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DISTRICT I

September 19, 2019

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

2016AP1562-CRNM State of Wisconsin v. Davonci S. Hennings (L.C. # 2015CF232)

Before Kessler, 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).

Davonci S. Hennings appeals from a judgment of conviction, entered upon his guilty pleas, on one count of robbery and one count of second-degree reckless injury, both as a party to a crime. Appellate counsel, Carly M. Cusack, 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] Hennings 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 appellate counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

K.S. gave a statement to police, indicating that he was robbed and shot by two men while attempting to purchase oxycodone. K.S. and two others, C.H. and T.C., had driven to Milwaukee because C.H. had a source, known as "D," from whom she had previously purchased pills. C.H. set up a meeting with "D," and Hennings drove up to the meeting spot. Hennings spoke first to C.H., but the pills he had did not look right, so K.S., C.H., and T.C. left. Hennings called C.H. and said he could get the oxycodone, so the trio drove back. This time, K.S. went to Hennings' car and got in.

Hennings drove to an alley, where another man Hennings said was his cousin got in the car. The second man produced a revolver, pointed it at K.S.'s head, and said, "Give me all your shit." Hennings took $375 from K.S.'s pocket while his cousin continued to point the gun at K.S.'s head. K.S. tried to get control of the gun but, when he felt he was losing control of the gun, grabbed Hennings' phone instead and jumped out of the car and ran. K.S. heard Hennings yell, "He's got my phone, pop him!" One shot was fired. K.S. was hit; the shot broke his hip.

C.H. provided police with a phone number for "D" and confirmed that he drove off with K.S. K.S. identified "D" from a photo array. Hennings was charged with one count of armed

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

robbery and one count of first-degree reckless injury while armed, both as a party to a crime. After a jury was empaneled, Hennings advised the State that he wanted to enter a plea.

As part of the plea agreement, the State filed an amended information charging robbery with the use of force and second-degree reckless injury, both as a party to a crime. The State would argue for a prison sentence without recommending a specific length. Hennings would plead guilty to the reduced charges, be able to request a presentence investigation report, and would state, under oath, the name, date of birth and relationship of the shooter, whom authorities had not been able to identify. The circuit court accepted Hennings' pleas. It sentenced Hennings to five years' imprisonment and five years' extended supervision on each count, to be served consecutively. Hennings appeals.

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

There is no arguable basis for challenging Hennings' pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Hennings completed a plea questionnaire and waiver of rights form, *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 jury instructions for the amended charges were attached. The form, along with an addendum, also specified the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

The circuit court 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 the circuit court began explaining to Hennings that he was giving up the right to make the State prove its case, the court asked Hennings, "Do you want the State to present their evidence or do you want to admit being guilty." Hennings responded, "Present evidence and plead guilty." When the court sought clarification, Hennings said he wanted the State to "[p]rove that I'm guilty." Some discussion ensued, and Hennings told the court, "I want to plead guilty, your honor, I don't want no trial."

The circuit court resumed the colloquy. When it asked Hennings what made him guilty of the robbery as party to a crime, Hennings responded, "I don't know. I was there." As the court noted, Hennings' mere presence at the scene of a crime would not establish a sufficient factual basis. Because of the lateness of the hour, the court adjourned the hearing until the next morning. Hennings then stated the factual basis for his offenses was that his cousin shot K.S. and he (Hennings) took the money. Ultimately, the court was satisfied with the pleas.

The plea questionnaire and waiver of rights form and addendum, the jury instructions, and the circuit court's colloquy appropriately advised Hennings 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. The circuit court

took appropriate measures to confirm Hennings' understanding of the proceedings when the colloquy became confusing. There is no arguable merit to a challenge to the pleas' validity.[2]

The other issue appellate 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, ¶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 stated that probation would unduly depreciate the seriousness of the crimes. It also stated that serious penalties were needed to deter others, because there seemed to be a belief that no one will report a robbery that occurs during a drug deal. The court

[2] Two mandatory DNA surcharges were assessed on the judgment of conviction. Because of the multiple DNA surcharges, we put this appeal on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because he was not advised at the time of the plea that multiple mandatory DNA surcharges would be imposed. ***Odom*** was voluntarily dismissed before oral argument. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __. ***Freiboth*** holds that a circuit court does not have a duty during a plea colloquy to inform a defendant about mandatory DNA surcharges because the surcharge is not a punishment or a direct consequence of the plea. *See* ***id.***, ¶12. Thus, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

acknowledged that Hennings had no prior criminal convictions, although he had multiple prior contacts, but commented that Hennings' offenses were fairly serious mid-level felonies involving dangerous conduct that could have become a homicide. The court declined to make Hennings eligible for the challenge incarceration or substance abuse programs, stating that doing so would depreciate the seriousness of the offenses and that confinement was best for protecting the community while Hennings was receiving treatment. The court also explained that the sentences would be consecutive because either one of the offenses could have been committed without the other, but Hennings committed both.

The maximum possible sentence Hennings could have received was twenty-seven and one-half years' imprisonment. The sentence totaling twenty years' imprisonment is 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 judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carly M. Cusack is relieved of further representation of Hennings 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