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September 19, 2018

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

2018AP453-CRNM	State of Wisconsin v. Sir T. Tolbert (L.C. # 2016CF3576)
2018AP454-CRNM	State of Wisconsin v. Sir T. Tolbert (L.C. # 2016CF3921)

Before Kessler, P.J., Brennan and Brash, 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).

Sir T. Tolbert appeals from judgments of conviction, entered upon his guilty pleas, on one count of robbery with the use of force as a party to a crime, one count of fleeing causing property damage, and one count of armed robbery as a party to a crime. Appellate counsel, Pamela Moorshead, 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 Tolbert was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by *Anders*, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

According to the criminal complaint in Milwaukee County Circuit Court case No. 2016CF3576, fifteen-year-old A.D.E. was sitting in the front passenger seat of his mother's new SUV while she and his brothers went into a store. The engine was on, the windows were down, and the radio was playing. Three individuals approached the vehicle. One, later identified as Tolbert, approached A.D.E. and told him to get out. When A.D.E. refused, Tolbert pulled him out through the window. Tolbert then got in the SUV and a female got in the driver's seat as A.D.E. ran into the store to tell his mother. The duo drove off; A.D.E. lost track of the third individual and did not know where he or she went.

A few hours after the SUV theft was reported, police spotted the stolen vehicle. At least two squad cars got behind the SUV and attempted a traffic stop. Tolbert was driving. He pulled over, but sped off as officers from the first squad approached the vehicle. The second squad gave chase as Tolbert fled. After about a mile and a half, Tolbert lost control and crashed the SUV into a parked car. Tolbert and his passenger fled from the SUV, but both were apprehended. Tolbert was charged with one count of robbery with the use of force and one count of fleeing police causing property damage.

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

The criminal complaint in Milwaukee County Circuit Court case No. 2016CF3921 was based on a statement from J.L. She had arranged to buy twenty dollars' worth of Vicodin from Tolbert, from whom she had purchased the drugs before. A friend drove her to the meeting spot. Tolbert and another person got in the back seat. J.L. handed Tolbert a twenty-dollar bill; he said it looked fake. J.L. responded that it was not. The second individual then pulled out a gun, racked it, and said, "Give me all your shit." J.L. jumped from the car and said she was calling the police. Tolbert and his acquaintance fled; Tolbert still had the bill and the drugs. Tolbert was charged with one count of armed robbery as a party to a crime.²

Tolbert agreed to resolve the cases with guilty pleas. Although no charge concessions were made, the State agreed to ask for consecutive sentences without making a recommendation as to length. The circuit court, after a brief adjournment to allow Tolbert to review discovery materials with counsel, accepted Tolbert's guilty pleas. For the armed robbery, the circuit court imposed four years of initial confinement and three years of extended supervision. For the robbery with the use of force, the circuit court also imposed four years of initial confinement and three years of extended supervision, to be served consecutively. For the fleeing, the circuit court imposed two years of initial confinement and two years of extended supervision, concurrent with the robbery sentence. Tolbert appeals.

² Although the armed robbery was charged after the vehicle theft, the armed robbery had happened on August 8, 2016, and the vehicle theft occurred on August 9, 2016.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Tolbert's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging Tolbert's pleas as not knowing, intelligent, and voluntary. See *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Tolbert completed plea questionnaire/waiver of rights forms, see *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The forms correctly acknowledged the maximum penalties Tolbert faced and the forms, along with an addendum to each, also specified the constitutional rights he was waiving with his pleas. See *Bangert*, 131 Wis. 2d at 262, 271.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, *Bangert*, and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. When Tolbert expressed concern that he had not been shown all of the discovery material by counsel, the court adjourned the morning plea hearing to the afternoon to allow Tolbert to review the material with counsel. We note that the circuit court did not expressly review party-to-a-crime liability with Tolbert, but did ask Tolbert if counsel had explained what the State would have to prove at trial; Tolbert acknowledged that counsel had done so. Further, the applicable jury instructions, including the instruction for party-to-a-crime liability, were attached to the plea questionnaire forms and initialed by Tolbert.

A circuit court accepting a guilty plea must also “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.” WIS. STAT. § 971.08(1)(b). When the circuit court attempted to ascertain a factual basis for the pleas, Tolbert expressed some

disagreement with the facts in the complaints, stating he had not pulled A.D.E. from the car and claiming he did not know his acquaintance had a gun. However, Tolbert admitted to threatening A.D.E.³ and admitted he was part of the drug scheme generally and that he did not withdraw when the gun was produced.

The plea questionnaire forms and addenda, the jury instructions, and the circuit court's colloquy appropriately advised Tolbert of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of *Bangert* and *Hampton* for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.

The other issue counsel raises is whether 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 primary factors including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. *See State v. Odom*, 2006 WI App 145,

³ The Class E felony of robbery can be committed either by using force or threatening the imminent use of force. *See* WIS. STAT. § 943.32(1). Additionally, the circuit court explained at sentencing that it believed the facts alleged in the complaint over Tolbert's denial.

¶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 *Ziegler*, 289 Wis. 2d 594, ¶23.

The circuit court's sentencing comments here are somewhat sparse. However, the circuit court identified appropriate sentencing objectives; in particular, it noted a need to send a message that one cannot rob people with a gun, pull kids from cars, or flee from police. It observed that these were serious crimes with dangerous behavior and rejected Tolbert's claim that he was just hanging out with the wrong people. The circuit court did not expressly state that it was rejecting probation, but commented that Tolbert's sanctions from Children's Court—an imposed and stayed sentence with release into the community for treatment—had not worked, as the stay was lifted and Tolbert was sent to Lincoln Hills until April 28, 2016, which was only a few months before these crimes. In other words, the juvenile sentence had not deterred Tolbert from future criminal activity, so a probationary sentence in the community was not warranted. The circuit court also did not expressly explain why the robbery and armed robbery sentences would be consecutive, but did note that the crimes had been committed “back to back,” suggesting that the separate nature and commission of the robberies justified separate sentences to be served for each offense.

The maximum possible sentence Tolbert could have received was sixty-one years of imprisonment. The sentences totaling fourteen years of imprisonment are well within the 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 sentencing court's discretion.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of further representation of Tolbert 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