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September 20, 2018

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

2017AP1198-CRNM State of Wisconsin v. Demoine Lytee Mallett, Jr.
(L.C. # 2014CF2516)

Before Brennan, Brash 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).

Demoine Lytee Mallett, Jr., appeals from a judgment of conviction for five drug-related felonies. Mallett's appellate counsel, Carl W. Chesshir, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Mallett has not filed a response. We have independently reviewed the record and the no-merit report as mandated by

Anders. We conclude that there is no issue of arguable merit that could be pursued on appeal. We summarily affirm the judgment.

The criminal complaint charged Mallett with five counts of delivering cocaine as a second or subsequent offense. One count involved between one and five grams of cocaine, and four counts involved between five and fifteen grams of cocaine. *See* WIS. STAT. §§ 961.41(1)(cm)1r., 961.48(1)(b), and 961.41(cm)2. (2013-14).[1] While these charges were pending and Mallett was out on bond, he was arrested and charged with possession of THC as a second or subsequent offense and felony bail jumping, in Milwaukee County Circuit Court Case No. 2015CF1666.

Mallett entered into a plea agreement with the State pursuant to which he agreed to plead guilty as charged in this case, with the charges in 2015CF1666 to be dismissed and read in for sentencing purposes. The State agreed to recommend a global sentence of six years of initial confinement and four years of extended supervision.

The trial court conducted a plea colloquy with Mallett, accepted Mallett's guilty pleas, and found him guilty. For the charge of delivering between one and five grams of cocaine, the trial court imposed a sentence of two years of initial confinement and two years of extended supervision. For the four counts of delivering between five and fifteen grams of cocaine, the trial court imposed four sentences of three years of initial confinement and three years of extended supervision, with one sentence consecutive to the lesser charge and the remaining sentences

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

concurrent. Mallett was also ordered to pay five mandatory $250 DNA surcharges for his five felony convictions.[2] The trial court made Mallett eligible for both the Challenge Incarceration Program and the Wisconsin Substance Abuse Program, but it specified that Mallett first had to serve three years of initial confinement. This appeal follows.[3]

The no-merit report analyzes three issues: (1) whether Mallett's guilty pleas were intelligently, knowingly, and voluntarily entered; (2) whether the trial court erroneously exercised its sentencing discretion; and (3) whether the fact that Mallett participated in "debriefing" with law enforcement while his cases were pending would be a new factor supporting a motion for sentence modification. This court agrees with appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues.

[2] Because Mallett was ordered to pay five mandatory DNA surcharges, we delayed deciding this appeal until the Wisconsin Supreme Court could decide ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument. We continued to delay deciding this appeal until the issuance of ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __. ***Freiboth*** held that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. *See* ***id.***, ¶12. Consequently, there would be no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges in Mallett's case.

[3] After a notice of intent to pursue postconviction relief was filed, Mallett filed multiple *pro se* letters and motions with the trial court, asking that his sentence be modified to reduce his periods of initial confinement and allow him to participate in early release programs before serving three years of initial confinement. The trial court denied Mallett's *pro se* motions three times. Appellate counsel's no-merit notice of appeal indicates that Mallett is appealing from the judgment of conviction and does not reference Mallett's *pro se* motions or the trial court's orders denying them.

We begin with Mallett's pleas. There is no arguable basis to allege that Mallett's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Mallett signed an addendum to the plea questionnaire indicating that he was giving up additional rights and defenses, and a printed list of the elements of the crimes was made a part of the record. The trial court went through the elements of each crime with Mallett, and it also told Mallett the ramifications of allowing crimes to be read in.

The transcript and the plea hearing documents demonstrate that the trial court conducted a thorough plea colloquy that addressed the charges to which Mallett was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶¶20-24, 38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. We conclude that the plea questionnaire, waiver of rights form, Mallett's conversations with his trial counsel, and the trial court's plea colloquy appropriately advised Mallett of the nature of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Mallett's pleas.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider additional factors. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. For instance, the trial court discussed Mallett's education and criminal history, the fact that the charges involved the sale of a "substantial" quantity of cocaine, and the fact that Mallett was arrested for a new offense while released on bond. It also said that given the quantities of drugs being sold by Mallett, it could not "justify probation in this case."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Mallett was facing up to ninety-two and one-half years of confinement. Mallett's sentences totaling five years of initial confinement and five years of extended supervision are well within the maximum total sentences, and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). This is especially true

where Mallett was also declared eligible for early release programs after he has served three years of initial confinement.

The final issue addressed in the no-merit report is whether the fact that Mallett participated in debriefing with law enforcement officers could form the basis for a motion for sentence modification under ***Rosado v. State***, 70 Wis. 2d 280, 234 N.W.2d 69 (1975). We agree with appellate counsel's conclusion that Mallett's participation in debriefing was not a new factor that would support a motion for sentence modification because at sentencing, trial counsel told the trial court about Mallett's debriefing, including the fact that he accepted responsibility for his crimes during that debriefing.

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

Upon the foregoing reasons,

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 from further representing Demoine Lytee Mallett, Jr., 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