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DISTRICT I

October 8, 2018

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

2016AP1256-CRNM State of Wisconsin v. Nathan L. King (L.C. # 2015CF1040)

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).

Nathan L. King appeals from a judgment of conviction, entered upon his guilty pleas, on two counts of attempted armed robbery as a party to a crime. Appellate counsel, Angela C. Kachelski, 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] King has filed a response. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and King's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Around 1 a.m. on June 21, 2014, C.L.M. dropped a friend at a home, then parked to send a text message. A vehicle pulled up and parked in front of him, blocking his path; a second vehicle then pulled alongside the first vehicle. C.L.M. did not pay much attention, but he noticed as a person, later identified as King, exited the front passenger seat of the second vehicle. A few moments later, King tapped on C.L.M.'s car window with a black semi-automatic gun. C.L.M. drove away, striking the first vehicle. As he was driving away, C.L.M. felt pain to his face and could not close his mouth. Realizing he had been shot, C.L.M. drove himself to the hospital. A bullet had entered the right side of his face at the lower jaw and exited his left cheek. Police located a bullet hole in his car's driver's window.

Around 1:45 a.m. on June 23, 2014, police were dispatched to another shooting. V.G.D. told the police that King and another individual, later identified as John Davis, tried to rob her of her car in front of her home as she was retrieving a gym bag from the passenger seat. V.G.D., who has a concealed-carry permit, reached in the bag for her gun. Davis grabbed her hand with her keys; King grabbed her other hand. Davis told King to "go get the cannon," which V.G.D. knew referred to a gun. A struggle ensued. V.G.D. was able to get her gun and fire once. King dropped to the ground; Davis fled. V.G.D. called police.

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

Fifteen-year-old King was interviewed at Children's Hospital and admitted his participation in both attempted robberies. He told police he did not know he had hit C.L.M.; he had only been shooting at the windows. King identified his co-actors for authorities.

King was waived into adult court following a contested juvenile waiver hearing. He was charged with one count of first-degree reckless injury, two counts of attempted armed robbery as a party to a crime, and one count of attempted operating a motor vehicle without the owner's consent as a party to a crime. He agreed to enter guilty pleas to the attempted armed robbery offenses. In exchange, the other two counts would be dismissed and read in. The circuit court accepted the pleas and sentenced King to the maximum twelve and one-half years' initial confinement and seven and one-half years' extended supervision for each robbery, but set the sentences to run concurrently. The circuit court also found King eligible for the challenge incarceration program and later ordered over $29,000 in restitution to C.L.M. King appeals.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of King'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 King's pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). King 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 attempt, armed robbery, and party-to-a-crime liability were all attached to the questionnaire. The form correctly acknowledged the maximum penalty for a count of attempted armed robbery and the form, along

with an addendum, also specified the constitutional rights King was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 271. Trial counsel further made a record that she had specifically reviewed a possible coercion defense with King, in light of his age, but that the defense was unsupported. Counsel also explained why she felt she had no basis on which to challenge King's waiver into adult court.[2]

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. Our review of the colloquy satisfies us that the circuit court complied with its obligations for taking a guilty plea.[3] *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In particular, it clarified that the maximum possible penalty of a $50,000 fine or twenty years' imprisonment was applicable to each offense. There is no arguable merit to a claim that the

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[2] A valid guilty plea waives any challenge to the juvenile court's decision to grant waiver to adult court. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 763, 457 N.W.2d 562 (Ct. App. 1990).

[3] The circuit court did not explain to King that restitution could be ordered on read-in offenses, a warning recommended but not required by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. The restitution award to C.L.M. was for medical bills. While the dismissed and read-in reckless injury charge clearly encompasses those costs, C.L.M.'s injuries also stem from the attempted armed robbery, so we conclude there is no arguable merit to challenging the plea based on the circuit court's failure to discuss the nature of read-ins.

circuit court failed to fulfill its obligations or that King's pleas were anything other than knowing, intelligent, and voluntary.[4]

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, ¶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.

In his response to counsel's no-merit report, King appears to take issue with the total length of his sentence, asking to serve the ten-year sentence—five years' initial confinement and five years' extended supervision—that his victims had recommended for him at sentencing. This

[4] 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 __, 916 N.W.2d 643. ***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.

court will sustain the circuit court's exercise of discretion if the conclusion reached was one that a reasonable judge could reach even if this court might have reached a different conclusion and imposed a different sentence. *See* ***Odom***, 294 Wis. 2d 844, ¶8.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. It noted that this case was "just not a probation situation"—it was "just too serious for that, even given [King's] youth" and, in light of the harm done to the community, probation would unduly depreciate the seriousness of the offenses.

The circuit court gave great weight to community protection, noting that this case involved the intersection of gun violence, carjackings, and violent crimes by juveniles. It commented that these offenses were "very violent" over a "relatively short period of time," and there easily could have been a homicide. Punishment was another important objective for the circuit court, along with deterrence. It noted that the offenses required planning by multiple people. It also stated that "this course of conduct [is] so bad, and so over the top, that even a 15-year-old has to know better[.]" The circuit court did consider mitigating factors, such as King's supportive family, his lack of a prior record, and his physical condition.[5] Nevertheless, the circuit court stated that it would give weight to protecting the community and what it viewed as a "present danger."

Although King received the maximum twenty-year sentence on each count, those sentences do not exceed the maximum allowed by law. *See* WIS. STAT. §§ 943.32(2),

[5] The record reflects that King was in a wheelchair during court proceedings, presumably as a result of being shot by his victim. The record does not indicate the nature of King's injuries.

939.32(1g)(b)1., 939.50(3)(c). In light of the sentencing factors articulated by the circuit court, all of which were proper considerations, the sentences imposed would not shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Moreover, King could have received a sentence totaling forty years' imprisonment if the circuit court had ordered the sentences to be served consecutively rather than concurrently. The circuit court noted specifically that King is "still going to be … [a] very young man when this sentence is over[.]" There is no arguable merit to a challenge to the circuit court's sentencing discretion.[6]

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 Angela C. Kachelski is relieved of further representation of King 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

[6] King did not dispute the amount of restitution C.L.M. had claimed, but did dispute whether he would ever be able to pay over $29,000. However, the circuit court explained that its first objective was to make victims whole. Further, "sometimes good financial things do happen to people in the future." The circuit court commented that any payments King might be able to make while imprisoned "won't amount to very much money, they will probably leave a large balance, but I think I have to operate from the principle of we should do what we can to make victims whole and see what happens in the future." The circuit court thus appears to have made proper considerations under WIS. STAT. § 973.20(13)(a), and we discern no arguably meritorious challenge to the exercise of discretion in awarding restitution. *See* ***State v. Haase***, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526.