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DISTRICT II

May 16, 2018

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

2017AP1624-CRNM State of Wisconsin v. Markese K. Tibbs (L.C. # 2014CF449)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Markese K. Tibbs appeals from a judgment convicting him of felony murder as a party to a crime. Tibbs' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Tibbs filed a response. After reviewing the record, counsel's report, and Tibbs' response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

In February 2015, Tibbs pled no contest to felony murder as a party to a crime. The charge stemmed from his participation in an armed robbery in which a codefendant shot and killed a man after taking the man's marijuana. Police responded to the scene and found fresh footprints in the snow. They followed the footprints to a nearby residence where they found Tibbs and the codefendant, along with a .32 caliber revolver and marijuana.

Prior to his sentencing, Tibbs learned that a police officer had engaged in misconduct in his case. Specifically, the officer admitted to planting a .22 caliber bullet and an ID card belonging to Tibbs at the residence where Tibbs and the codefendant were found.² The officer later resigned and pled guilty to misconduct in public office.³

Tibbs sought and received an evidentiary hearing to explore the matter and determine whether he wanted to keep or withdraw his plea. After completion of a multi-day hearing, Tibbs

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

² The planted evidence was not consequential, as (1) the victim was shot with a .32 caliber bullet and (2) Tibbs admitted to staying at the residence where he was found.

³ A disciplinary action has been brought against the prosecutor for failing to properly disclose the police officer's misconduct prior to Tibbs' plea. See *Office of Lawyer Regulation v. Robert Zapf*, Appeal No. 2016AP2514-D.

elected to keep his plea and proceed with sentencing.⁴ The circuit court subsequently sentenced him to sixteen years of initial confinement and fifteen years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether Tibbs' no contest plea was knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Tibbs that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.⁵ A signed plea questionnaire and waiver of rights form was entered into the record, along with the relevant jury instructions detailing the elements of the offense. Moreover, the court later engaged in an additional colloquy with Tibbs to ensure that his decision to keep his plea was his own and not the result of force or coercion. We agree with counsel that a challenge to the entry of Tibbs' no contest plea would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offense,

⁴ Tibbs had one week to decide whether he wanted to keep or withdraw his plea after completion of the evidentiary hearing on the police officer's misconduct. His decision to keep it was likely driven by the other evidence against him, including (1) a statement from another codefendant implicating him in the crime, (2) Tibbs' own inculpatory statements to police, (3) the discovery of the .32 caliber revolver and marijuana in the residence where he was found, and (4) other acts evidence from a previous robbery he committed.

⁵ There is one exception to this. The circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, however, as there is no indication that Tibbs' plea is likely to result in his deportation, exclusion from admission to this country, or denial of naturalization.

Tibbs' character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Tibbs' prior robbery conviction, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Tibbs' sentence would lack arguable merit.

As noted, Tibbs filed a response to counsel's no-merit report. In it, he complains that (1) he was misadvised about the punishment he faced, (2) he was coerced into keeping his plea, (3) the prosecutor breached the plea agreement at sentencing, (4) the prosecutor had a conflict of interest, and (5) Tibbs had a potential defense in challenging the reliability of the police's investigation.

We are not persuaded that Tibbs' response presents an issue of arguable merit. To begin, many of his complaints are belied by the record, which demonstrates that (1) the circuit court properly advised Tibbs of the maximum punishment he faced, (2) Tibbs' decision to keep his plea was not coerced, and (3) the prosecutor gave the promised recommendation at sentencing. As for the alleged conflict of interest and potential defense, those issues were forfeited by Tibbs' no contest plea. See *State v. Kelty*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. Stehle*, 217 Wis. 2d 50, 54, 577 N.W.2d 29 (Ct. App. 1998).

Our independent review of the record does not disclose any potentially meritorious issue for appeal.⁶ Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Marcella De Peters of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Tibbs in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals

⁶ Tibbs did move to suppress his inculpatory statements made to police. However, he elected not to litigate the motion prior to entering his no contest plea. In doing so, he stated that he was waiving the issue. Accordingly, we will not discuss it further.