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June 4, 2018

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

2017AP731-CRNM State of Wisconsin v. Devontae O'Dezen Bracken
(L.C. # 2015CF936)

Before Kesser, P.J., Brennan 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).

Devontae O'Dezen Bracken appeals a judgment of conviction entered after he pled guilty to robbery by threat of imminent force as a party to a crime. *See* WIS. STAT. §§ 943.32(1)(b)

(2015-16),[1] 939.05. Appellate counsel, Attorney Erin K. Deeley, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Bracken responded, and Attorney Deeley filed a supplemental no-merit report. Upon our review of the no-merit reports, Bracken's response, and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Bracken was one of several men who robbed M.F. in front of her Milwaukee, Wisconsin home late in the evening of February 23, 2015. While M.F. was seated in her parked car, the men approached her in a dark-colored sport utility vehicle. One man pointed a gun at her while a second pulled her from her car. The assailants seized her purse, then fled in the sport utility vehicle. Shortly thereafter, police located a Toyota Highlander Sport idling on a Milwaukee street and found M.F.'s purse inside the vehicle. Officers followed footprints in the snow leading away from the Toyota and discovered Bracken along with several other men hiding behind a garage. Police also found a black semi-automatic handgun nearby.

The State charged Bracken with armed robbery as a party to a crime. He posted bail and then failed to appear in court. After nearly six months as an absconder, he was arrested on a warrant. Thereafter, he decided to accept a plea bargain in which he agreed to plead guilty to a reduced charge of robbery by threat of imminent force as a party to a crime, and the State agreed to recommend a prison sentence without specifying a recommended term of imprisonment. The

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

circuit court accepted Bracken's guilty plea, ordered a presentence investigation report (PSI), and set the matter for sentencing.

At the outset of the initial sentencing hearing, the circuit court observed that when the author of the PSI interviewed Bracken, he denied participating in the robbery. The circuit court therefore questioned whether to go forward with sentencing and suggested that the matter should instead be resolved with a trial. The parties agreed to adjourn the matter to permit Bracken to consider how he wanted to proceed.

When the parties reconvened, Bracken told the circuit court that he had been confused when he talked to the presentence investigator and that in fact he was guilty of robbery. The circuit court then conducted a second plea colloquy. During the colloquy, Bracken reiterated that he wanted to plead guilty and did not want to have a trial. The circuit court again accepted Bracken's guilty plea, and the matter proceeded to sentencing. The circuit court imposed a thirteen-year term of imprisonment bifurcated as eight years of initial confinement and five years of extended supervision. The circuit court also ordered Bracken to pay restitution in the amount of $671.29, found him ineligible for the Wisconsin substance abuse program, and found him eligible for the challenge incarceration program. Bracken appeals.

In the no-merit report, appellate counsel first addresses whether Bracken could challenge the validity of his guilty plea. For the reasons stated in the no-merit report, we agree that Bracken could not mount such a challenge, but some additional discussion is warranted.

To ensure a knowing, intelligent, and voluntary plea, a circuit court must satisfy a variety of statutory and court-imposed duties. *See* ***State v. Hoppe***, 2009 WI 41, ¶18 & n.11, 317 Wis. 2d 161, 765 N.W.2d 794. Among those duties is the obligation to "establish that a

defendant understands every element of the charge[] to which he pleads." *See* ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court explained to Bracken each element of the offense of robbery in violation of WIS. STAT. § 943.32(1). In doing so, the circuit court ensured Bracken's understanding that one element is that "[t]he defendant acted forcibly." *See* WIS JI—CRIMINAL 1479. As appellate counsel observes, however, the circuit court told Bracken that '"forcibly' means that actual physical force was used against" M.F., but in this case the State alleged in the amended information that Bracken committed robbery by threatening—rather than using—imminent force.

Appellate counsel advises that the discrepancy between the charging document and the circuit court's explanation does not give rise to an arguably meritorious ground for postconviction relief in light of ***Manson v. State***, 101 Wis. 2d 413, 304 N.W.2d 729 (1981). There, the supreme court concluded that robbery "[b]y using force" as prohibited in WIS. STAT. § 943.32(1)(a), and robbery "[b]y threatening the imminent use of force" as prohibited in § 943.32(1)(b), constitute the same offense, and a jury need not unanimously agree as to the defendant's mode of committing the crime of robbery. *See* ***Manson***, 101 Wis. 2d at 419-20, 429-30. The supreme court explained that a "jury should not be obliged to decide between two statutorily prohibited ways of committing the crime if the two ways are practically indistinguishable." ***Id.*** at 430.

We agree with appellate counsel that ***Manson*** informs the analysis here. Additionally, in ***State v. Steele***, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595, we concluded that when a defendant pleads guilty to violating a statute that sets forth a single offense with multiple modes

of commission, the circuit court need not explain the mode of commission with specificity. *See* ***id.***, ¶¶3, 8-9.[2] Moreover, after deciding ***Steele***, the supreme court held that a circuit court is not required to ensure that the defendant understands precisely how the State may prove each element of the crime. *See* ***State v. Trochinski***, 2002 WI 56, ¶22, 253 Wis. 2d 38, 644 N.W.2d 891. Rather, the defendant must know and understand the elements that the State must prove. *See* ***id.*** The record shows that the circuit court ensured Bracken's understanding that the State was required to prove that Bracken acted forcibly before a jury could convict him of robbery. Accordingly, there is no merit to further pursuit of this issue.

