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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV/II

October 11, 2017

To:

Hon. Jon M. Counsell
Circuit Court Judge
Clark County Courthouse
517 Court Street
Neillsville, WI 54456

Heather Bravener
Clerk of Circuit Court
Clark County Courthouse
517 Court Street
Neillsville, WI 54456

Lyndsey A. B. Brunette
District Attorney
517 Court Street, Rm. 404
Neillsville, WI 54456-1903

Colleen Marion
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Reavon W. Taylor, #453594
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2016AP30-CRNM State of Wisconsin v. Reavon W. Taylor (L.C. #2014CF13)

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).

Reavon Taylor appeals from a judgment convicting him of delivering heroin contrary to WIS. STAT. § 961.41(1)(d)1. (2011-12). Taylor's appellate counsel[1] filed a no-merit report

[1] Attorney Sara Kelton Brelie filed the no-merit report. Taylor is now represented by Attorney Colleen Marion.

pursuant to WIS. STAT. RULE 809.32 (2015-16)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Taylor received a copy of the report and has filed a response to it. Upon consideration of the report, Taylor's response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Taylor's no contest plea was knowingly, voluntarily and intelligently entered; and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest plea to delivering heroin,[3] Taylor answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. Taylor stated that no threats or promises were made to induce him to enter a no contest plea. The court confirmed that Taylor had discussed with his counsel waiving his right to a trial, to have his counsel look for defenses, and review the actions of the State in bringing and prosecuting the charges. Taylor confirmed that he was satisfied with his trial counsel's representation and with the information counsel had provided to him and he did not have any other questions for his attorney or the court. Taylor confirmed that he did not need more time to

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

[3] The plea agreement amended the original charge of first-degree reckless homicide to delivering heroin. According to the autopsy report, the victim died as a result of acute intoxication due to the combined effects of several drugs, with heroin being the predominant contributor.

speak with his counsel. Counsel agreed that Taylor was fully informed about his case and his decision to waive a trial and that there was a factual basis for the plea. When given the opportunity to do so by the court, Taylor did not disagree with his counsel's statements, did not have any questions and stated that he was satisfied with counsel's efforts on his behalf. In addition, the plea questionnaire form Taylor signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). The record discloses that Taylor's no contest plea was knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Taylor's no contest plea.

In his response, Taylor faults his trial counsel on a number of fronts: (1) Taylor wanted drug evidence in the case tested; (2) Taylor wanted to review certain evidence; (3) there were issues with investigating aspects of the case which impacted his decision to plead no contest; (4) trial counsel should have investigated why another party was not charged in the crime; and (5) Taylor was pressured into pleading no contest and he felt rushed into doing so by the actions of his trial counsel.

We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

The record created during the plea hearing shows that Taylor was satisfied with his counsel and with the information he possessed about his case. At the time he pled no contest, Taylor knew what he did and did not have in the way of information about his case, including which evidence had been tested.[4] During the plea colloquy, Taylor repeatedly stated that he was satisfied with his counsel's representation, even though he was aware that evidence had not been tested as he requested. We conclude that the plea hearing record contradicts and forecloses Taylor's complaints about his trial counsel's representation. On this record, Taylor chose to enter a no contest plea after affirming the quality of his counsel's representation and stating that he was satisfied with the information he possessed. A party will not be heard to maintain a position on appeal which is inconsistent with the position taken in the circuit court. *See* ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987). We conclude that there would be no arguable merit to a claim of ineffective assistance of trial counsel.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Taylor to nine and one-half years (six years of initial confinement and three and one-half years of extended supervision). At sentencing, Taylor admitted giving heroin to the victim, who died, stated that he was "responsible for her not being here," took responsibility for his conduct while stating that he had been swayed by negative influences in his life, and admitted dealing heroin until after the victim died. In fashioning Taylor's sentence, the

[4] Taylor claims that he wanted the drugs and drug containers collected in the case tested for DNA. We take no position on the merits of such a claim.

