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January 12, 2018

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

2017AP937-CRNM State of Wisconsin v. Bryant K. Claypool (L.C. # 2015CF2163)

Before Brennan, P.J., 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).

Bryant K. Claypool appeals from a judgment of conviction, entered upon his guilty plea, on one count of armed robbery as a party to a crime. Appellate counsel, J. Dennis Thornton, 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] Claypool also appeals from the circuit court order denying his motion for postconviction relief. Claypool 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 that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

BACKGROUND

On August 31 and September 1, 2014, Claypool and others engaged in a series of armed robberies and carjackings. This crime spree culminated in the death of co-conspirator Camron Powell during an armed robbery. Claypool was positively identified by at least two victims, and he admitted his participation in the robbery to which he ultimately pled.

A juvenile delinquency petition was filed against then-fourteen-year-old[2] Claypool, alleging one count of conspiracy to commit armed robbery with the use of force, six counts of conspiracy to operate a motor vehicle without the owner's consent, and eighteen counts of conspiracy to commit armed robbery, all as a party to a crime. A separate petition was filed relating to the offenses that directly resulted in Powell's death. The State petitioned to waive the juvenile court's jurisdiction; the petition was granted. The criminal complaint filed after the waiver order charged Claypool with one count of operating a motor vehicle without the owner's consent (armed carjacking) and one count of armed robbery, both as a party to a crime. Both of these offenses were ones in which the victims positively identified Claypool.

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

[2] Claypool was, at the time, within a week of his fifteenth birthday.

Claypool agreed to resolve his case with a plea. In exchange for his guilty plea to the armed robbery charge, the State would move to dismiss and read in the armed carjacking charge and recommend ten years' initial confinement, with the term of extended supervision left to the court. The circuit court accepted the plea and later sentenced Claypool to ten years' initial confinement and five years' extended supervision with eligibility for the challenge incarceration and substance abuse programs.

Claypool filed a postconviction motion to modify his sentence based on a supposed new factor in the form of two psychological reports prepared for the juvenile waiver proceedings. The motion also referenced the sentences of his co-defendants and three cases from the United States Supreme Court dealing with sentencing juveniles.[3]

The circuit court denied the motion. It noted that the United States Supreme Court cases dealt with different sentencing scenarios—capital punishment and sentences of life without parole. To the extent that those cases touched on the diminished mental capacity of juveniles, the circuit court explained that the cases, decided well before Claypool's 2015 sentencing, were "not new information for this court." It rejected Claypool's claim that the psychological reports were a new factor, because the information therein was generally known to the circuit court at sentencing, and trial counsel had specifically referenced one of the reports in his sentencing

[3] The cases Claypool cited are ***Roper v. Simmons***, 543 U.S. 551 (2005), ***Graham v. Florida***, 560 U.S. 48 (2010), and ***Miller v. Alabama***, 567 U.S. 460 (2012).

arguments. The circuit court further explained all of the related factors it had considered at sentencing and noted that even if Claypool had established a new factor, that factor did not warrant sentence modification. Claypool appeals.

DISCUSSION

I. Sufficiency of the Complaint

Counsel first discusses whether the complaint stated probable cause. A complaint is sufficient when it answers "'(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?'" ***State v. Reed***, 2005 WI 53, ¶12, 280 Wis. 2d 68, 695 N.W.2d 315 (citation omitted). Quite simply, the complaint in this case suffices. There is no arguable merit to an appellate challenge to the complaint.

II. Timing of the Complaint

Counsel next discusses whether the complaint was timely issued, noting that Claypool was arrested, apparently without a warrant, on September 1, 2014, but the criminal complaint was not filed until May 13, 2015. Counsel concludes that "[f]acially, this does not present a problem." On its face, however, a delay between arrest and charging of more than eight months does present a problem. A judicial determination of probable cause should be made within forty-eight hours of a warrantless arrest. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991); ***State v. Koch***, 175 Wis. 2d 684, 695-96, 499 N.W.2d 152 (1993).

We note, however, that the juvenile delinquency petition was filed on September 28, 2014, and the waiver order was entered on April 30, 2015, so, despite the implication to the

contrary, Claypool was not imprisoned without charges or process for over eight months.[4] Further, a ***Riverside*** violation is not a jurisdictional issue. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). Thus, the issue is waived by a valid plea.[5] *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Finally, the remedy for a ***Riverside*** violation is suppression of evidence obtained by the improper delay. *See* ***Golden***, 185 Wis. 2d at 769. The record does not indicate that any evidence in this case was so obtained. There is no arguable merit to a challenge to the timing of the complaint.

III. Validity of the Plea

Counsel next discusses whether there is any basis for a challenge to the validity of Claypool's guilty plea as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Claypool 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 offenses. The jury instructions for armed robbery and party-to-a-crime were also attached to the questionnaire. The form correctly acknowledged the maximum penalties Claypool 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 also conducted a plea colloquy, as

[4] Although the timing is unclear from the record, a second juvenile delinquency petition was filed against Claypool with regard to the robberies resulting in Powell's death. Further, it appears that at some point prior to the resolution of this case, Claypool was adjudicated a "serious juvenile offender," possibly in the other juvenile action, and was thus detained as a result of that decision. *See* WIS. STAT. § 938.34(4h).

