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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 12, 2019

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room G-8
Milwaukee, WI 53233

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Steven Zaleski
The Zaleski Law Firm
10 E. Doty St., Ste. 800
Madison, WI 53703

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Raphfeal Lyfold Myrick 448715
Stanley Correctional Inst.
100 Corrections Drive
Stanley, WI 54768

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

2016AP247-CRNM State of Wisconsin v. Raphfeal Lyfold Myrick (L.C. # 2009CF3494)

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

Raphfeal Lyfold Myrick appeals a judgment entered after he pled guilty to felony murder as a party to a crime. *See* WIS. STAT. §§ 940.03, 939.05 (2009-10).[1] His appellate counsel, Steven W. Zaleski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders***

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

v. California, 386 U.S. 738 (1967). Myrick received a copy of the report and filed a fifty-one page response raising numerous issues. We then directed appellate counsel to file a supplemental report addressing some of the issues raised by Myrick. Upon consideration of these submissions and an independent review of the remand record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2011, Myrick pled guilty to being a felon in possession of a firearm, and a jury found him guilty of first-degree intentional homicide. The circuit court sentenced him to life in prison on the homicide charge. For being a felon in possession of a firearm, the circuit court sentenced him to a concurrent term of five years of initial confinement and five years of extended supervision.

Myrick appealed. ***State v. Myrick*** (***Myrick I***), 2013 WI App 123, ¶1, 351 Wis. 2d 32, 839 N.W.2d 129. Myrick's original appeal related only to the homicide conviction. *See* ***id.*** We reversed after concluding that the circuit court erred in allowing the State to read, during its case-in-chief, preliminary-examination testimony Myrick provided in another case. *See* ***id.*** The Wisconsin Supreme Court affirmed. ***State v. Myrick*** (***Myrick II***), 2014 WI 55, ¶2, 354 Wis. 2d 828, 848 N.W.2d 743.

On remand, the circuit court vacated Myrick's judgment of conviction and sentence for first-degree intentional homicide. The State subsequently filed an amended information charging Myrick with first-degree intentional homicide and kidnapping, both as a party to a crime. Following negotiations, Myrick pled guilty to felony murder as a party to a crime. In exchange, the State agreed to recommend that Myrick be sentenced to an eighteen-year period of

confinement; it did not make a recommendation as to extended supervision. The circuit court accepted Myrick's plea and sentenced him to seventeen years of initial confinement and eight years of extended supervision.

The no-merit report addresses whether Myrick's plea was freely, voluntarily, and knowingly entered, whether trial counsel was effective, whether the sentence was the result of a proper exercise of discretion, and a number of other issues.[2] We agree with appellate counsel's conclusions that there would be no arguable merit to pursuing these issues on appeal and will discuss the following: the validity of Myrick's guilty plea and the circuit court's exercise of sentencing discretion. We will also address some of the numerous issues Myrick raises in his response.

By his own acknowledgment, many of Myrick's claims "rest on the foundation of the trial proceedings[.]" At the outset, however, we note that the scope of this court's no-merit review is limited to the proceedings on remand. *See* WIS. STAT. RULE 809.10(4) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant … made in the action or proceeding *not previously appealed* and ruled upon." (emphasis added)); *see, e.g.*, ***State v. Drake***, 184 Wis. 2d 396, 400, 515 N.W.2d 923 (Ct. App. 1994). Therefore, to the extent that Myrick raises claims related to the sufficiency of the evidence and to trial errors, those claims need not be considered because they relate to a

[2] Appellate counsel analyzes DNA surcharge, restitution, and sentence credit issues and additionally addresses whether the prosecutor's remarks at sentencing could arguably constitute a violation of the plea agreement.

previous final judgment of conviction.[3] Myrick had an appeal from that judgment of conviction in which he could have challenged the sufficiency of the evidence or other trial errors but did not. He cannot now revive issues he abandoned.

Guilty Plea

In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective and the defendant did not understand information that should have been provided, ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), or demonstrate that under the analysis of ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996), factors extrinsic to the plea colloquy rendered his or her plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794.

Our review of the record—including the signed plea questionnaire and waiver of rights form; the separate document prepared by Myrick's trial counsel and signed by Myrick setting forth agreed upon facts and the terms of the plea agreement; and the plea hearing transcript itself—confirms that the circuit court conducted an appropriate plea colloquy and adequately complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08 and ***Bangert***.

[3] In his response, Myrick asserts that the lack of transcripts and discovery from the original trial hindered him from presenting issues for this court's consideration. Again, issues relating to the previous final judgment of conviction, which was entered after Myrick's original trial, are not presently before us.

As to the remand proceedings, appellate counsel advised in a report to this court that he has provided Myrick with all of the record materials and transcripts.

We note that at one point during the plea hearing, the circuit court improperly referenced the maximum penalty that Myrick faced as thirty-five years. That misstatement, however, appears very shortly after the circuit court's proper advisement to Myrick that the felony murder charge to which Myrick was pleading guilty exposed him to potential imprisonment of fifty-five years. Myrick confirmed that he understood this. Later during the plea hearing, the prosecutor reiterated that Myrick faced a sentence of fifty-five years. Additionally, the fifty-five year maximum was accurately reflected on the second amended information. In light of the record before us, we conclude that a challenge to the validity of the plea based on this isolated misstatement by the circuit court would lack arguable merit. *See* ***State v. Taylor***, 2013 WI 34, ¶¶34-39, 347 Wis. 2d 30, 829 N.W.2d 482.

