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**DISTRICT I**

October 2, 2018

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

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2016AP2378-CRNM State of Wisconsin v. Terranzo Butler, Jr. (L.C. # 2016CF510)

Before Kessler, P.J., 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).**

Terranzo Butler, Jr., appeals from a judgment of conviction for two counts of attempted armed robbery, as a party to a crime, contrary to WIS. STAT. §§ 943.32(2), 939.32, and 939.05 (2015-16).[1] Butler's appellate counsel, Leonard D. Kachinsky, has filed a no-merit report

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

pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Butler filed a response.[2] We have independently reviewed the record, the no-merit report, and the response, 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.

Butler was charged with two counts of attempted armed robbery as a party to a crime and one count of possession of a firearm by an adjudicated delinquent. The criminal complaint alleged that on a single day, Butler, another man, and a juvenile approached two different individuals and attempted to rob them. The complaint alleged that in both instances, Butler displayed a gun. The first victim, a woman carrying a two-year-old child, indicated that she did not have any property with her, and the men eventually left without taking anything from her. The second victim ran into his house before the men could take any of his property.

Butler entered a plea agreement with the State. In exchange for pleading guilty to the two attempted armed robberies, the State agreed to dismiss and read in the firearm possession charge. The State also asked the trial court to strike language in the criminal complaint alleging that Butler was subject to mandatory minimum sentences. The State explained that it had concluded that the mandatory minimum provisions were not applicable in this case because Butler was pleading guilty to attempted crimes. Under the terms of the plea agreement, the State agreed to recommend a prison sentence of unspecified length, "leaving the length of prison up to the [c]ourt's discretion." Butler was free to argue for any sentence.

[2] Butler's response was filed long after the no-merit report. The response addresses an order this court issued in September 2017 placing this case on hold, as well as an additional issue. We have accepted Butler's response and considered it in making our decision in this case.

The trial court conducted a guilty plea hearing with Butler and accepted his guilty pleas. At the parties' request, the trial court proceeded to sentencing after taking a short recess. The trial court sentenced Butler to two consecutive terms of four years of initial confinement and four years of extended supervision. The trial court also ordered Butler to pay two mandatory $250 DNA surcharges.[3] This appeal follows.

The no-merit report analyzes two issues: (1) whether Butler's pleas were intelligently, voluntarily, and knowingly entered; and (2) whether the trial court erroneously exercised its sentencing discretion. 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.

We begin with Butler's guilty pleas. There is no arguable basis to allege that they 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). Butler completed a plea questionnaire and waiver of rights form—which the trial court referenced during the plea hearing—as well as an addendum that addressed potential defenses and motions that would be forfeited. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The jury

[3] Because Butler was ordered to pay two mandatory DNA surcharges, we placed 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 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. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, 916 N.W.2d 643. ***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, contrary to Butler's assertions in his response to the no-merit report, there would be no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges in Butler's case.

instructions for armed robbery, attempt, and party-to-a-crime liability were made a part of the record, and the trial court reviewed what the State would be required to prove at a trial. The trial court also determined that there was a factual basis for the pleas.

The trial court conducted a thorough plea colloquy that addressed Butler's understanding of the plea agreement and the charges to which he 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. Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Butler's conversations with trial counsel, and the trial court's colloquy 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 Butler's guilty pleas.

In his response to the no-merit report, Butler suggests that he was found guilty of the robbery involving the female victim "when all [the] evidence showed [he] never committed the crime." Butler asserts that the female victim did not identify him and that there was no DNA material recovered from the gun used in the robbery. We are not persuaded that Butler has identified an issue of arguable merit. As noted, Butler pleaded guilty to the crime. The trial court reviewed with Butler the facts of the attempted robbery outlined in the complaint and then asked him: "Is that what happened?" Butler replied: "Yeah." Later, the trial court told Butler that it would "accept as true the allegations in this complaint to find [him] guilty," and Butler indicated that he understood. Those allegations included a statement by Butler's co-defendant indicating that Butler was the man who threatened the woman and "demand[ed] her money, phone and wallet." At no time during the plea hearing did Butler claim he was not involved in

the robbery. The co-defendant's statement, as well as Butler's admission, provided a factual basis for Butler's conviction. We are not persuaded there would be any arguable merit to challenge Butler's conviction for the crime.

Next, the no-merit report also addresses the sentence imposed, providing citations to the sentencing transcript and analyzing the trial court's compliance with ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. This court is satisfied that the no-merit report properly analyzes the issues it raises and will not discuss those issues further. We also conclude that there would be no arguable merit to asserting that the sentences were excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The maximum penalty for each count was twelve and one-half years of initial confinement and seven and one-half years of extended supervision. Butler's sentences require him to serve a total of eight years of initial confinement and eight years of extended supervision, which is substantially less than the total sentence that could have been imposed. *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.").

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Butler further in this appeal.

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 Leonard D. Kachinsky is relieved from further representing Terranzo Butler, Jr. in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*