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DISTRICT IV

July 23, 2019

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

2018AP629-CRNM State of Wisconsin v. Keane J. Singleton (L.C. # 2012CF104)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, 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 Keane Singleton, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)[1]

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

and ***Anders v. California***, 386 U.S. 738 (1967). Singleton filed a response, and counsel filed a supplemental report. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Singleton was alleged to have used a knife to repeatedly stab a woman causing serious injury. He pled guilty to one count of first-degree reckless injury, with use of a dangerous weapon, and one count of aggravated battery. The court imposed concurrent sentences on each count for an effective total of thirteen years of initial confinement and ten years of extended supervision. Singleton filed a postconviction motion seeking plea withdrawal. The circuit court held an evidentiary hearing and denied the motion.

The no-merit report addresses whether the circuit court erred in denying Singleton's postconviction motion based upon the court's conclusion that Singleton's plea was knowing, intelligent, and voluntary. For the following reasons, we agree with counsel that there is no arguable merit to this issue.

Under WIS. STAT. § 971.08 and case law, the circuit court must fulfill a number of duties at the plea hearing. *See* ***State v. Brown***, 2006 WI 100, ¶¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. These duties are "designed to ensure that a defendant's plea is knowing, intelligent, and voluntary." ***Id.***, ¶23. Here, there were two ways in which the circuit court failed, or arguably failed, to fulfill its plea duties. As we now discuss, however, neither provides any basis to pursue further proceedings.

First, the circuit court arguably failed to fulfill its duty to ascertain, in a manner consistent with ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, whether there were any threats or promises outside the plea agreement. This arguable plea colloquy defect was not addressed at the postconviction evidentiary hearing. However, in a response to an order by this court dated April 2, 2019, counsel explained that he consulted with Singleton on this topic, and that Singleton is unable to provide any factual allegations to support a claim that there were such threats or promises. Therefore, there is no arguable merit to pursuing a claim that Singleton's plea was not knowing and voluntary on that basis.

Second, the circuit court failed to fulfill its duty to establish Singleton's understanding of the nature of the crime and the range of punishments. Specifically, the court failed to explain the use-of-a-dangerous-weapon element to Singleton and in particular how it could be used to increase Singleton's maximum sentence. However, after hearing testimony by Singleton and trial counsel, the circuit court made factual findings that Singleton understood this element, including how it could be used to increase the penalty he faced. The circuit court's factual findings are supported by the record, and the court was not required to accept Singleton's testimony to the contrary. *See* ***Nicholas C.L. v. Julie R.L.***, 2006 WI App 119, ¶23, 293 Wis. 2d 819, 719 N.W.2d 508 (The circuit court "is the ultimate and final arbiter of the credibility of witnesses, and we must accept the [circuit] court's credibility determination."). Accordingly, there is no arguable merit to further pursuing plea withdrawal based on the circuit court's failure to explain the use-of-a-dangerous-weapon element to Singleton at the plea hearing.

In his response to the no-merit report, Singleton argues that the defective plea colloquy here is analogous to what occurred in ***State v. Bartelt***, 112 Wis. 2d 467, 334 N.W.2d 91 (1983), in which the supreme court allowed plea withdrawal. *See* ***id.*** at 469, 487. We disagree that the

two situations are analogous. Unlike here, the circuit court in ***Bartelt*** made no postconviction findings that the defendant understood the information omitted from the plea colloquy. *See* ***id.*** at 475-76.

Singleton also argues that trial counsel was ineffective by failing to inform him regarding the use-of-a-dangerous-weapon element. For the reasons we have already discussed, there is no arguable merit to this issue. Regardless whether counsel's alleged failure was deficient performance, the circuit court's postconviction findings preclude Singleton from showing prejudice. Singleton cannot be prejudiced by counsel's alleged failure to provide the information that the circuit court found Singleton knew and understood.

The no-merit report addresses whether there is an ineffective assistance of trial counsel issue relating to a potential conflict of interest on the part of one attorney in the series of trial attorneys who represented Singleton. We agree with no-merit counsel that this issue is worth discussing but ultimately has no arguable merit.

No-merit counsel explains that Attorney Dennis Ryan represented Singleton for parts of 2013 and 2014 and that, subsequent to that representation but prior to Singleton's entry of his plea in 2016, Attorney Ryan began working at the Sauk County District Attorney's Office, the office prosecuting Singleton. No-merit counsel further explains that an attorney who represented Singleton after Attorney Ryan did not honor Singleton's request to seek disqualification of the Sauk County DA's Office. However, according to no-merit counsel, Singleton cannot establish prejudice because Attorney Ryan never participated in Singleton's case as a representative of the State, and Singleton is unable to show that Attorney Ryan breached any confidences.

We agree with counsel that there is no arguable merit to this potential ineffective assistance issue. To show prejudice, Singleton would need to show that Attorney Ryan "actively represent[ed]" the State's interests or that Attorney Ryan's competing loyalties "adversely affected" Singleton's interests. *See* ***State v. Kalk***, 2000 WI App 62, ¶¶16, 21, 234 Wis. 2d 98, 608 N.W.2d 428. The record reveals no basis for such a showing, and Singleton does not claim that there is any information outside the record to support such a showing.

Turning to a different issue, Singleton asserts that he did not waive his right to a timely preliminary hearing, and he makes several arguments relating to this right. We agree with no-merit counsel that there is no possible merit to these arguments. First, the record indicates that Singleton *did* waive the applicable time limits, both at his April 9, 2012 initial hearing and at a May 17, 2012 hearing. Second, even if those waivers were for some reason invalid, Singleton's guilty plea waived any defect relating to the preliminary hearing. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (guilty plea waives "nonjurisdictional" defects); ***State v. Webb***, 160 Wis. 2d 622, 635, 467 N.W.2d 108 (1991) ("no procedural defect of any sort at the preliminary hearing affects the circuit court's jurisdiction").

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The total sentence was within the maximum allowed, and the circuit court discussed the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197.

The no-merit report addresses whether there are any new factors to support a motion to modify Singleton's sentence. We agree with counsel that the record reveals no arguable merit to seeking sentence modification based on a new factor.

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

Therefore,

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Philip Brehm is relieved of any further representation of Keane Singleton 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