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DISTRICT I

January 15, 2019

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

2016AP2003-CRNM State of Wisconsin v. Miguel Bailey Torres-Bailey
(L.C. # 2014CF4627)

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).

Miguel Bailey Torres-Bailey appeals from a judgment of conviction, entered upon his guilty pleas, on one count of second-degree reckless homicide with a dangerous weapon and one

count of possession of a firearm by a felon. Appellate counsel[1] has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[2] Torres-Bailey 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 that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgment.

Torres-Bailey was charged with first-degree intentional homicide with a dangerous weapon and possession of a firearm by a felon in the shooting death of Jim Penny. Torres-Bailey shot at Penny, who was in a car. Penny was hit, and the bullet traveled through his diaphragm, mesentery, small intestine, and right iliac artery and vein. A witness to the shooting, who knew both Torres-Bailey and Penny, believed the men had ongoing disputes regarding Torres-Bailey's girlfriend and his minor child. Police recovered Torres-Bailey's cell phone from the shooting scene and determined he had exchanged threatening texts with Penny shortly before the shooting.

Penny had also been able to fire at Torres-Bailey, who was injured and sought treatment at the hospital. A police officer was dispatched to investigate a potential shooting victim, as reported by the hospital. Torres-Bailey told the officer he had heard two gunshots and realized he had been shot. He made no statement indicating he was involved in an altercation with Penny or even that he had been in possession of a gun.

[1] The no-merit report was filed by Assistant State Public Defender John R. Breffeilh. While this matter was pending, Attorney Breffeilh took a new position out of state. He was withdrawn as counsel, and Assistant State Public Defender Andrea Taylor Cornwall was appointed as successor counsel. She is the current attorney of record.

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

Torres-Bailey filed a pretrial motion to suppress his statement given to the police officer at the hospital, claiming he had not been properly given ***Miranda***[3] warnings. He also filed a ***McMorris***[4] motion, seeking to admit evidence of Penny's prior threatening behavior. The circuit court scheduled a motion hearing at which only Officer Kurt Saltzwadel, the officer who had responded to the hospital, testified. After hearing Saltzwadel's testimony, the circuit court denied the motion to suppress Torres-Bailey's statement. The ***McMorris*** motion was granted in part and denied in part.

Subsequently, Torres-Bailey agreed to resolve this case with a plea agreement. In exchange for his pleas to second-degree reckless homicide with a dangerous weapon and possession of a firearm by a felon, the State agreed to simply recommend a substantial prison term without specifying an exact length of time. The circuit court accepted the pleas and sentenced Torres-Bailey to fifteen years of initial confinement and ten years of extended supervision on the homicide, plus five years of initial confinement and five years of extended supervision for the firearm possession, to be served consecutively. Torres-Bailey appeals.

The first issue discussed in the no-merit report is whether the circuit court erred in denying Torres-Bailey's motion to suppress his statement. Generally, a valid guilty or no-contest plea waives nonjurisdictional defects and defenses, *see* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886, but orders denying motions to suppress evidence may be challenged on direct appeal despite the entry of a plea, *see* WIS. STAT. § 971.31(10).

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] *See* ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

A circuit court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not reverse the circuit court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***, ¶9.

Officer Saltzwadel testified that his purpose in interviewing Torres-Bailey was to determine whether the shooting had occurred and who was involved. He encountered Torres-Bailey in a trauma room, where Torres-Bailey was being treated for gunshot wounds. At least three medical personnel were in the room. At the time, Saltzwadel did not know whether Torres-Bailey was a suspect in the shooting, and there was no information relayed to him during the interview to indicate Torres-Bailey was a suspect. While Saltzwadel testified that he did not think Torres-Bailey was free to leave and that he was detaining Torres-Bailey, this information was not conveyed in any way to Torres-Bailey. Indeed, Saltzwadel also acknowledged he could not have prevented Torres-Bailey from leaving the hospital room. Saltzwadel also never placed Torres-Bailey under arrest. Saltzwadel estimated that they spoke for less than five minutes and that he allowed Torres-Bailey to be nonresponsive to some questions. It is undisputed that Saltzwadel did not administer ***Miranda*** warnings to Torres-Bailey before speaking with him.

