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October 27, 2017

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

2017AP812-CRNM State of Wisconsin v. Derrick Arnell Christmas, Jr.
(L.C. # 2014CF5537)

Before Brennan, P.J., Kessler and Brash, 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).

Derrick Arnell Christmas, Jr., appeals from a judgment, entered upon his guilty plea, convicting him of one count of first-degree recklessly endangering safety, while armed with a dangerous weapon, as a party to a crime. Appellate counsel, Kaitlin A. Lamb, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT.

RULE 809.32 (2015-16).[1] Christmas was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, around 10:40 a.m. on December 8, 2014, S.H. was stopped at a gas station when he received a call from Ulandas R. Turner, who said he wanted to talk to S.H. Turner pulled up to S.H. at the gas station in a minivan; Christmas and Xavier Poston were also in the minivan. S.H., who had known all three individuals for years, got in. Shortly after S.H. got in the minivan, the others began yelling at him not to move. Christmas, from behind S.H. in the rear seat, pointed a pistol at S.H. Poston, in front, had a large-capacity semi-automatic weapon. Turner was driving. Christmas took S.H.'s money, car keys, and cell phone from his pockets without his consent. S.H. was then driven about a mile away from the gas station, removed from the minivan by Turner and Christmas, and left there.

S.H. was able to flag down a passing vehicle, a Chevrolet, and the driver gave him a ride back to the gas station. Turner's minivan pulled up alongside the Chevrolet in the gas station lot, and someone in the minivan began shooting at the car. At least one bullet struck the vehicle; both S.H. and the driver were still inside. One of the bullets went astray and entered the vehicle of I.W. through the right rear passenger window, lodging in the driver's headrest, right behind I.W.'s head. I.W. had no connection to the incident and was merely driving past the gas station at the same time as the shooting.

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

Christmas, Turner, and Poston were all charged with armed robbery as a party to a crime and first-degree recklessly endangering safety, while armed, as a party to a crime, with S.H. identified as the victim for both offenses. When he was arrested, Christmas stated he was not present for, and denied being part of, the incident.

Christmas eventually agreed to resolve his case through a plea. In exchange for his guilty plea to recklessly endangering safety as charged, the State would dismiss and read in the armed robbery. Additionally, while the State would recommend a prison sentence, it would not recommend any particular length. After accepting Christmas's guilty plea, the circuit court imposed a sentence of five years' initial confinement and three years' extended supervision, with $740 restitution to I.W.

Appellate counsel identifies two potential issues: whether Christmas knowingly, voluntarily, and intelligently entered his plea and whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging Christmas's plea as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offense. Included in the record are copies of the jury instructions for first-degree recklessly endangering safety and the modifiers, with the elements of each initialed by Christmas. The form correctly acknowledged the maximum penalties

Christmas faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. There is a flaw in the colloquy: the circuit court, in advising Christmas of the maximum possible penalty he faced, indicated that the maximum penalty Christmas faced was twelve and one-half years' imprisonment. This is accurate for first-degree recklessly endangering safety, *see* WIS. STAT. §§ 941.30(1), 939.50(3)(f), but does not account for the "while armed" modifier. The modifier exposed Christmas to an additional possible five years' imprisonment. *See* WIS. STAT. § 939.63(1)(b). Nevertheless, this omission would not permit an arguably meritorious challenge to Christmas's plea. The complaint and the information both identify the five-year penalty enhancer, the court commissioner advised Christmas of the enhancer at the initial appearance, and the plea questionnaire, which lists the enhancer in the maximum penalty section, bears Christmas's initials acknowledging the potential maximum. Thus, the record sufficiently establishes Christmas's awareness of the maximum penalty, notwithstanding the circuit court's misstatement during the colloquy. *See* ***State v. Finley***, 2016 WI 63, ¶83, 370 Wis. 2d 402, 882 N.W.2d 761; ***State v. Taylor***, 2013 WI 34, ¶¶8-9, 32-38, 347 Wis. 2d 30, 829 N.W.2d 482.

Ultimately, the plea questionnaire and waiver of rights form and addendum, the jury instructions, and the court's colloquy, considered as a whole, appropriately advised Christmas of the elements of his offenses and the potential penalties he faced and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that punishment, deterrence, and rehabilitation were sentencing goals in this case. With respect to the gravity of the offense, the circuit court deemed Christmas's offense to be aggravated: the court had no doubt that the robbery had been planned. The circuit court commented that Christmas was extremely lucky that the stray bullet lodged in I.W.'s headrest without striking her, or he would have been facing a homicide charge. With respect to Christmas's character, the circuit court considered Christmas's record to be "terrible," noting that he bragged about receiving a four-month sentence for a prior armed robbery that had been amended to lesser charges when the victim declined to cooperate. The circuit court stated that it accepted Christmas's statement that he was sorry for what happened to S.H. and I.W., although the court also observed that Christmas was clearly minimizing his role in the events. With respect to the public, the circuit court noted that the public wants to be able to drive around at 10:40 in the morning without having to worry about getting shot.

The maximum possible sentence Christmas could have received was seventeen and one-half years' imprisonment. The sentence totaling eight years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The record reveals that the circuit court considered no improper factors, and Christmas stipulated to the restitution amount. There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved of further representation of Christmas 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