervision up until your retirement age to keep an eye on you." The circuit court's sentence was a demonstrably proper exercise of discretion. Further, we cannot conclude that the three-year sentence when measured against the possible maximum of six years is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

As to sentence credit, the court set a cash bail in this case on December 23, 2013. Walker never posted bail and remained in custody until his June 3, 2015 plea and sentencing hearing. With trial counsel in agreement, the circuit court did not award any sentence credit "because it seemed like he was in custody on his other charges" during the pendency of this case. Appellate counsel's original no-merit report concluded that Walker was not entitled to any sentence credit in this case because he was in custody in connection with other cases at all times during the relevant period. In particular, the no-merit report pointed to jail time ordered as a condition of probation in Sheboygan and Ozaukee County cases, and to Milwaukee County case No. 2013CF2455, in which Walker received a six-year bifurcated sentence on October 13, 2014.

During the pendency of this no-merit appeal, Walker filed a pro se motion in the circuit court seeking sentence credit in this case from December 23, 2013 (the date his cash bail was set), to October 13, 2014 (the date he was sentenced in Milwaukee No. 2013CF2455). Walker argued that because the time spent in custody in connection with his Sheboygan and Ozaukee cases was ordered as a condition of probation, he was not serving any other "sentence" until October 13, 2014. The State filed an opposing memorandum asserting that Walker was in custody in connection with Milwaukee No. 2013CF2455 from June 6, 2013, to October 13, 2014, and that because the instant sentence was ordered consecutive, he was not entitled to dual credit. The State's memo also stated that Walker was awarded forty-seven days of credit toward his Milwaukee sentence. The circuit court denied Walker's sentence credit motion citing the reasons "provided in correspondence from the State." On April 7, 2017, appellate counsel wrote a letter to the circuit court stating: "A no merit appeal was filed in this case which addresses the issue of sentence credit and is still pending in the court of appeals."

As stated in our August 4, 2017 order, neither the record nor appellate counsel's no-merit report definitively established that Walker was not entitled to sentence credit. However, it appeared from the electronic circuit court docket entries that during the pendency of this no-merit appeal, the Milwaukee County Circuit Court entered an order in connection with case No. 2013CF2455 granting Walker an additional 494 days of sentence credit. We directed counsel to file a supplemental no-merit report, stating "it is likely that the award of additional sentence credit in Walker's Milwaukee case renders any claim for additional sentence credit in the present case meritless."

Appellate counsel's supplemental no-merit report establishes that by order entered December 12, 2016, the Milwaukee County Circuit Court granted Walker's sentence credit motion filed in case No. 2013CF2455, and ordered that he receive credit for the period "from June 6, 2013 until October 13, 2014." Because the sentence in the present case was ordered to run consecutive to Milwaukee No. 2013CF2455, we are satisfied that any claim for sentence credit in this case would be without arguable merit. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) ("Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively" because this would amount to dual credit.).

Our review of the record discloses no other potential issues for appeal.[2] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Walker in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Cheryl A. Ward is relieved from further representing Rodney T. Walker in this matter. *See* 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

[2] Walker's no contest plea forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. We also conclude that the imposition of the $250 DNA surcharge does not give rise to an arguably meritorious challenge. The circuit court specifically ascertained that Walker committed his offense before the effective date of WIS. STAT. § 973.046(1r)(a), which mandates a $250 surcharge per felony conviction for sentences imposed on or after January 1, 2014. Knowing that the surcharge was not mandatory, the circuit court nonetheless determined it was "appropriate." *See* WIS. STAT. § 973.046(1g) (2011-12) (in its discretion, the sentencing court may impose the DNA surcharge for a felony conviction). In light of the record, the imposition of the DNA surcharge was a proper exercise of discretion. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶11-13, 338 Wis. 2d 151, 807 N.W.2d 241 (the sentencing court is not required to explicitly describe its reasons for imposing a DNA surcharge or otherwise use magic words; its entire sentencing rationale reflects on whether imposition of the surcharge is a proper exercise of discretion).