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DISTRICT I

Amended March 27, 2019
March 21, 2019

To:

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

2018AP1138-CRNM State of Wisconsin v. Marcel L. Westbrook (L.C. # 2014CF5173)

Before Kessler, P.J., Brennan and Kloppenburg, 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).

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).

Marcel L. Westbrook appeals a judgment convicting him of armed robbery as a party to a crime for his role in a carjacking involving a woman and her baby. He also appeals two orders denying his motions for postconviction relief. Attorney Christopher D. Sobic, who was

appointed to represent Westbrook, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18),¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Westbrook was advised of his right to respond, but he has not done so. After considering the no-merit report and conducting an independent review of the record, we conclude that there are no issues of arguable merit that Westbrook could raise on appeal. Therefore, we summarily affirm the judgment of conviction and orders denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be arguable merit to a claim that Westbrook's guilty plea was not knowingly, intelligently, and voluntarily entered. Before accepting a plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading guilty, the constitutional rights he or she is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Based on our review of the record, we conclude that the circuit court's colloquy with Westbrook complied with § 971.08 and *Brown*, 293 Wis. 2d 594, ¶35. There would be no arguable merit to an appellate challenge to the guilty plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. The circuit court imposed seven years of initial incarceration and four years of extended supervision. We agree with counsel's analysis that an appellate challenge to the sentence would lack arguable merit because the circuit

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

court properly exercised its sentencing discretion. The court explained the objectives of the sentence, considered appropriate sentencing factors in light of the circumstances, and reached a reasoned and reasonable decision. See *State v. Gallion*, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. There would be no arguable merit to a sentencing challenge.

The no-merit report next addresses whether the circuit court erred in denying Westbrook's postconviction motion for resentencing based on Westbrook's claim that the circuit court incorrectly believed that he had three robbery adjudications as a juvenile, rather than one robbery adjudication. A defendant seeking resentencing on the ground that the circuit court relied on inaccurate information must show both that the information was inaccurate and that the circuit court actually relied on the inaccurate information. *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). At the postconviction motion hearing, the circuit court said that during sentencing it had been looking at Westbrook's electronic juvenile record and saw only one robbery adjudication. Although the circuit court's sentencing comments were unclear, the circuit court unequivocally stated that it had accurate information during the sentencing hearing when it denied the postconviction motion. Therefore, there would be no arguable merit to this claim.

The no-merit report also addresses whether there would be arguable merit to a claim that Westbrook should be resentenced because the circuit court incorrectly believed that Westbrook physically assaulted a victim by punching him when he committed robbery with use of force as a juvenile. In its order denying the postconviction motion, the circuit court explained that Westbrook had *six* separate juvenile cases, some of which were quite similar to the offense in this case. The court further explained that it "did not rely on the specific factual allegations of any one juvenile offense in making its sentencing decision in this case but rather [relied]

collectively upon the entirety of the juvenile record,” which showed that Westbrook “had committed a series of bold and confrontational-type offenses showing a lack of respect for law enforcement and authority involving taking people’s property by force and threatening people.” Because the circuit court explained that it relied on Westbrook’s prior record as a whole, rather than the specific punching allegation, there would be no arguable merit to a claim that Westbrook is entitled to relief for being sentenced on the basis of inaccurate information. *See id.*

Finally, the no-merit report addresses whether there would be arguable merit to a claim that Westbrook is entitled to resentencing because his attorney incorrectly told the circuit court that he had no mental health issues when, in fact, he has suffered from depression and was diagnosed with ADHD. At the postconviction motion hearing, the circuit court stated that, while it did not want to minimize the seriousness of depression and ADHD, knowing that Westbrook had been diagnosed with these illnesses would not have changed its sentencing decision. The court said that it was aware that Westbrook must have had some mental health issues in the past or he would not have qualified for wraparound services. Because the circuit court explained why the mental health information would not have changed its sentence, we conclude that there would be no arguable merit to this issue. *See id.*

Our independent review of the record also reveals no arguable basis for an appeal. Therefore, we affirm the judgment of conviction and orders denying postconviction relief, and relieve Attorney Sobic from further representation of Westbrook.

IT IS ORDERED that the judgment and orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christopher Sobic is relieved of any further representation of Westbrook 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