OFFICE OF THE CLERK
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 IV

July 15, 2019

To:

Hon. James P. Daley
Circuit Court Judge
Rock County Courthouse
51 S. Main St.
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
51 S. Main St.
Janesville, WI 53545

Philip J. Brehm
23 W. Milwaukee St., Ste. 200
Janesville, WI 53548

Katharine Buker
Assistant District Attorney
51 S. Main St.
Janesville, WI 53545

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

Brandon Scott Turnure 624556
Stanley Correctional Inst.
100 Corrections Drive
Stanley, WI 54768

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

2018AP205-CRNM State of Wisconsin v. Brandon Scott Turnure (L.C. # 2013CF707)

Before Lundsten, P.J., Blanchard 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).

Attorney Philip Brehm, appointed counsel for Brandon Scott Turnure, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding that there would be no arguable merit to challenging Turnure's judgment of

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

conviction or the orders denying his postconviction motions. Counsel provided Turnure with a copy of the report, and both counsel and this court advised him of his right to file a response. Turnure has not responded. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Background

Pursuant to a plea agreement, Turnure pled guilty in the Rock County Circuit Court to the following three charges: Count 1, armed robbery, use of a dangerous weapon, as a party to the crime (PTAC); Count 2, first-degree recklessly endangering safety, use of a dangerous weapon; and Count 4, a charge of armed robbery, use of force, PTAC, from Dane County. During the plea colloquy, the circuit court informed Turnure that the maximum penalty for each armed robbery charge was 40 years, and that the maximum penalty for the reckless endangerment charge was 12½ years.

At sentencing, the circuit court withheld sentence on Count 4, the Dane County count, and imposed a 10-year period of probation, consecutive to Turnure's Rock County sentences. On the Rock County counts, the court imposed 12 years of initial confinement followed by 6 years of extended supervision on Count 1, and 12 years of initial confinement followed by 5 years of extended supervision on Count 2, to run concurrently. By imposing more than 7½ years of initial confinement on Count 2, a Class F felony, the sentencing court invoked the WIS. STAT. § 939.63(1)(b) dangerous weapon enhancer. The court ruled that Turnure was authorized to participate in the Challenge Incarceration Program after he had served 8 years of confinement, but was not eligible for the Substance Abuse Program. Turnure filed a postconviction motion for

sentence modification, requesting that the court find him eligible for the Substance Abuse Program. The court denied the motion, and Turnure appealed.

On June 5, 2017, this court issued an order identifying three potential issues of arguable merit. First, we noted that, although the record demonstrates that Turnure pled guilty to first-degree recklessly endangering safety by use of a dangerous weapon, the plea-taking court did not mention the WIS. STAT. § 939.63 weapon enhancer, and misleadingly informed Turnure that the maximum penalty was 12½ years, which is the maximum without the enhancer. Second, we noted that the circuit court did not inform Turnure that it was not bound by the terms of any plea agreement as required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Third, we stated that the judgment of conviction reflects that Turnure's conviction on Count 1, armed robbery, PTAC, includes the § 939.63(1)(b) dangerous weapon enhancer, even though the State had acknowledged in earlier proceedings that the weapon enhancer could not properly be applied to the armed robbery offense.

After consulting with Turnure, counsel moved to dismiss the appeal. This court granted the motion and dismissed the appeal without prejudice. Turnure then filed a postconviction motion under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), requesting that he be allowed to withdraw his pleas because he was not accurately advised of the penalty for Count 2, first-degree recklessly endangering safety by use of a dangerous weapon, and further alleging that he was not aware of the maximum sentence when he entered his plea. The circuit court denied the motion after an evidentiary hearing, and this no-merit appeal follows.

Discussion

We turn first to the issue of whether there would be any arguable merit to challenging the circuit court's denial of Turnure's postconviction motion for plea withdrawal. "A post-conviction motion to withdraw a plea is addressed to the discretion of the trial court and will be granted only when necessary to correct a manifest injustice." ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. "We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.***

Turnure's postconviction motion for plea withdrawal identified a defect in the plea colloquy and alleged that he did not know or understand the information that should have been provided at the plea hearing—namely, that he faced a maximum possible sentence of 17½ years on Count 2, due to the application of the weapon enhancer. Therefore, Turnure was entitled to a hearing at which the State had the burden of showing that the plea was nonetheless knowing and voluntary. *See* ***Bangert***, 131 Wis. 2d at 274.[2]

[2] The plea colloquy was also defective in that the circuit court failed to inform Turnure that the court was not bound by the terms of the plea agreement, as required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. However, given that the imposed sentences were less than the joint sentencing recommendation, Turnure received the benefit of the plea agreement. Therefore, there would be no arguable merit to a claim that this defect in the colloquy presents a manifest injustice warranting plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶¶12, 14, 339 Wis. 2d 421, 811 N.W.2d 441.

An evidentiary hearing was held on Turnure's postconviction motion on October 11, 2017. Turnure and his trial counsel testified at the hearing. In response to questioning by the prosecutor, Turnure admitted that he was not disputing that weapons were involved. When the prosecutor asked Turnure whether he had a copy of the amended information in front of him at the time he pled, Turnure answered, "Yes, I think." The amended information correctly states that Turnure was charged with first-degree recklessly endangering safety, use of a dangerous weapon, and that he faced 12 years and 6 months of imprisonment, plus an additional 5 years due to the weapon enhancer. The State also elicited testimony from Turnure's trial counsel that counsel told Turnure that he had to plead "as charged" to the agreed-upon counts. Trial counsel testified that there were never any discussions with the State about dismissing the "while armed" portions of the charges, and that Turnure did not indicate that he was confused about what was said by the court at the plea hearing.

Turnure also admitted that he had knowingly and willingly pled guilty to armed robbery, which carries a 40-year penalty. The following exchange occurred between the prosecutor and Turnure at the hearing:

> Q. How is it possible then that the difference between 12 and a half and 17 and a half would have meant you would not have plead [sic] to that other count?
>
> A. Because the plea capped, capped at 15. I know I got less than that but it still -- at that point in time there's still too much opening up.

After hearing Turnure's testimony and the testimony of his trial counsel, the circuit court determined that Turnure had entered his pleas freely, voluntarily, and intelligently. The court stated that it did not "think [Turnure] was confused" by the incorrect maximum the court gave for Count 2. The circuit court was in the unique position to observe Turnure during the plea

colloquy and during his testimony at the postconviction motion hearing, and made its decision based on credibility determinations. We generally will not disturb credibility determinations on appeal, and nothing in the record or the no-merit report suggests that we should do so here. *See* ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992) ("It is generally not the province of the reviewing court to determine issues of credibility."). Because the propriety of denying Turnure's plea withdrawal motion following an evidentiary hearing turned on the circuit court's credibility determinations, which we must defer to, any challenge to the denial of Turnure's postconviction motion for plea withdrawal would lack arguable merit.

There also is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. The court considered the seriousness of the offenses, Turnure's character, the need to protect the public, and Turnure's rehabilitative needs, and imposed a sentence authorized by law. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶40-46 and nn. 9-12, 270 Wis. 2d 535, 678 N.W.2d 197 (discussing sentencing factors to be considered by circuit courts on the record). With respect to Count 2, the count for which the court had stated the incorrect maximum during the plea colloquy, the court amended the judgment of conviction to reduce Turnure's sentence to 7½ years of initial confinement and 5 years of extended supervision. The amended judgment of conviction also reflects that the dangerous weapon enhancer was removed from Count 1, armed robbery, thus correcting an issue identified in this court's June 5, 2017 order rejecting counsel's initial no-merit report.

It is also significant that Turnure ultimately was given sentences that were less than the joint sentencing recommendation, in which the State agreed to cap its recommendation at 15 years of initial confinement and 10 years of extended supervision on the Rock County counts, with no agreed recommendation as to the Dane County count. Under the circumstances, it

cannot reasonably be argued that Turnure's sentence is "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

There also would be no arguable merit to an argument that the circuit court erroneously exercised its discretion when it denied Turnure's request to be made eligible for what counsel refers to in the no-merit report as the "substance abuse program." WISCONSIN STAT. § 302.05 establishes the substance abuse program administered by the Department of Corrections (DOC). Under § 302.05(3), an eligible inmate serving a bifurcated sentence obtains early release from the confinement portion of a sentence if DOC determines that the inmate has successfully completed a substance abuse program operated by the department. An inmate's eligibility for this type of programming is also referred to as "earned release program" or ERP eligibility. *See* WIS. STAT. § 973.01(3g). A sentencing court is required to decide, within the exercise of its discretion, "whether the person being sentenced is eligible or ineligible to participate in the earned release program under s. 302.05(3) during the term of confinement in prison portion of the bifurcated sentence." ***Id.*** Because the circuit court's decision on ERP eligibility is discretionary, our review is limited to determining whether the court erroneously exercised that discretion. While the court must state whether a defendant is eligible or ineligible for the program, "we do not read the statute to require completely separate findings on the reasons for the eligibility decision, so long as the overall sentencing rationale also justifies the ERP determination." ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187.

In this case, the record reflects that the circuit court considered Turnure's eligibility for the Challenge Incarceration Program (CIP) and for ERP, and determined him eligible for the former but not the latter. In its sentencing remarks, the court discussed Turnure's need for drug

addiction treatment in a confined setting. The court ruled that there would be an "AODA component" to Turnure's participation in CIP. Because the record reflects that the court considered Turnure's need for substance abuse treatment, and specified that the need would be served through his CIP participation, any challenge to the circuit court's denial of Turnure's request for ERP or substance abuse program eligibility would be without arguable merit.

Finally, the record and the no-merit report disclose no arguable basis for challenging the effectiveness of Turnure's trial counsel. To establish ineffective assistance of counsel, Turnure must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Turnure must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Any claim of ineffective assistance 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). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's effectiveness.

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

IT IS ORDERED that the judgment and orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Philip Brehm is relieved of any further representation of Brandon Scott Turnure in this matter pursuant to 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