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February 27, 2018

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

2017AP864-CRNM State of Wisconsin v. Dennis E. Harris (L.C. # 2015CF1863)

Before Sherman, Blanchard and Fitzpatrick, 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).

Dennis Harris appeals related judgments[1] convicting him of intimidation of a witness by use of force, battery and disorderly conduct, each as a domestic abuse incident, and also an order denying his postconviction motion for plea withdrawal. Attorney Patricia Sommer has filed a

[1] Although the notice of appeal refers to a judgment in the singular, we note that the circuit court entered separate judgments on the felony and misdemeanor charges.

no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[2] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses Harris's pleas and sentences. Harris was sent a copy of the report, and has filed a response challenging the factual basis for the pleas, asserting that he was suffering from a major depressive disorder when he entered his pleas; claiming that counsel failed to investigate a written recantation by a key witness; claiming that the prosecutor's remarks at the plea hearing undermined the plea agreement; challenging the imposition of consecutive terms of probation with conditional jail time; claiming that the State Public Defender's Office handled his case with grave indifference in several respects, and complaining that he was silenced when he attempted to make his voice heard and was told to let his attorney speak for him. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

As to Harris's pleas, we first note that the circuit court conducted an adequate plea colloquy, inquiring into the defendant's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring the defendant's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08 and ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. In addition, Harris provided the court with a signed plea questionnaire. Harris indicated to the court that he understood the information explained on that form and had answered all of the questions truthfully. *See* ***State v. Moederndorfer***, 141 Wis. 2d

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

823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The court further observed that Harris's demeanor and responses to questions indicated that he understood what was going on.

Absent any objection, the circuit court found that the facts set forth in the complaint provided a sufficient factual basis for the pleas. Harris now asserts that he did not authorize counsel to make any acknowledgement as to the factual basis for the pleas. It was not necessary for Harris to make a personal admission that the facts in the complaint were true, however, when the record included a preliminary hearing that provided an independent factual basis for the pleas.

Harris now asserts that he was suffering from a major depressive disorder at the time that he entered his pleas, suggesting that he did not fully understand the proceedings. However, following testimony at the plea withdrawal hearing, the circuit court found Harris's claim that he had just been answering questions during the plea colloquy perfunctorily without fully understanding what was going on to be "patently incredible," particularly in light of Harris's extensive history with the criminal justice system. Credibility determinations cannot be challenged on appeal.

The circuit court similarly rejected Harris's contention that counsel failed to investigate or advise him about the implications of a recantation by the victim, finding that counsel had provided a sufficient defense and consulted with the defendant. The court's finding was supported by counsel's testimony that it was his general practice to explain what would happen if the victim did not show up, or did show up and could be impeached with prior statements.

Harris now appears to argue that either he misunderstood the plea agreement or that the State breached the plea agreement because the plea questionnaire stated that the State would

recommend twelve months in jail as a sentence, but at the plea hearing the prosecutor stated that "this will be a short argued sentencing." However, both statements were, in fact, true. The State did recommend twelve months in jail as a sentence, while the defense argued for six months. The State's comment that the sentence would be argued does not show that there was any misunderstanding or breach of the plea agreement regarding the cap on the State's sentence recommendation.

Harris further argued in his plea withdrawal motion that the prosecutor had essentially undermined the plea agreement by editorializing about Harris's extensive criminal history in a manner that conveyed to the judge that a harsher sentence than was being recommended would be warranted. However, we agree with the circuit court that the prosecutor did no more than relay relevant information to the court, and did not suggest that the court "do an end-around" the State's recommendation.

Harris also asserted in his plea withdrawal motion that no one had explained to him that a one-year jail sentence could be served in prison, without good time. However, Harris withdrew that claim after the DOC gave him a release date of nine months.

Next, we conclude that a challenge to Harris's sentences would also lack arguable merit. The record shows that the court considered relevant sentencing factors and explained their application to this case, and that it did not rely upon any improper factors. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court then imposed and stayed a sentence of five years of initial incarceration and four years of extended supervision on the count of intimidating a victim, subject to a three-year term of probation. The court also

imposed consecutive jail sentences of nine months on the battery count and ninety days on the disorderly conduct count.

None of the sentences exceeded the maximum available penalties. *See* WIS. STAT. §§ 940.45(1) (classifying intimidation of a victim by use or attempted force as a Class G felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 973.09 (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement); 940.19(1) (classifying battery as a Class A misdemeanor); 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor); 947.01(1) (classifying disorderly conduct as a Class B misdemeanor); and 939.51(3)(b) (providing maximum imprisonment of ninety days for a Class B misdemeanor).

Harris questions how a term of probation, which is not a sentence, can be imposed consecutively to jail terms. The answer is that WIS. STAT. § 973.09(1)(a) explicitly provides that a period of probation may be made consecutive to a sentence on a different charge.

We do note that the judgment of conviction on the misdemeanor counts still contains repeater allegations that the court ordered to be struck from both judgments of conviction. Therefore, the misdemeanor judgment should be amended to conform to the record.

Next, Harris raises various complaints about what he views as the indifferent manner in which the State Public Defender's Office handled his case. None of Harris's complaints in this regard negate the validity of the pleas and sentences.

Finally, Harris complains that he was told to let his attorney speak for him when he tried to speak on his own behalf. However, there is no constitutional right to hybrid representation (meaning by both counsel and the appellant *pro se*). ***State v. Debra A.E.***, 188 Wis. 2d 111, 138, 523 N.W.2d 727 (1994). Harris had the choice whether to represent himself or to have the representation of counsel. He was not entitled to do both.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction for battery and disorderly conduct shall be amended to conform to the record by removing the repeater allegations from each count of conviction. As amended, both judgments of conviction and the postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of Dennis Harris in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals