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DISTRICT III

May 7, 2019

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

2018AP123-CRNM State of Wisconsin v. Percy Nathaniel Sims
(L. C. No. 2015CF1005)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Percy Sims has filed a no-merit report concluding no grounds exist to challenge either Sims's conviction for first-degree intentional homicide, contrary to WIS. STAT. § 940.01(1)(a) (2017-18), or the order denying Sims's postconviction motion for plea

withdrawal.¹ Sims was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment and the order. *See* WIS. STAT. RULE 809.21.

The State charged Sims with first-degree intentional homicide with use of a dangerous weapon, possession of a firearm by a felon, and armed robbery, all counts as a repeater. The charges arose from allegations that Sims shot and killed Krystal Torres-Smith and took property, including Torres-Smith's cell phone, from her person. In exchange for Sims's guilty plea to the homicide charge without the penalty enhancers, the State agreed to dismiss and read in the remaining charges in this case, as well as pending charges in other matters. The State also agreed to recommend eligibility to petition for parole after forty years of the mandatory life sentence. The defense remained free to argue at sentencing. The circuit court imposed a life sentence to commence June 28, 2016, with eligibility to seek parole in forty years.² Sims filed a postconviction motion for plea withdrawal, and that motion was denied after a hearing.³

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

² The parties and the circuit court spoke in terms of "parole" eligibility. Where, as here, a person is sentenced to life imprisonment for a crime committed on or after December 31, 1999, the circuit court shall make an "extended supervision eligibility date determination." WIS. STAT. § 973.014(1g)(a); *see also State v. Brown*, 2006 WI 131, ¶6, 298 Wis. 2d 37, 725 N.W.2d 262 ("Under Truth in Sentencing, extended supervision and reconfinement are, in effect, substitutes for the parole system that existed under prior law."). Because the reference to parole eligibility rather than extended supervision eligibility appears to be a mere oversight on the part of the parties and the circuit court, upon remittitur, the court

(continued)

Although the no-merit report does not specifically address it, the record discloses no arguable basis for withdrawing Sims's guilty plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Sims completed, informed Sims of the elements of the offense, the penalty that would be imposed—namely, the mandatory life sentence—and the constitutional rights he waived by entering a guilty plea. The circuit court confirmed that Sims understood the court was not bound by the terms of the plea agreement, *see State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and advised Sims of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Sims acknowledged that the medications he was taking did not interfere with his ability to understand the proceedings. Although Sims disputed some facts in the criminal complaint, he agreed that any facts in dispute did not go to the elements of first-degree intentional homicide. The circuit court, therefore, properly found that undisputed facts in the complaint formed a sufficient factual basis to support the conclusion that Sims committed the crime charged. The record shows the plea was knowingly, voluntarily and intelligently made. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The no-merit report addresses whether the circuit court properly exercised its sentencing discretion; whether the court properly denied Sims's postconviction motion for plea withdrawal; and whether there are any grounds to challenge the effectiveness of Sims's trial counsel. Upon

shall enter an amended judgment of conviction correctly reflecting Sims's eligibility for extended supervision, rather than parole.

³ Although Sims was present and testified at the hearing on his postconviction motion, he did not appear in person or telephonically when the court later gave its oral ruling denying the postconviction motion. However, pronouncement of an oral ruling is not a type of proceeding for which a defendant has a statutory right to be present. *See* WIS. STAT. § 971.04(1). Therefore, any challenge to the ruling based on Sims's absence would lack arguable merit.

reviewing the record, we agree with counsel's description, analysis, and conclusion that there is no arguable merit to these issues. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgment is modified and, as modified, affirmed; order affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney James Rebholz is relieved of his obligation to further represent Sims 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