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DISTRICT I

October 4, 2017

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

2016AP2049-CRNM State of Wisconsin v. Vernon Gibson (L.C. # 2015CF4631)

Before Kessler, Brash and Dugan, 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).

Vernon Gibson pled no-contest to one count of aggravated battery. The State Public Defender appointed Attorney Michael S. Holzman to represent Gibson in postconviction and appellate proceedings. Attorney Holzman filed a no-merit report, concluding that Gibson could not pursue an arguably meritorious postconviction or appellate challenge to the plea or to the

sentence. *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Gibson was advised of his right to respond to the report, but he did not do so. The no-merit report addresses: (1) whether Gibson's no-contest plea was knowingly, intelligently and voluntarily entered; (2) whether the circuit court misused its sentencing discretion; (3) whether the circuit court erred in ordering Gibson to pay a DNA surcharge; and (4) whether the circuit court erred in ordering Gibson to pay $4077 in restitution. After reviewing the no-merit report and conducting an independent review of the record, we conclude that no arguably meritorious issues exist for appeal. Accordingly, we summarily affirm. *See* WIS. STAT. RULE 809.21.[2]

We first consider whether Gibson could pursue an arguably meritorious challenge to his no-contest plea. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty or no-contest plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crime to which he is entering a plea, the constitutional rights he is waiving by entering his plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may refer to a plea questionnaire and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the [circuit] court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

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

[2] We placed this case on hold on August 2, 2017. We now lift the hold and decide the case.

At the outset of the plea proceeding, the State described the terms of the parties' plea bargain: in exchange for Gibson's plea to the charge, the State would recommend prison at sentencing, but leave the length of both initial incarceration and extended supervision to the court's discretion. Both Gibson and Gibson's lawyer told the court that the State had correctly stated the plea agreement.

The circuit court explained to Gibson the maximum penalties he faced by entering a plea. Gibson said that he understood. The circuit court reviewed the elements of the crime with Gibson, and Gibson said that he understood. The circuit court also reviewed the constitutional rights Gibson was waiving and Gibson said that he understood.

The circuit court told Gibson that it was not bound by any plea negotiations and that it was free to impose the maximum sentence. Gibson said that he understood. Gibson informed the court that he had enough time to talk to his lawyer, that he had not been promised anything outside of the plea bargain to induce his no-contest plea, and that he had not been threatened by anyone. The circuit court further explained to Gibson that his no-contest plea exposed him to various risks if he was not a citizen of the United States. *See* WIS. STAT. § 971.08(1)(c). Gibson said that he understood.

The circuit court asked why Gibson was pleading no-contest rather than guilty. His attorney explained that there was a civil liability issue. The prosecutor informed the court that it had no issue with Gibson pleading no-contest because Gibson did not deny that he committed the crime. The circuit court explained to Gibson that he would be found guilty if he pled no-contest. Gibson said that he understood. The circuit court asked Gibson whether it could use the facts alleged in the complaint as a factual basis for the plea. Gibson said that it could.

The circuit court asked Gibson whether his attorney had reviewed the plea questionnaire and waiver-of-rights form with him. Gibson said that he had. The circuit court asked Gibson whether he understood the information on the form and whether he had signed it. Gibson said that he did. The signed plea questionnaire and waiver-of-rights form is included in the record. The form reflects that Gibson was fifty-four years old at the time of the no-contest plea and that he had completed the twelfth grade. The form lists the constitutional rights Gibson was waiving by pleading no-contest to the charge and the penalties that the circuit court could impose. Jury instructions attached to the form list the elements of the crime.

In sum, the record reflects that Gibson entered his no-contest plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***Hoppe***, 317 Wis. 2d 161, ¶32 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider whether Gibson could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, 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 may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id***. The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court considered the primary sentencing factors: the gravity of the offense, the character of the defendant, and the need to protect the public. The circuit court stated that this was a very serious offense because the victim permanently lost vision in one of her eyes. The circuit court also stated that Gibson's character was poor—he had a substantial prior record, made excuses for his behavior, blamed the victim, and had not adequately accepted responsibility for his actions. Our review of the sentencing hearing transcript shows that the circuit court explained the factors that it considered when imposing sentence and applied them to Gibson's situation in a reasoned and reasonable manner. Therefore, we conclude that a challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

The no-merit report next addresses whether Gibson could pursue an arguably meritorious challenge to the circuit court's order that he pay a $250 DNA surcharge. Counsel explained that Gibson believed that he should not have to pay the surcharge because he already paid one in a prior case. Gibson committed this crime after the effective date of WIS. STAT. § 973.046(1r)(a) which provides that a defendant must automatically pay a $250 surcharge for each felony conviction. There is no statutory exception if a defendant has already paid the surcharge on

another conviction. Moreover, although there are multiple recently decided cases addressing the constitutionality of § 973.046(1r), those cases do not apply in Gibson's situation because he committed this crime after the effective date of § 973.046(1r). *See, e.g.*, ***State v. Williams***, 2017 WI App 46, ___ Wis. 2d ___, 900 N.W.2d 310, *petitions for review pending* (imposition of the mandatory DNA surcharge for a single felony conviction violates the *ex post facto* prohibition when the crime was committed prior to January 1, 2014, the effective date of § 973.046(1r)).

The no-merit report next addresses whether Gibson could pursue an arguably meritorious challenge to the order requiring him to pay $4077 in restitution to the victim. More specifically, appellate counsel explained that Gibson believed that there was no evidence that the cost of the new artificial eye that the victim would need to purchase would be $3000. To the contrary, the victim stated at the sentencing hearing that the Milwaukee County Sheriff told her that the new eye would cost about $3000. Gibson's trial counsel did not object to that statement, and there is no evidence currently available to this court that suggests that $3000 is an unreasonable amount to pay for an artificial eye. There would be no arguable merit to this claim.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of any further representation of Vernon Gibson on appeal. *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