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March 14, 2018

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

2016AP1532-CRNM State of Wisconsin v. Joseph P. Ross (L.C. # 2014CF624)

Before Fitzpatrick, J.[1]

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).

Joseph P. Ross appeals from a judgment of conviction entered upon his no contest plea to one count of criminal damage to property. Ross's appellate counsel filed a no-merit report

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967), seeking to withdraw as appellate counsel. The no-merit report addresses the validity of Ross's plea and sentence, as well as the effectiveness of trial counsel. Ross filed a response asserting various claims of error, and appellate counsel filed a supplemental no-merit report addressing Ross's response. Upon consideration of the original and supplemental no-merit reports, Ross's response, and my independent review of the record, I 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.

Ross was charged with one count of criminal damage to a cemetery or mortuary, a felony, contrary to WIS. STAT. § 943.012(2). According to the complaint, Ross wrote the word "love" and left his footprints in wet cement at a veteran's memorial site. At Ross's request, his first-appointed trial attorney was permitted to withdraw and successor trial counsel was appointed. Thereafter and pursuant to a negotiated settlement, Ross pled no contest to an amended charge of misdemeanor criminal damage to property, and the parties agreed to jointly recommend that the sentencing court order $1500 in restitution, to be taken from Ross's bond, and court costs. The circuit court accepted Ross's plea and, pursuant to the parties' agreement, ordered Ross to pay court costs and $1500 in restitution.

First, I agree with the analysis and conclusion in appellate counsel's original and supplemental no-merit reports that there exists no arguable basis for plea withdrawal. During the plea hearing, the circuit court fulfilled each of the duties set forth in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record shows that the plea-taking court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986),

and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon the defendant's signed plea questionnaire. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

In his response to the no-merit report, Ross asserts that his "responses given during the plea colloquy were false and coerced because [he] was under the threat of being locked in a mental institution." In support, he cites to the circuit court's statements made more than four months before Ross entered his no contest plea, and which concerned a potential competency evaluation. Ross alleges that the circuit court's statements rendered his no contest plea unknowing and involuntary by leaving him so "totally confused and frightened" that, by the time of his plea hearing, he felt "coerced to obey and cooperate" with the plea-taking court. Appellate counsel concludes in the supplemental no-merit report that this claim lacks arguable merit. I agree. Ross's assertion is conclusory and contradicted by the record, most notably by the plea questionnaire and the plea hearing transcript.

Next, I conclude that a challenge to Ross's sentence would lack arguable merit because the circuit court followed the parties' joint recommendation. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved). Ross agreed to pay $1500 in restitution, and the amount of the award is supported by the State's restitution paperwork.

In his response, Ross contends that the circuit court erred by entering an amended judgment of conviction to reflect the restitution ordered and associated surcharges. Ross asserts that "the circuit court is in breach of contract." I disagree. The judgment was simply amended to reflect the circuit court's oral pronouncement. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239

Wis. 2d 244, 618 N.W.2d 857. Restitution and costs were expressly contemplated by Ross's plea agreement. Further, the circuit court is not a party to, and therefore cannot "breach," the parties' plea agreement.

In anticipation of Ross's response, appellate counsel's no-merit report addresses the imposition of the $200 DNA surcharge reflected on Ross's judgment and concludes that any challenge to that surcharge would lack arguable merit. I agree. As set forth in the no-merit report, Ross committed his crime after January 1, 2014, the effective date of WIS. STAT. § 973.046(1r), which mandates a DNA surcharge for misdemeanor convictions. His plea and sentencing occurred after April 1, 2015, the date on which convicted misdemeanants were first required to provide a DNA sample. *See* WIS. STAT. § 165.76(1)(as). I reject Ross's argument that, because the judgment does not require him to provide a DNA sample, his DNA surcharge is unconstitutional. "Nothing in [the DNA surcharge statute] requires a DNA sample to be collected before the court can order the payment of the surcharge." ***State v. Jones***, 2004 WI App 212, ¶7, 277 Wis. 2d 234, 689 N.W.2d 917 (discussing the DNA surcharge provisions in § 973.046(1g), an earlier version of the DNA surcharge statute that gave trial courts discretion to impose the DNA surcharge). Ross does not explain why he should benefit from the clerk's apparent oversight.

Next, Ross's response attaches a letter he sent to appellate counsel listing potential ineffective assistance of trial counsel claims. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate counsel has addressed each of Ross's claims and has explained why none supports a colorable ineffective assistance of trial counsel claim. I agree with the analysis and conclusion in the no-merit and supplemental no-

merit reports that Ross's assertions do not give rise to any arguably meritorious challenge based on trial counsel's ineffective assistance. Contrary to Ross's assertion, the record shows that his original trial counsel withdrew at his request and was not "removed for incompetence." Further, original trial counsel did not represent Ross at his plea and sentencing; Ross has not minimally shown that counsel's perceived deficiencies were prejudicial.[2]

The no-merit and supplemental no-merit reports address Ross's apparent claim that the circuit court erred by adjourning the matter over Ross's objection. I agree with appellate counsel's analysis and conclusion that no issue of arguable merit arises from this potential issue. The decision to grant an adjournment is left to the circuit court's sound discretion. *See* ***State v. Echols***, 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993). Nothing in the record supports Ross's assertion that the circuit court erroneously exercised its discretion by continuing rather than dismissing the case. Further, to the extent Ross attempts to cast this as a speedy trial violation, the record shows that Ross did not demand a speedy trial.

Next, I conclude that Ross's claim for two days of sentence credit lacks arguable merit because it is moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."). The circuit court did not impose incarceration as part of Ross's sentence. A sentence credit award would not effect Ross's conviction or sentence.

[2] Nothing in Ross's "Statement of Issues" implicates an ineffective assistance claim as to successor trial counsel. The no-merit report discusses successor counsel's performance and concludes it does not give rise to an arguably meritorious ineffective assistance claim. Based on my review of the record, I agree.

Ross's response asserts as another potential issue that the circuit court erred "in forcing a lawyer upon Ross after his numerous intelligent lawful protestations and objections." Ross alleges he "repeatedly" told the court he wanted to defend himself and suggests that the circuit court denied his request "based on the fact that I have neither legal training nor years of law school." To the extent Ross is asserting that the circuit court improperly denied him his right to represent himself, I disagree. The record does not bear out Ross's characterization of events. Ross did not clearly and unequivocally demand the right to proceed pro se, and the circuit court did not make an ultimate determination as to whether Ross would be permitted to represent himself. *See* ***State v. Darby***, 2009 WI App 50, ¶¶18-29, 317 Wis. 2d 478, 766 N.W.2d 770. Ross's written motion sought to "replace" original trial counsel with "effective counsel." The circuit court directed the appointment of successor counsel and left open the possibility that Ross might later seek to represent himself. Successor counsel was appointed, and Ross never again mentioned the issue of self-representation.

My independent review of the record reveals no other potential issues of arguable merit. To the extent I have not explicitly addressed a potential issue identified in appellate counsel's no-merit report or Ross's response, I have considered but rejected the issue as wholly frivolous.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Linda J. Schaefer is relieved from further representing Joseph P. Ross in this matter. *See* 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