In his response, Myrick argues that there is arguable merit to a motion to withdraw his plea because factors extrinsic to the plea colloquy—namely, the ineffective assistance of his trial counsel—rendered his plea unknowing, unintelligent, and involuntary. *See* ***Bentley***, 201 Wis. 2d at 312. We specifically asked appellate counsel to address this issue in his supplemental no-merit report.

We normally decline to address claims of ineffective assistance of trial counsel for the first time on appeal, *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), but appellate counsel's no-merit report seeks counsel's discharge from the duty of continued representation. Therefore, we must independently determine whether Myrick's claim has sufficient merit to require appellate counsel to file a postconviction motion and request a ***Machner*** hearing.

To establish a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v.***

Washington, 466 U.S. 668, 687 (1984). In instances where a defendant is seeking to withdraw a plea based upon a claim of ineffective assistance of counsel, it is the defendant's burden to show that, but for counsel's deficient performance, there is a reasonable probability that he or she would not have entered the plea and would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312.

Myrick asserts that his plea was not knowingly, intelligently, and voluntarily entered into due to trial counsel's failure to investigate and provide him with accurate and complete information beforehand. Myrick argues that trial counsel was ineffective in numerous ways, which include the following: (1) failing to investigate the lack of DNA and fingerprints on the gun he allegedly used; (2) failing to retain experts in DNA, fingerprint, and ballistic evidence to rebut the State's expert; (3) failing to impeach an officer who testified that Myrick discarded a handgun; (4) failing to question the lack of gun residue on Myrick; (5) failing to establish a timeline that would answer the question of whether Myrick could have gotten involved after the fatal shooting yet before arrest; (6) failing to retain an expert to substantiate Myrick's state of mind; (7) failing to challenge the addition of the kidnapping charge as vindictive prosecution; and (8) failing to challenge the kidnapping charge under the fruit of the poisonous tree doctrine.

As previously detailed, Myrick had the benefit of a complete trial and a full appeal. He had the same privately retained trial counsel both during the initial trial and on remand when, as described by appellate counsel, Myrick had a complete "do over" of this case. Appellate counsel writes, "It is hard to imagine a defendant having more information about his case at the time he entered this plea, than Myrick." Procedural posture notwithstanding, Myrick argues that "had trial counsel effectively addressed … the issues herein, [his] case would have been stronger leading to a significantly better plea offer[.]"

A defendant must base a challenge to his representation on more than speculation. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (explaining that "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [case]" (citation omitted)). Myrick's claims fall short. They are wholly speculative as to what the investigation Myrick identifies would have revealed, let alone how it would have altered the outcome. His assertions lack arguable merit.

Myrick's other claims appear to relate to matters of trial strategy. The record suggests that trial counsel made a strategic decision not to pursue claims related to the additional kidnapping charge in light of the favorable plea offer that Myrick accepted that reduced his prison exposure.[4] Any contention that trial counsel was ineffective for not pursuing these claims is unavailing because trial counsel cannot be faulted for failing to litigate an issue that became irrelevant by virtue of Myrick's decision to enter a plea. *See* ***Strickland***, 466 U.S. at 689-691 (reasonable strategic decisions do not constitute ineffective assistance of counsel).

Myrick's response does not give rise to an issue of arguable merit under ***Bentley***.

Sentencing

Counsel also discusses the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the circuit court erroneously exercised its

[4] Myrick's trial counsel initially objected to the amended information that added a kidnapping charge after the case was remanded. The circuit court advised the defense that it could reserve objections and argue the matter before the successor court the following week. Four days later, Myrick pled guilty to felony murder.

sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public. ***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* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The circuit court noted that it did not believe that Myrick "couldn't do something other that watch [his co-actor] pump twelve bullets into [the victim]. I think you could have done something more." As mitigating factors, the circuit court noted that Myrick was described as a hard worker with a limited criminal history. Notwithstanding these factors, the circuit court made clear that punishment was a key objective.

The circuit court sentenced Myrick to seventeen years of confinement, which was one year less than the State recommended pursuant to the plea agreement, and eight years of extended supervision. This sentence was well within the maximum sentence allowed.[5]

While Myrick does not challenge the imposition of restitution nor its amount, he does object to the Department of Correction's (DOC) deduction of funds to pay his restitution obligation. "Once the court orders restitution, it is within the DOC's authority to collect it from an inmate." *See* ***State v. Williams***, 2018 WI App 20, ¶7, 380 Wis. 2d 440, 909 N.W.2d 177. This issue is not appropriate for appeal because "[a]s an inmate, [Myrick's] recourse is to the inmate complaint review system (ICRS), WIS. ADMIN. CODE ch. DOC 310 [(Mar. 2018)], which, if denied at the administrative level, allows [Myrick] to bring a writ of certiorari to the circuit court." *See* ***Williams***, 380 Wis. 2d 440, ¶1.

No other issues warrant discussion. Insofar as Myrick's response raises additional issues, we have considered his assertions and concluded that the allegations he makes do not suggest arguably meritorious grounds for further postconviction or appellate proceedings. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (explaining that the court of appeals is not required to explicitly identify and reject the nearly infinite meritless issues that are present). Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Myrick further in this appeal.

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[5] Pursuant to WIS. STAT. § 940.03, the maximum term of imprisonment for felony murder is fifteen years more than the maximum term of imprisonment provided by law for the underlying felony. Here, the underlying felony was kidnapping, carrying a maximum of forty years of imprisonment. *See* WIS. STAT. §§ 940.31(1)(a), 939.50(3)(c). Therefore, the maximum statutory term of imprisonment for felony murder charged in this case was fifty-five years.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Steven W. Zaleski is relieved of further representation of Raphfeal Lyfold Myrick 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