[5] A valid plea also constitutes waiver of a challenge to the juvenile court's decision to grant waiver. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 763, 457 N.W.2d 562 (Ct. App. 1990).

required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Our review of the record satisfies us that the circuit court completed all of its mandatory duties for conducting a plea colloquy.

The plea questionnaire and waiver of rights form and addendum, the attached jury instructions, and the circuit court's colloquy appropriately advised Claypool of the elements of his offense, 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.

IV. Sentencing

Counsel next addresses 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, the circuit 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 primary factors including the gravity of the offense, the character of the offender, and the protection of the public, and may consider additional factors. *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 stated that Claypool's offense was serious in light of the impact on the victims, including the fact that someone lost his life during the crime spree. The circuit court

considered that Claypool might have been under the influence of drugs or his peers, but commented that Claypool was also under a "self-delusion" that his participation in the various crimes would help him develop a reputation or credibility with those peers. The circuit court explained that in light of Claypool's reckless involvement and alleged drug use, as well as the public's loss of a sense of safety and the amount of fear and concern caused, confinement was appropriate to address Claypool's treatment needs and to provide a period of punishment.

The maximum possible sentence Claypool could have received was forty years' imprisonment. The sentence totaling fifteen 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). There would be no arguable merit to a challenge to the sentencing court's discretion.

V. Ineffective Assistance of Counsel

The final issue counsel addresses is whether Claypool received effective assistance of counsel. Presumably, appellate counsel is referring to trial counsel when he states simply that Claypool "makes no factual showing that counsel's performance was deficient or that he was prejudiced by counsel's performance in any way."

The question for this court is whether, on the existing record, there is any arguable merit to a claim of ineffective assistance of trial counsel. We are unable to discern any basis in the record on which Claypool could advance an arguably meritorious claim of ineffective trial counsel.

VI. The Postconviction Motion

Inexplicably, counsel has failed to address whether there is any arguable merit to challenging the circuit court's denial of Claypool's postconviction motion for sentence modification on a new factor. In fact, the motion is barely mentioned beyond the fact that it was filed and denied. We, however, have reviewed the record and conclude that there is no arguable merit to challenging the circuit court's denial of the motion.

The circuit court appears to have considered the motion to be conclusory, an assessment with which this court agrees. The motion claims that two psychological reports prepared for the juvenile waiver hearing are a "new factor," but the motion does not explain why or how those reports satisfy the applicable legal standard. The motion also references the sentences of Claypool's co-actors, but develops no related argument. Also, while the motion in its "conclusion" cites to three United States Supreme Court cases on juveniles, the motion again develops no argument on those cases, nor does it link those cases in any fashion to Claypool's case.

This leads us to consider whether there is any arguable merit to a challenge to postconviction counsel's performance for an inadequate motion. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶¶18-27, 314 Wis. 2d 112, 758 N.W.2d 806. Ultimately, however, the motion for sentence modification would have failed even if it was properly developed, and counsel is not ineffective for failing to pursue a meritless motion. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

A new factor is a fact, or a set of facts, "'highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then

in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

If the reports were prepared for the juvenile waiver proceeding, then they existed before sentencing. The circuit court noted that one of the reports was discussed in the presentence investigation report and referenced by defense counsel at sentencing, so it was not overlooked by all of the parties. The reports, therefore, are not a new factor.

The circuit court further indicated that even if the reports did constitute a new factor, sentence modification was not warranted. Whether a new factor justifies sentence modification is a decision committed to the discretion of the circuit court. *See* ***Harbor***, 333 Wis. 2d 53, ¶33. Based on our review of the record and the circuit court's explanation for denying the motion, we discern no arguable basis for disturbing that discretionary decision.

The circuit court rejected any claim that the United States Supreme Court cases constituted a new factor. The cases, and their discussion of diminished juvenile culpability, were known to the court well before sentencing. The circuit court also explained why the cases would not warrant modification in any event.

The reason for mentioning the co-actors' sentences in the motion is unclear, particularly as the motion acknowledges that different sentences among co-actors would not automatically give rise to a different claim of sentencing disparity, and the record in this case reveals no basis

on which to claim Claypool's sentence was based on improper or irrelevant sentencing considerations.[6] *See* ***Jung v. State***, 32 Wis. 2d 541, 548, 145 N.W.2d 684 (1966).

Accordingly, there is no arguable merit to a challenge to the circuit court's denial of the postconviction motion or to postconviction counsel's performance in drafting it.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney J. Dennis Thornton is relieved of further representation of Claypool 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
Acting Clerk of Court of Appeals

[6] One of the co-actors received the same fifteen-year sentence as Claypool, one received ten years' imprisonment, one received five years' imprisonment, and one remained in juvenile court. The defendant who received ten years' imprisonment was sentenced by a different judge; the defendant receiving five years was deemed least culpable by the sentencing court; and the defendant who remained in juvenile court had cooperated with the State.