The record also shows that Bracken could not mount a challenge to any other aspect of his guilty plea. Bracken executed a plea questionnaire and waiver of rights form in which he acknowledged understanding the elements of the offense, the penalties that could be imposed, the recommendation the State would make, and the constitutional rights he waived by entering a guilty plea. During both plea colloquies, the circuit court ascertained that Bracken understood the form he signed and went on to fulfill the obligations imposed on the circuit court by statute and case law. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***Hoppe***, 317 Wis. 2d 161, ¶18. We conclude that Bracken entered his guilty plea knowingly, intelligently, and voluntarily. Accordingly, we agree with appellate counsel that no arguably meritorious basis exists on which to challenge the guilty plea.

[2] The supreme court recently affirmed the validity of ***State v. Steele***, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595. *See* ***State v. Hendricks***, 2018 WI 15, ¶25, 379 Wis. 2d 549, 906 N.W.2d 666. The ***Hendricks*** court concluded that when accepting a guilty plea to violating a statute with multiple modes of commission, the "circuit court must identify at least one of the prohibited modes ... to ensure there exists a factual basis for accepting a plea," *see* ***id.***, ¶26, but the specific mode of commission need not be defined, *see* ***id.***, ¶33.

Appellate counsel does not discuss whether Bracken could pursue any issues arguably arising from the proceedings that took place before he entered his plea. We conclude that he could not do so. By entering a valid guilty plea, a defendant gives up the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights occurring before the plea. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

The no-merit reports include appellate counsel's discussion of why Bracken cannot pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion in selecting a term of imprisonment and in finding him ineligible for the Wisconsin substance abuse program. We are satisfied that the no-merit reports properly analyze these issues, and we will not discuss them further.

We also agree with appellate counsel's conclusion that Bracken did not raise an issue of arguable merit in his response to the no-merit report. In Bracken's view, he is entitled to relief because he was sentenced on the basis of inaccurate information.[3] A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a denial of this right, the defendant must show that the sentencing court actually relied on inaccurate information. *See* ***id.***, ¶26. Here, Bracken says the circuit court wrongly believed that his codefendant, Timothy Williams, "had been sentenced to twenty-two years based entirely upon his participation in the crimes for which he and

[3] Bracken explicitly advises in his response to the no-merit report that he "does not take issue with counsel's claims that Bracken is not entitled to withdrawal of his guilty plea and that his sentence does not constitute an excessive sentence."

B[ra]cken both stood before the court." In fact, Bracken contends, the twenty-two-year sentence reflected that Williams "had his previous probationary term revoked." Appellate counsel correctly points out, however, that during Bracken's sentencing hearing, the State and the defense both advised the circuit court that Williams had a substantial prior record, and defense counsel went on to explain that "Williams's record is what caused him ... to get the lengthy sentence that he did. Plus he pled to the armed robbery [rather than the lesser charge of robbery that Bracken ultimately faced]."[4]

The circuit court thus received information that while Bracken's only criminal conviction was for misdemeanor possession of tetrahydrocannibols, Williams had a substantial criminal history. Nothing in the record suggests that the circuit court misunderstood that information.[5] Accordingly, any claim that Bracken was sentenced on the basis of inaccurate information regarding Williams's sentencing would be frivolous within the meaning of ***Anders***.

Finally, we conclude that no arguably meritorious basis exists to challenge the order imposing restitution. The presentence investigation report disclosed that M.F. sought $671.29, and at sentencing, M.F. reiterated that the amount requested accurately reflected her loss.

[4] Armed robbery is a Class C felony carrying maximum penalties of a fine not exceeding $100,000 and imprisonment not exceeding forty years. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c). Robbery, by contrast, is a Class E felony carrying maximum penalties of a fine not exceeding $50,000 and imprisonment not exceeding fifteen years. *See* §§ 943.32(1), 939.50(3)(e).

[5] Perhaps Bracken intends to suggest that when Williams was sentenced for his role in robbing M.F., he was also sentenced after revocation of probation imposed in another matter. If so, Bracken offers nothing to support that suggestion. The record in this case shows that the State charged Williams in Milwaukee County case No. 2015CF2042 for his role in the February 23, 2015 robbery. Electronic docket entries, of which we may take judicial notice, *see* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522, show that case No. 2015CF2042 involved a single count of armed robbery, and nothing in the docket suggests that sentencing for that count included a sentencing after revocation of probation for any other crime.

Bracken told the circuit court that he had no objection to a restitution order in that amount. Under these facts, the circuit court properly ordered restitution in the amount M.F. requested. *See* ***State v. Szarkowitz***, 157 Wis. 2d 740, 748-49, 460 N.W.2d 819 (Ct. App. 1990) (defendant who does not object to the amount of restitution reflected in the PSI constructively stipulates to a restitution order in that amount).

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further 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 Erin K. Deeley is relieved of any further representation of Devontae O'Dezen Bracken on appeal. *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