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December 6, 2017

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

2017AP945-CRNM State of Wisconsin v. Patrick M. Evans (L.C. #2016CF448)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Patrick M. Evans appeals from a judgment of conviction for being a party to the crime of felony murder. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE

809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967). Evans received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an 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.

Donovan Cotter had a two-month-old dispute with Phillip Spell regarding a \$40 drug deal Cotter had “middled” in which Spell thought he got “ripped off.” Around 2:45 a.m. on July 11, 2016, Cotter went to meet Spell knowing there would be a fight. Evans, armed with a tire iron, and Candice DeBlaey, armed with a mini baseball bat, accompanied Cotter. Unknown to Evans was that Cotter had a knife with him. A fight broke out and Evans and DeBlaey were almost immediately disarmed and started to run away. Cotter stabbed Spell twice. Spell died as a result of a wound directly to his heart. Evans was charged with being a party to felony murder as a result of being a party to battery.

Evans entered a no contest plea under a plea agreement that required the prosecution to recommend a withheld sentence in favor of three years probation, with the possibility of early discharge after two years, and with six months conditional jail time. The required recommendation was given at sentencing. Evans was sentenced to four years’ initial confinement and four years’ extended supervision. The sentence was stayed in favor of five years’ probation and twelve months’ conditional jail time.

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

Evans is represented by Attorney Andrew H. Morgan in this appeal. Attorney Morgan's no-merit report very briefly concludes that Evans' plea was freely, voluntarily and knowingly entered and that the sentence was a proper exercise of discretion and not unduly harsh or excessive. The report is inadequate and fails to give any meaningful discussion of the potential issues regarding the plea taking and the sentence. The report's discussion of the plea entry is not adequate because it fails to demonstrate to this court that appointed counsel examined the validity of the plea in light of the applicable law such that counsel could advise Evans if there were potential grounds for plea withdrawal. The report's conclusion about the sentence is similarly devoid of the applicable standard of review and factors discussed by the sentencing court. The twin functions of an *Anders* brief are to "provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability," and to help courts make "the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." *Penson v. Ohio*, 488 U.S. 75, 82 (1988) (citation omitted). The discussion portion of the no-merit report is just nine sentences and fails to offer any analysis helpful to this court's independent evaluation. *See State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1*, 137 Wis. 2d 90, 100, 103, 403 N.W.2d 449 (1987). More than a conclusory statement of the frivolity of the appeal is required. *Id.* at 100-01. Attorney Morgan is warned that future no-merit reports of such a cursory nature may be rejected on that basis alone.

To be constitutional, a no contest plea must affirmatively be shown to be knowing, voluntary and intelligent. *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). At the plea hearing, the trial court must address the defendant personally and fulfill several duties outlined in *Bangert*, WIS. STAT. § 971.08, and additional case law. *See State v. Brown*, 2006 WI

100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. These duties include ascertaining whether any promises or threats were made in connection with the plea; establishing the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself; ascertaining whether a factual basis exists to support the plea; informing the defendant of the constitutional rights he is waiving and verifying that he understands that he is giving up these rights; establishing personally that the defendant understands that the trial court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement; notifying the defendant of the direct consequences of his plea; and notifying the defendant that if he is not a citizen of the United States, his guilty plea could result in deportation, exclusion from admission to this country, or the denial of naturalization. *State v. Cross*, 2010 WI 70, ¶18, 326 Wis. 2d 492, 786 N.W.2d 64; *Brown*, 293 Wis. 2d 594, ¶35. The trial court must also advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and ascertain whether the defendant understands this information. *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

During the plea hearing, the trial court fulfilled each of the above described duties. Moreover, the circuit court clarified at a subsequent hearing that Evans' no contest plea was to felony murder with the underlying crime being party to the crime of battery, and not just attempted battery, and that the party to the crime element was satisfied by a conspiracy to commit battery. The complaint and facts admitted by Evans provided a factual basis for accepting the no contest plea.

Apparently the one concern Evans voiced to appellate counsel was that he was charged with felony murder when the underlying crime was simple battery. The no-merit report correctly observes that the underlying offense for felony murder can be misdemeanor battery under Wis. STAT. § 940.19. WISCONSIN STAT. § 940.03 defines felony murder as causing “the death of another human being while committing or attempting to commit a *crime* specified in s. 940.19.” (Emphasis added.) “Crime” includes a misdemeanor because it is conduct punishable by fine or imprisonment, or both. WIS. STAT. § 939.12. There is no arguable merit to a challenge to Evans’ plea.²

Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. *Id.*, ¶18.

An erroneous exercise of discretion occurs when a sentence is based on irrelevant or improper factors. *Id.*, ¶17. In addition, in order to properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. *Id.*, ¶39. It must specify the objectives of the sentence on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.*, ¶40. It must identify the general objectives of greatest importance, which may vary

² A motion for plea withdrawal was filed before sentencing based on a claim that Evans had not been given the benefit of the prosecutor’s promise to not oppose bail reduction if Evans entered his plea early. The motion was withdrawn as it came to light that the prosecution’s representation that it would not oppose bail reduction was never part of the plea agreement. Withdrawal of the motion does not give rise to any issue of arguable merit.

from case to case. *Id.*, ¶41. The trial court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. *Id.*, ¶42. Similarly, it must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the sentencing decision. *Id.*, ¶43.

The trial court adequately discussed the facts and factors relevant to sentencing Evans, and properly exercised its discretion. The trial court expressly considered the seriousness of the offense, including Evans' choice to accompany Cotter and arming himself with the tire iron knowing there would be a fight. It acknowledged that Evans had no criminal record and no pattern of violent conduct. The court determined that there is a need to protect the public based on the gravity of the offense. The trial court reasonably concluded that an imposed but stayed sentence was necessary to protect the public when placing Evans on probation. No basis exists to disturb the sentence imposed by the trial court.

Our review of the record discloses no other potential issues for appeal.³ Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Evans further in this appeal.

Upon the foregoing reasons,

³ Any other possible appellate issues from the proceedings before entry of the plea are waived because Evans' no contest plea waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

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

IT IS FURTHER ORDERED that Attorney Andrew H. Morgan is relieved from further representing Patrick M. Evans in this 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