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May 18, 2018

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

2017AP162-CRNM State of Wisconsin v. Philippa P. Miles (L.C. # 2016CF537)

Before Lundsten, P.J., Kloppenburg 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).

Attorney Carl W. Chesshir, appointed counsel for Philippa P. Miles, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there

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

would be arguable merit to a challenge to Miles' plea or sentencing. Miles was sent a copy of the report, and has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Miles was charged with first-degree reckless injury by use of a dangerous weapon, carrying a concealed weapon, and disorderly conduct while using a dangerous weapon. Pursuant to a plea agreement, Miles pled guilty to first-degree reckless injury by use of a dangerous weapon, and the remaining charges were dismissed. The court sentenced Miles to seven years of initial confinement and three years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit to a challenge to Miles' plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Miles signed, satisfied the court's mandatory duties to personally address Miles and determine information such as Miles' understanding of the nature of the charge and the range of punishments she faced, the constitutional rights she waived by entering a plea, and the direct consequences of the plea.² *See State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765

² Although the court failed to inform Miles that the court was not bound by the terms of the plea agreement, as required under *State v. Hampton*, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14, Miles received the benefit of the plea agreement. Therefore, this defect in the colloquy does not present a manifest injustice warranting plea withdrawal. *See State v. Johnson*, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441. Additionally, while the circuit court failed to personally advise Miles of the deportation consequences of her plea, contrary to WIS. STAT. § 971.08(1)(c) and (2), the record indicates

(continued)

N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Miles' plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Miles' sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Miles' character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. We discern no other basis to challenge the sentence imposed by the circuit court.

Miles argues in her response that her trial counsel did not explain to Miles what was happening in court, and that Miles did not understand what was happening or what was being said. She argues that her trial counsel did not care about her case and twice appeared late for court. However, Miles does not state what it was that her counsel did not explain or what she did not understand. During the plea hearing, Miles affirmed that she understood the charge of first-degree reckless injury and the potential punishments, that she had in fact committed the offense as charged in the complaint, and that she had had enough time to talk with her attorney and that she was satisfied with the assistance her attorney had provided to her. At sentencing, Miles' counsel argued mitigating factors on Miles' behalf, and argued for a withheld sentence and a

that Miles was born in Illinois and is therefore a United States citizen. Because Miles is not subject to deportation, we determine that this issue lacks arguable merit for appeal.

term of probation. Nothing before us would support a non-frivolous argument that Miles was denied the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (claim of ineffective assistance of counsel “must show that counsel’s performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and also that “the deficient performance prejudiced the defense,” that is, that the errors undermine our confidence in the outcome).

Miles also asserts that she should not have been subject to the habitual offender sentencing enhancer under WIS. STAT. § 939.62 because she had not had a conviction within the prior five years. However, Miles was not charged as a habitual offender under § 939.62. Rather, Miles was charged as committing her offense by use of a dangerous weapon, and was thus subject to the dangerous weapon enhancer under WIS. STAT. § 939.63(1)(b). The dangerous weapon enhancer does not rely on a prior conviction within the previous five years.

Miles also asserts that she believes that the circuit court was unfair to her. Miles states that she is asking for eligibility for the Earned Release Program or sentence modification. However, Miles is statutorily ineligible for either the Challenge Incarceration Program or the Substance Abuse Program because she was convicted of a crime under WIS. STAT. ch. 940. *See* WIS. STAT. §§ 302.045(2)(c) and 302.05(3)(a)1. The circuit court explained why the court believed a prison sentence was necessary and why the court followed the recommendation of the presentence investigation report after considering the facts of this case and the mitigating factors argued by Miles’ counsel. Nothing in the record, the no-merit report, or no-merit response would support a non-frivolous argument related to sentencing.

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.

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

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of any further representation of Philippa P. Miles 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