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May 17, 2019

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

2017AP1719-CRNM State of Wisconsin v. Carlton E. Johnson (L.C. # 2013CF1655)

Before Brennan, 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).

Carlton E. Johnson appeals from a judgment convicting him of robbery of a financial institution and attempting to flee or elude a traffic officer. *See* WIS. STAT. §§ 943.87, 346.04(3) (2013-14).[1] His appellate counsel, Assistant State Public Defender Jeremy C. Perri, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738

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

(1967). Johnson filed a response to the no-merit report and counsel filed a supplemental no-merit report. Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no issue of arguable merit that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

Johnson was charged with two counts of robbery of a financial institution and one count of attempting to flee or elude a traffic officer. He pled guilty to one count of robbery of a financial institution and to attempting to flee or elude a traffic officer, and the remaining charge of robbery of a financial institution was dismissed as a read-in. The circuit court conducted a plea colloquy, accepted Johnson's guilty pleas, and found him guilty. On the robbery count, the circuit court sentenced Johnson to fifteen years of initial confinement and five years of extended supervision to run concurrently with a revocation sentence he was serving. On the attempting to flee or elude count, the circuit court imposed a concurrent sentence of one year and six months of initial confinement and two years of extended supervision. The circuit court determined that Johnson was ineligible for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP).

In a WIS. STAT. RULE 809.30 motion, Johnson sought additional sentence credit (reflecting a total of 137 days) and a finding of eligibility for CIP and SAP. The postconviction court determined that Johnson was eligible for CIP and SAP after serving thirteen years of confinement, a waiting period it deemed was "necessary to strike a proper balance between

[Johnson]'s AODA treatment needs and the goals of punishment, deterrence and community protection."[2] Johnson's motion for sentence credit subsequently was granted.[3]

This appeal follows. The no-merit report addresses the potential issues of whether Johnson's pleas were intelligently, voluntarily, and knowingly entered, and whether the sentences were the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court discusses them further only to the extent they tie into issues raised by Johnson.[4]

In his response to the no-merit report, Johnson argues that trial counsel was ineffective because she misstated, on the plea questionnaire and waiver of rights form, the bifurcated sentences he faced on each of the charges to which he pled guilty; the circuit court relied on inaccurate information when it sentenced him; the State breached the terms of the plea agreement at sentencing; and a new factor exists that warrants sentence modification. We will address each issue in turn.

On the plea questionnaire and waiver of rights form, Johnson's trial counsel properly listed the maximum penalties but misstated the bifurcated sentences Johnson faced on each

[2] The Honorable William S. Pocan issued the order resolving Johnson's request for a finding of eligibility for CIP and SAP.

[3] The Honorable David A. Hansher issued the order resolving Johnson's request for sentence credit.

[4] We note that the circuit court did not recite the deportation warning that WIS. STAT. § 971.08(1)(c) requires. It should have. The record, however, indicates that Johnson was born in Wisconsin. Johnson thus would be unable to show that his plea is likely to result in deportation, exclusion from admission to this country, or denial of naturalization. *See* § 971.08(2). Consequently, the failure to recite the deportation warning amounted to harmless error. *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶4, 378 Wis. 2d 504, 904 N.W.2d 773.

charge. The maximum penalty for robbery of a financial institution was forty years of imprisonment and a $100,000 fine. The correct maximum bifurcation was twenty-five years of initial confinement and fifteen years of extended supervision. *See* WIS. STAT. § 973.01(2)(b)3., (d)2. The guilty plea questionnaire form, however, indicates that the forty years could be bifurcated as twenty years of extended supervision and twenty years of initial confinement.

The maximum penalty for attempting to flee or elude a traffic officer was properly listed as three years and six months of imprisonment and a $10,000 fine. The correct maximum bifurcation was one year and six months of initial confinement and two years of extended supervision. *See* WIS. STAT. § 973.01(2)(b)9., (d)6. Yet, the guilty plea questionnaire form indicates that the sentence could be bifurcated as two years of initial confinement and one year and six months of extended supervision. Johnson asserts that as a result of these misstatements, he did not understand the range of punishments he faced and that consequently, his pleas were not made intelligently.

