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March 28, 2018

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Robert J. Rogers
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You are hereby notified that the Court has entered the following opinion and order:

2017AP1501-CRNM State of Wisconsin v. Robert J. Rogers (L.C. # 2016CF494)

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).

Robert Rogers appeals an amended judgment convicting him, based upon a no-contest plea, of possession of narcotic drugs as a repeat offender. Attorney Ralph Sczygelski has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-

16);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses the factual basis for the plea, the voluntariness of the plea, and whether the sentence was unduly harsh. Rogers was sent a copy of the report, and has filed a response alleging that he misunderstood the plea agreement and thought that the repeater allegation was to be dropped; that trial counsel provided ineffective assistance by failing to pursue a suppression motion; that the circuit court was "all over the place" and failed to provide an adequate explanation for the sentence; that Rogers' sentence credit should be applied to his conditional jail time; that the conditional jail time plus the imposed and stayed sentence combined would exceed the maximum available penalty for the offense; and that appellate counsel filed a no-merit report without ever speaking to Rogers. Sczygelski has filed a supplemental no-merit report addressing the issues Rogers raises. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal.

As to the terms of the plea agreement, the State explained at the plea hearing that it was amending the charge from delivery of heroin as a second or subsequent offense to possession of narcotic drugs as a repeater, and agreeing to cap its sentence recommendation in exchange for the plea. The State noted that the second and subsequent offense enhancer and the repeat offender enhancer each increased the potential penalty by four years. Both defense counsel and Rogers himself told the court that they agreed with the State's recitation of the plea agreement.

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

Rogers provided the court with a signed plea questionnaire. The plea questionnaire listed the charge as "Possession of Schedule I/II Narcotic," without mentioning the repeater penalty enhancer. An attached jury instruction sheet likewise set forth the elements of possession of narcotics without mentioning that Rogers needed to have a qualifying prior felony conviction for the repeater penalty enhancer to apply. However, the "Understandings" section of the plea questionnaire stated that the "maximum term of imprisonment may not be increased by more than four (4) years" which is the amount of additional time attributable to the repeater provision under WIS. STAT. § 939.62(1)(b).

The circuit court then conducted a plea colloquy, inquiring into Rogers' ability to understand the proceedings and the voluntariness of his plea, and further exploring his understanding of the nature of the amended charge, the penalty range and other direct consequences of the plea, and the constitutional rights being waived. As part of the plea colloquy, the court explicitly advised Rogers that the charge included a repeater allegation, and Rogers indicated both that he understood the charge included a repeater allegation and that he had a qualifying prior conviction.

The facts set forth in the complaint, which Rogers acknowledged to be true—namely, that Rogers and his girlfriend obtained heroin and shot it up at a park, where the girlfriend overdosed—provided a sufficient factual basis for the plea. In conjunction with the plea questionnaire and complaint, the colloquy was sufficient to satisfy the court's obligations under WIS. STAT. § 971.08. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Rogers now alleges that he thought the repeater allegation was supposed to be dropped as part of the plea agreement. However, he also states that his attorney told him "it was the same amount of time" and that the only real difference in the amended charge was the reduction from delivery to possession. Because Rogers is not alleging that he misunderstood the elements of the drug possession charge or the amount of time he faced including the repeater provision, and is not disputing that he did have a prior conviction, his allegations do not provide any basis to believe that being better informed about the repeater allegation would have led him to go to trial rather than accept the plea.

Rogers also claims that counsel should have obtained a ruling on his pending suppression motion before having him enter a plea. The suppression motion sought to exclude a syringe allegedly used by Rogers' girlfriend and given to her by Rogers on the grounds that there were gaps in the chain of custody. However, gaps in a chain of custody generally go to the weight of the evidence, not its admissibility. ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54. Moreover, the syringe was subsequently tested and found not to have been used by the woman who overdosed. Because Rogers cannot show that his suppression motion would have been successful, he cannot demonstrate prejudice from counsel's alleged error in failing to pursue the suppression motion.

Rogers has not alleged any other facts that would give rise to a manifest injustice warranting plea withdrawal.

A challenge to Rogers' sentence would also lack arguable merit.

Rogers complains that the circuit court was "all over the place, going back [and] forth" at the sentencing hearing, which was held over two dates. However, the record shows that the

circuit court's comments addressed a number of relevant sentencing factors that had been addressed by the State, the PSI author, and defense counsel, and rationally explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It does not matter in what order the court addressed those factors.

The court deemed the offense serious, not only because of the damage that heroin does to the community in general, but also because Rogers was already on extended supervision for another drug charge when he committed the instant offense, and because he did not seek medical attention for his girlfriend when she overdosed. In terms of Rogers' character, the court deemed Rogers to be a "habitual criminal" with "severe character issues" and a "profound disregard for the rules of society" based on his extensive criminal history and disciplinary problems in jail and prison. The court noted that past terms of probation and extended supervision had not worked, and that some external control needed to be exercised over Rogers to protect the public. However, the court also acknowledged that Rogers seemed to be doing better under his current plan, and that the parties and PSI agent all were recommending probation so that Rogers could continue with treatment in the community.

The court then imposed and stayed a sentence of three years of initial confinement and two years of extended supervision, subject to a five-year period of probation with twelve months of conditional jail time with work and treatment release privileges. The court also imposed standard costs and conditions of probation and supervision, determined that Rogers would be eligible for the Substance Abuse Program in the event that his probation was revoked, and awarded 79 days of sentence credit.

The stayed sentence, period of probation, and amount of conditional jail time did not exceed the maximum available penalties. *See* WIS. STAT. §§ 961.41(3g)(am) (classifying possession of narcotic drugs as a Class I felony); 973.01(2)(b)9. and (d)6. (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality); 973.01(2)(c) (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer); 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); 973.09(4) (allowing up to one year of jail as a condition of probation). Nor was the stayed sentence or period of probation unduly harsh, taking into account Rogers' extensive criminal history. *See generally* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Rogers complains that his sentence credit is not being applied to his conditional jail time, and that adding the amount of conditional jail time to his stayed sentence exceeds the maximum available sentence. However, conditional jail time is not a sentence in and of itself, but rather a condition of Rogers' probation, and it does not count towards Rogers' stayed sentence. In the event Rogers' probation is revoked, Rogers will receive his sentence credit.

Finally, Rogers asserts that appellate counsel filed a no-merit report without first discussing the case with him. Counsel responds that he spoke with Rogers on several occasions on the phone. We need not resolve any factual disputes about the length or nature of the conversations between Rogers and counsel because, as we have determined, none of the issues Rogers wishes to pursue have arguable merit.

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 is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ralph Sczygelski is relieved of any further representation of Robert Rogers 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