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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 8, 2018

To:

Hon. William S. Pocan
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St., Room 401
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Marcella De Peters
Law Office of Marcella De Peters
PMB #318
6650 W. State St.
Wauwatosa, WI 53213

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Davario D. Washington 641527
Wisconsin Secure Program Facility
P.O. Box 9900
Boscobel, WI 53805-9900

Amy Wochos, Legal Counsel
Milwaukee County Courthouse
901 North Ninth Street, Suite 104
Milwaukee, WI 53233-1425

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

2017AP2197-CRNM	State of Wisconsin v. Davario D. Washington (L.C. # 2014CF5346)
2017AP2198-CRNM	State of Wisconsin v. Davario D. Washington (L.C. # 2015CF4693)

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).

Davario D. Washington appeals from judgments of conviction, entered upon his guilty pleas, on two counts of armed robbery with the threat of force and two counts of taking and driving a motor vehicle without the owner's consent. Appellate counsel, Marcella De Peters, 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] Washington was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude that, subject to a minor modification to the restitution award in one case, there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

On November 29, 2014, the State charged Washington in Milwaukee County Circuit Court case No. 2014CF5346 with one count of armed robbery with the threat of force and one count of misdemeanor theft. Washington, as "Dee Man," had responded to Facebook ads selling a video game console and shoes and made arrangements to meet up with the sellers. When the game seller arrived, Washington pointed a gun at him and stole a bag with the console, controller, and games. When the shoe seller arrived, Washington made a pretense of looking at the shoes, then reached into the seller's car and stole his phone. The game seller identified Washington through a photo array. The shoe seller also identified him through an array with eighty-five-percent certainty. After Washington was arrested, he gave a statement in which he admitted he was "Dee Man" and stated his prior screen name was "Boopertinglazin."

An amended complaint filed on December 10, 2014, added a count of armed robbery with the threat of force. The amended complaint alleged that Washington had approached C.C. while he was riding a bike and tried to take her phone. When he was unsuccessful, he pointed a gun at her. She threw the phone on the ground and he took it. C.C. then bought a new phone

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

and began receiving phone calls from an unknown woman looking for a man from Facebook with the screen name "Boopertinglazin." C.C. realized the calls must be coming to her new phone because she had transferred the phone number. She looked for "Boopertinglazin" on Facebook and found pictures of the man who had robbed her.

On October 29, 2015, the State charged Washington in Milwaukee County Circuit Court case No. 2015CF4693 with four counts of taking and driving a motor vehicle without the owner's consent. The four incidents occurred between August 7, 2015, and October 10, 2016—while Washington was released on bond in his other case. Each vehicle theft began with Washington responding to a Craigslist ad regarding a car for sale. In each instance, Washington went to examine the vehicle for sale and was able to get himself in the driver's seat with the keys, and the owner out, so that Washington could drive away with the vehicle.

After the first vehicle theft, police spotted the vehicle and turned around to follow it. By the time police caught up, the vehicle was parked. Officers approached a group of people standing near the car. One identified himself as Washington and provided his phone number to police. That phone number was used by the perpetrator in each of the four vehicle thefts. After the vehicle was returned to the victim, he found Washington's driver's license in the glove compartment and recognized him as the fraudulent buyer.

The second theft victim was injured during the theft—he had jumped on the hood of his car when he realized what was happening, then jumped off when he realized the thief was not going to stop driving. The thief ran over the victim's left leg and foot, breaking the foot and necessitating several stitches in the knee. The vehicle was recovered after it was in a collision with another vehicle. Washington's thumbprint was recovered from the stolen vehicle.

The third vehicle was recovered when a citizen called police to remove a car from his garage that he believed had been left there overnight by his friend, "Boo." Additionally, the seller told police that she had signed over the title in anticipation of payment and had watched as the buyer signed the title with the name "Davario Washington." The buyer then yanked the title away when she asked for the payment, and the buyer's companion displayed a gun while they fled with the car. The seller looked up the buyer's phone number on Facebook and found a profile for "Boopertin Glazin."

The fourth theft victim asked his wife to look up the buyer's phone number on Facebook. They linked the phone number to an account for "Boopertinglazin." The victim identified Facebook photos of Washington as the person who took his car. The vehicle was recovered following a high speed chase against traffic during which the vehicle sideswiped two parked cars. Washington's fingerprint was on the stolen vehicle. An acquaintance of Washington's also identified him as "Boop."

Washington agreed to resolve his cases through guilty pleas. In the first case, Washington would plead guilty to the two armed robberies. The misdemeanor theft would be dismissed and read in; another uncharged misdemeanor theft would also be read in. In the second case, Washington would plead to counts 2 and 3; the other two would be dismissed and read in. The State would recommend prison but would make no recommendation as to the length of the sentence. The circuit court accepted Washington's pleas and imposed sentences totaling twelve years' imprisonment, plus over $15,800 in restitution to which Washington stipulated.

The first potential issue counsel discusses is whether Washington should be allowed to withdraw his pleas as not knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights forms and addenda, attached jury instructions for armed robbery and operating a motor vehicle without the owner's consent that were signed by Washington, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court also informed Washington of the effects of read-in offenses, including the possibility of being ordered to pay restitution on those offenses, as recommended by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. There is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Washington's pleas were anything other than knowing, intelligent, and voluntary.

The other issue counsel discusses is whether this court should remand the matters for resentencing because 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, a 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 several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of 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* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The twelve-year sentence imposed is well within the ninety-two-year year 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 court's sentencing discretion.

As noted, Washington stipulated to restitution, and each restitution award is supported by a restitution worksheet in the record. It is clear that the parties and the court relied on that documentation. However, there is a discrepancy in one of the awards, which we believe should be corrected upon remittitur.

Progressive Insurance Company submitted a restitution request on behalf of its insured, P.F., the victim in the fourth car theft. The "Total Restitution Amount" requested was $4510.74: $4326.74 as the "Amount Progressive Paid," plus $250 as P.F.'s deductible, *minus* $66 in "Salvage Recovery." The circuit court awarded the "Amount Progressive Paid" to Progressive and P.F.'s deductible to P.F., for a total restitution award of $4576.74, which is $66 more than Progressive requested. Reviewing the sentencing transcript, we see that the reason for this error is that the State neglected to account for the $66 salvage credit listed on Progressive's restitution worksheet, resulting in a restitution award that was greater than Progressive actually requested.

Because this court is "in just as good a position as the trial court to make factual inferences based on documentary evidence," *see* ***Cohn v. Town of Randall***, 2001 WI App 176,

¶7, 247 Wis. 2d 118, 633 N.W.2d 674, we conclude it is not necessary to reject the no-merit report and require additional postconviction proceedings on the excessive restitution award. Rather, we simply direct that, upon remittitur, the judgment of conviction in Milwaukee County Circuit Court case No. 2015CF4693 be amended to reflect a restitution award to Progressive of $4260.74—the amount Progressive paid minus the amount it recovered via salvage, as listed on its restitution request. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment of conviction in Milwaukee County Circuit Court case No. 2014CF5346 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that, upon remittitur, the judgment of conviction in Milwaukee County Circuit Court case No. 2015CF4693 shall be modified as described herein.

IT IS FURTHER ORDERED that the judgment of conviction in Milwaukee County Circuit Court case No. 2015CF4693, as modified, is summarily affirmed.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Washington in these matters. *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