Miranda dealt primarily "with the restricted and coercive atmosphere when the defendant is accompanied only by the police and is in isolation from others and the world in general and the psychological pressures thus placed on the defendant." ***State v. Clappes***, 117 Wis. 2d 277, 282, 344 N.W.2d 141 (1984). Thus, ***Miranda*** warnings "are required before questioning where 'an individual is taken into custody or otherwise deprived of his freedom by the authorities[.]'" ***State v. Schambow***, 176 Wis. 2d 286, 292, 500 N.W.2d 362 (Ct. App. 1993) (citation omitted).

"A suspect is in custody when the suspect's freedom to act is restricted to a 'degree associated with formal arrest.'" ***State v. Torkelson***, 2007 WI App 272, ¶13, 306 Wis. 2d 673, 743 N.W.2d 511 (citation omitted). In assessing whether a person is "in custody," the circuit court must consider the totality of the circumstances, including whether the person is free to leave, the purpose, place and length of the questioning, and the degree of restraint. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). However, "the conditions of custody or [other] deprivation of freedom requiring ***Miranda*** warnings [are] those caused or created by the authorities." ***Clappes***, 117 Wis. 2d at 285; *see also* ***State v. Bartelt***, 2018 WI 16, ¶47, 379 Wis. 2d 588, 906 N.W.2d 684, *cert. denied*, __ U.S.__, 139 S.Ct. 104 (2018).

The circuit court made findings of fact that essentially incorporated Saltzwadel's undisputed testimony. We discern no arguably meritorious claim that these findings are clearly erroneous. Relying on its factual findings, the circuit court concluded:

> Under all of the circumstances [Torres-Bailey] was not told he was arrested. He was being treated. As the officer indicated, had he wanted to leave he could have left. The officer would not have been able to prevent him from leaving. Under the circumstances no reasonable person could reasonably believe that they were under arrest during the five minutes or less than five minutes that the officer was talking to the defendant.
>
> So at this point I will find that the defendant was not the subject of any type of custodial interrogation. So the fact that the constitutional rights warnings were not given is of no consequence. They were not required. So the defense motion for suppression of the statements made to Officer Saltzwadel at the hospital … is denied.

We agree with the circuit court's conclusion that there is no evidence to support a conclusion that Torres-Bailey was deprived of his freedom due to conditions caused by the authorities. *See, e.g.*, ***Schambow***, 176 Wis. 2d at 292-95; ***Clappes***, 117 Wis. 2d at 286-87. There is no arguable merit to a claim the circuit court erroneously denied the suppression motion.

The second potential issue the no-merit report discusses is whether there is any arguable merit to a motion for plea withdrawal because Torres-Bailey's pleas were not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

Torres-Bailey 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 form correctly acknowledged the maximum penalties Torres-Bailey faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 270-71.

The circuit court also conducted a plea colloquy with Torres-Bailey. Our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas pursuant to WIS. STAT. § 971.08, ***Bangert***, 131 Wis. 2d at 261-62, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Torres-Bailey's pleas were anything other than knowing, intelligent, and voluntary.[5]

[5] Two mandatory DNA surcharges were assessed on the judgment of conviction. Because of the multiple 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 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, 383 Wis. 2d 733, 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.

(continued)

The final issue the no-merit report addresses is whether the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence. *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* ***id.*** Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors and considered no improper factors.

Torres-Bailey was sentenced to the maximum penalty for his base offenses: twenty-five years of imprisonment for the homicide and ten years of imprisonment for the firearm possession. *See* WIS. STAT. §§ 940.06(1) (2013-14) & 939.50(3)(d) (2013-14) (second-degree homicide); *see also* WIS. STAT. §§ 941.29(2)(a) (2013-14) & 939.50(3)(g) (2013-14) (possession of a firearm by a felon). However, the circuit court did not invoke the dangerous weapon penalty

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Shortly after the release of ***Freiboth***, Attorney Cornwall submitted a supplemental statement, indicating her conclusion that there was "no arguable merit to a claim that plea withdrawal is warranted in this case because Mr. Torres-Bailey was not advised at the time of his plea that he faced multiple mandatory DNA surcharges." This conclusion relied on ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, which, while holding that the mandatory DNA surcharge is not punitive, dealt with only a single surcharge. Nevertheless, based on ***Freiboth***, we agree with the ultimate conclusion that there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

enhancer on the homicide, for which it could have imposed an additional five years of imprisonment. *See* WIS. STAT. § 939.63(1)(b) (2013-14). Thus, the thirty-five year sentence imposed is within the forty-year range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. We do not believe the sentence is so excessive under the circumstances so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, there would be no arguable merit to a challenge to the court's sentencing 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 Andrea Taylor Cornwall is relieved of further representation of Torres-Bailey 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