Claims of ineffective assistance of trial counsel must first be raised in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court normally declines to address such questions in the context of a no-merit review if the issue was not first raised in a postconviction motion in the circuit court. However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether an ineffective assistance of counsel claim has sufficient merit to require appellate counsel to file a postconviction motion and request a ***Machner*** hearing.

In his no-merit report, appellate counsel addresses the viability of a claim of trial counsel's ineffectiveness on this basis. A claim of ineffective assistance of counsel has two

parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate counsel explains that for this issue to have arguable merit, Johnson would be required to show prejudice, i.e., that if the maximum bifurcation had been properly stated on the plea questionnaire form, there is a reasonable probability that Johnson would not have entered his guilty pleas. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. In an affidavit submitted with his supplemental no-merit report, appellate counsel avers that he asked Johnson about the incorrect bifurcation maximum penalties listed on the plea questionnaire and Johnson said "that he never talked about the potential bifurcation with trial counsel and he was not even aware of what the potential bifurcation could be." *See* WIS. STAT. RULE 809.32(1)(f) ("If the attorney is aware of facts outside the record that rebut allegations made in the person's response, the attorney may file … a supplemental no-merit report and an affidavit … including matters outside the record."). Johnson cannot demonstrate prejudice from the misstated bifurcation maximums written on the plea questionnaire form.

Johnson also contends that the State made several inaccurate statements regarding Johnson's failure to take advantage of and complete various opportunities offered while he was in the juvenile corrections system or as part of his alternative to revocation and that the circuit court relied on these statements when it sentenced him. Johnson directs our attention to the following sentencing remarks by the circuit court: "every time you got a[n] opportunity, I think it's quite clear you weren't ready to take advantage of it for whatever reason"; and in terms of the alternative to revocation, "it was quite clear that you were really not ready or interested in doing what was required[.]" To establish a due process violation regarding an allegedly

inaccurate basis for the sentence, a defendant must show both that the information the court considered was false and that the court relied on the false information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1.

With his response, Johnson included various exhibits to reflect his willingness to participate in and complete programming. Appellate counsel, in his supplemental no-merit report, concludes that the circuit court's comments at sentencing were not inaccurate. In his affidavit, appellate counsel states that he obtained Johnson's juvenile records, information about Johnson's programming while at Lincoln Hills School, and Johnson's Department of Corrections records while on supervision. *See* WIS. STAT. RULE 809.32(1)(f). Appellate counsel details Johnson's shortcomings following his release from custody in another matter and after completing a program designed to address criminal thinking and decision making in 2004. There is no arguable merit to a challenge on this basis.

Next, Johnson asserts that there is arguable merit to a claim that the State breached the terms of the plea agreement during his sentencing. As part of the plea agreement, the State agreed that it would not make a specific sentencing recommendation. During the State's remarks at the sentencing hearing, the prosecutor concluded by saying: "I simply ask that you fashion a fair and just sentence for Mr. Johnson." According to Johnson, this statement was a clear breach of the plea agreement. A breach of a plea bargain may entitle a defendant to relief, but to be actionable, the breach must be material and substantial. *See* ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. We see no error, let alone an actionable breach, by the State's remark. There is no arguable merit to a challenge on this basis.

As for the new factor that was overlooked, Johnson submits correspondence between trial counsel and the State that indicates Johnson's willingness to cooperate with law enforcement. Johnson argues that this information, which was highly relevant to sentencing, was never presented to the circuit court. "Substantial and important assistance to law enforcement" can, in certain circumstances, constitute a new factor, *see* ***State v. Boyden***, 2012 WI App 38, ¶¶12, 15-17, 340 Wis. 2d 155, 814 N.W.2d 505 (citation omitted), but here, Johnson's offer to cooperate was never realized. There is no arguable merit to a challenge on this basis.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the convictions and discharges appellate counsel of the obligation to represent Johnson further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeremy C. Perri is relieved from further representing Carlton E. Johnson in this appeal. *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