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DISTRICT I

March 11, 2019

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

2018AP1802-CRNM State of Wisconsin v. Miguel Griffin (L.C. # 2015CF3799)

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).

Miguel Griffin appeals from a judgment, entered upon his guilty pleas, convicting him of one count of first-degree recklessly endangering safety with use of a dangerous weapon and one count of possession of a firearm by a felon. Griffin also appeals from an order denying his

postconviction motion to withdraw his pleas. Appellate counsel, Attorney Carly Cusack, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Griffin 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 there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

On August 12, 2015, Griffin and his girlfriend, D.O.-R., got into an argument, and Griffin began hitting her. D.O.-R.'s brother, T.O., entered the room and saw Griffin hit D.O.-R. Griffin and T.O. then began fighting. D.O.-R. went to call police. Griffin and T.O. separated, with T.O. retreating to his room. Griffin entered T.O.'s room and pointed a gun at T.O.'s head. T.O. tried to convince Griffin to drop the gun and tried to shut the door, but Griffin pushed the door open and fired once, striking T.O. in the knee. Griffin also pointed his gun at D.O.-R., but another person dragged him from the house and out to a car. A criminal complaint charged Griffin with first-degree recklessly endangering safety with use of a dangerous weapon, endangering safety with a dangerous weapon (pointing), misdemeanor battery as an act of domestic abuse, and possession of a firearm by a felon.

Griffin agreed to plead guilty to first-degree recklessly endangering safety with use of a dangerous weapon, a Class F felony, and possession of a firearm by a felon, a Class G felony. *See* WIS. STAT. §§ 941.30(1), 941.29(2) (2013-14). In exchange, the State would recommend concurrent prison terms without specifying a length, and the other two charges would be

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

dismissed and read in. At sentencing, the circuit court imposed consecutive terms of six years' initial confinement and six years' extended supervision for recklessly endangering safety, plus two years' initial confinement and two years' extended supervision for possession of a firearm.[2]

Griffin also filed a postconviction motion, seeking to withdraw his guilty pleas on the grounds that he had not been informed during the plea colloquy that two mandatory DNA surcharges were part of the punishment he faced. The circuit court held the motion in abeyance pending decisions in ***State v. Odom***, appeal No. 2015AP2525-CR, and ***State v. Freiboth***, appeal No. 2015AP2535-CR. Ultimately, this court held in ***Freiboth*** that the mandatory DNA surcharge is not a punishment, so a circuit court does not have a duty during a plea colloquy to inform a defendant about that surcharge. *See* ***id.***, 2018 WI App 46, ¶12, 383 Wis. 2d 733, 916 N.W.2d 643. Thus, the circuit court denied the postconviction motion.[3] Griffin appeals.

The first potential issue appellate counsel discusses is whether Griffin's pleas were knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Griffin 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

[2] Later, the term of extended supervision for recklessly endangering safety was commuted to a five-year term after the Department of Corrections informed the circuit court that a six-year term exceeded the allowable statutory amount. *See* WIS. STAT. §§ 973.01(2)(d)4. (for Class F felony, "the term of extended supervision may not exceed 5 years"), 973.13 ("In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.").

[3] The Honorable Frederick C. Rosa accepted Griffin's pleas and imposed sentence. The Honorable T. Christopher Dee denied the postconviction motion.

for first-degree recklessly endangering safety and possession of a firearm by a felon were initialed by Griffin and attached to the form.[4] The plea questionnaire form correctly acknowledged the maximum base penalties Griffin faced[5] and the form, along with an addendum, also specified the constitutional rights Griffin 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. Our review of the record satisfies us that the circuit court adequately complied with its obligations for taking a guilty plea. *See* § 971.08; *see also* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906; ***Bangert***, 131 Wis. 2d at 261-62. There is no arguable merit to a claim that Griffin's pleas were not knowing, intelligent, and voluntary.

The other potential issue appellate counsel discusses 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*

[4] The jury instructions for the "while armed" penalty enhancer were not included with the plea questionnaire. *See* WIS JI—CRIMINAL 990. The circuit court, however, confirmed that Griffin understood that the State had alleged he had used a dangerous weapon while committing the crime of first-degree recklessly endangering safety.

[5] The plea questionnaire form does not list the additional five years Griffin faced for the "while armed" penalty enhancer. *See* WIS. STAT. § 939.63(1)(b). The circuit court, however, informed Griffin of the additional five years he faced for the penalty enhancer, and Griffin affirmatively acknowledged his understanding of that potential penalty.

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 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.

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. Among other things, the circuit court noted that Griffin's adult record appeared to be a continuation of his juvenile record, Griffin had not done well in the juvenile system, Griffin appeared to have an "affinity" for firearms, and, in this case, Griffin was in possession of a firearm when he should not have been.

Griffin faced a maximum possible sentence of twenty-seven and one-half years of imprisonment. The sixteen-year sentence imposed is well within that range, *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 circuit court's sentencing discretion.

We note that, prior to the appointment of postconviction/appellate counsel, Griffin sent a *pro se* letter to the circuit court regarding his sentence structure. Griffin wrote, in relevant part, that he believed "as a part of the plea agreement … the sentences were to be [run] concurrent with the [eligibility] for challenge incarceration program and substance abuse to help me with my drug habit and the State was supposed to stand silent after these agreements." While the letter indicates that Griffin was expecting his attorney "to file a motion/appeal … addressing these [issues]," appellate counsel does not discuss this letter in the no-merit report.

We have independently considered whether Griffin's letter identifies any arguably meritorious sentencing issues. Accompanying the plea questionnaire form is a page memorializing the State's offer, which appears to have been copied and pasted from an email between the State and defense counsel. This printed page matches the terms of the agreement as stated on the record at the plea hearing—notably, that the State would recommend concurrent sentences, which it did. There is no mention of the challenge incarceration program or substance abuse program as part of the agreed-upon sentencing recommendation. Further, the circuit court cautioned Griffin, and he acknowledged, that the circuit court was not bound by the terms of the plea agreement.

The circuit court did not make Griffin eligible for either early release program, but that is a discretionary decision, and our review of the circuit court's sentencing comments—in particular, its statement that Griffin was a danger to the community—supports that determination. *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187 (separate findings on eligibility for programs not required so long as the overall sentencing rational justifies eligibility determination). Accordingly, there is no arguable merit to pursuing any claims regarding Griffin's eligibility for programs or the consecutive structure of his sentences.

We have also independently considered whether Griffin has an arguably meritorious claim for a breach of the plea agreement, as "[a] criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." *See* ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244. However, the only part of the process on which the State was required to "stand silent" under the terms of the agreement was the specific length of any

possible prison sentence. The record reflects that the State fulfilled its part of the bargain. Thus, there is no arguably meritorious claim for a breach of the plea agreement to be pursued.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Carly Cusack is relieved of further representation of Griffin in this matter. *See* WIS. STAT. RULE 809.32(3) (2017-18).

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

Sheila T. Reiff
Clerk of Court of Appeals