court considered the seriousness of the drug offense and that the victim died, Taylor's character and history of other offenses, the impact on the victims, the need to punish, deter and rehabilitate Taylor, 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 weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

In his response, Taylor argues that the presentence investigation report was inadequate and incomplete. Approximately two weeks before the April 1, 2015 sentencing, the parties appeared and discussed a previous agreement to adjourn sentencing because the presentence investigation report was not timely submitted. Taylor's counsel noted that the presentence investigation report did not and would not contain any information from Taylor's family because the presentence investigation report author did not make contact with his family members. Taylor's counsel informed the court that she and Taylor discussed these circumstances and agreed that because the defense intended to submit a sentencing memorandum, the memorandum would include information from Taylor's family. The court then asked Taylor whether he (1) wanted to appear for sentencing on April 1 knowing that no further modifications would be made to the presentence investigation report or (2) wanted another adjournment so that the court could order the presentence investigation report author to modify the presentence investigation report. Taylor responded, "I would like to go ahead with the April 1st sentencing date. It was already problems. I guess, yeah, I would just like to stay April 1st." The court sentenced Taylor

on April 1. At sentencing, Taylor offered numerous corrections to the presentence investigation report.

Having specifically agreed to proceed on the presentence investigation report filed in his case, Taylor cannot argue on appeal that the presentence investigation report was inadequate. ***Michels***, 141 Wis. 2d at 98. This issue lacks arguable merit for appeal.

Taylor also complains that the circuit court considered that the person to whom Taylor delivered heroin died. "Evidence of unproven offenses involving the defendant may be considered by the court" at sentencing. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). This issue lacks arguable merit for appeal.

Although not discussed in either the no-merit report or the response, we note that the circuit court did not state a reason for requiring Taylor to pay the $250 DNA surcharge.[5] "'[R]egardless of the extent of the [circuit] court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the [circuit] court's decision had it fully exercised its discretion.'" ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted; alteration in original). We have rejected the notion that the "circuit court must explicitly describe its reasons for imposing" a discretionary DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. The court's entire sentencing rationale may be examined to determine if imposing the DNA surcharge was a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

[5] At the time Taylor committed his crime, the circuit court had discretion to impose the $250 DNA surcharge. WIS. STAT. § 973.046(1g) (2011-12); ***State v. Radaj***, 2015 WI App 50, ¶5, 363 Wis. 2d 633, 866 N.W.2d 758.

The complaint states that DNA evidence was collected and analyzed in this case. For arguable merit to exist to a claim that the circuit court erroneously exercised its discretion in imposing the DNA surcharge, Taylor would have to show that imposition of the surcharge was unreasonable. ***Id.***, ¶12. Given the use of DNA testing in his case, Taylor cannot show that the surcharge was unreasonable.[6] Accordingly, we are satisfied that a challenge to the imposition of the DNA surcharge would lack arguable merit.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Colleen Marion of further representation of Taylor in this matter.

Upon the foregoing reasons,

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

[6] We distinguish ***State v. Williams***, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310. In ***Williams*** we held that imposition of a mandatory DNA surcharge for a single felony conviction when that decision was discretionary for the circuit court at the time the crime was committed is an ex post facto violation when applied to a defendant who previously gave a DNA sample when the current case did not involve a DNA sample. ***Id.***, ¶26. The remedy for such an ex post facto violation is remand to the circuit court to apply the DNA surcharge statute in effect at the time the defendant committed the crimes of conviction. ***Id.***, ¶27.

Here, the record supports a discretionary decision to impose a DNA surcharge because DNA evidence was collected and analyzed in this case. Unlike in ***Williams***, here there was a connection between the imposition of the DNA surcharge and the use of DNA evidence in this case. ***Id.***, ¶26. Therefore, remanding for an exercise of circuit court discretion relating to the imposition of the DNA surcharge would not be a wise of use of scarce judicial resources.

IT IS FURTHER ORDERED that Attorney Colleen Marion is relieved of further representation of Reavon Taylor in this matter.

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

Diane M. Fremgen
Clerk of Court of Appeals