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 I

October 1, 2019

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233-1425

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

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

Becky Nicole Van Dam
Mayer Law Office, LLC
120 N. Main St., Ste. 360
West Bend, WI 53095

Lewieveton Rocky Clemons 470664
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

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

2018AP793-CRNM State of Wisconsin v. Lewieveton Rocky Clemons
(L.C. # 2017CF1089)

Before Brash, P.J., Kessler 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).

Lewieveton Rocky Clemons appeals from a judgment of conviction for one count of possession of cocaine, one count of possession of a firearm by a person adjudicated delinquent, and one count of carrying a concealed weapon. *See* WIS. STAT. §§ 961.41(3g)(c),

941.29(1m)(bm), and 941.23(2) (2017-18).[1] Clemons's appellate counsel, Becky Nicole Van Dam, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Clemons filed a response to that no-merit report on June 4, 2018. By order dated October 1, 2018, we granted Clemons's motion to withdraw his June 4, 2018 response to the no-merit report and file a new response to the no-merit report. Clemons filed his new response on December 4, 2018.[2] Van Dam subsequently filed a supplemental no-merit report, and Clemons filed a response to that supplemental report.[3] We have now reviewed the reports and responses, and we have independently reviewed the record as mandated by ***Anders***. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm.

The no-merit report provides a detailed statement of the facts that led to Clemons being arrested after officers observed Clemons and two other men in a vehicle who appeared to be involved in illegal drug sales. Clemons ultimately entered into a plea agreement with the State pursuant to which he pled guilty to the three aforementioned crimes. In exchange for Clemons's

---

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

[2] Clemons referred to his December 4, 2018 filing as both a response to the no-merit report and a petition for habeas corpus filed pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (holding that "to bring a claim of ineffective assistance of appellate counsel, a defendant must petition the appellate court that heard the appeal for a writ of habeas corpus"). Here, the filing of a ***Knight*** petition is premature because the appellate process has not yet concluded. Moreover, a ***Knight*** petition must be signed in the presence of a notary, *see* ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶11, 288 Wis. 2d 707, 709 N.W.2d 515, and Clemons's filing was not notarized. Accordingly, we have construed Clemons's filing to be solely a response to the no-merit report, and we will not analyze his claims in the context of ineffective assistance of appellate counsel. We do, however, address each of his concerns about the sentencing hearing in this decision.

[3] Because the appendix to the supplemental no-merit report contains an affidavit and a document related to a juvenile case, we granted Van Dam's motion to seal those documents.

guilty pleas, the State agreed to recommend a global sentence of thirty months of initial confinement and thirty months of extended supervision.

At the parties' request, the trial court immediately proceeded to sentencing after accepting Clemons's guilty pleas. As a result, there was no presentence investigation by the Department of Corrections. During its sentencing argument, the State reviewed the facts that led to Clemons's arrest and also summarized Clemons's juvenile and criminal history, including uncharged criminal activities. The State gave the trial court a certified copy of Clemons's juvenile records and read from electronic court records. The State urged the trial court to impose thirty months of initial confinement and thirty months of extended supervision, while Clemons's counsel urged the trial court to impose less than one year of initial confinement.

When the trial court began its sentencing remarks, it indicated that it wanted to address Clemons's criminal history, noting: "I know the State didn't have easy access to some of the answers to some of the questions I had about your background, right? So I'm gonna see what I can figure out here." The trial court reviewed the copy of Clemons's juvenile record provided by the State and it asked the parties follow-up questions. When the trial court sought additional information about a 2006 incident that occurred when Clemons was an adult, the State arranged for the police reports to be emailed to the courtroom, and both the parties and the trial court took time to review printed copies of those reports in the courtroom. Ultimately, the trial court imposed the maximum sentences on all three counts, consecutive to one another, resulting in a total sentence of six years and nine months of initial confinement and five years of extended supervision.

The no-merit report addresses three issues: (1) whether Clemons's pleas were knowingly, intelligently, and voluntarily entered; (2) whether the sentences imposed were excessive or unduly harsh; and (3) whether the trial court erroneously exercised its discretion when it found that Clemons was not eligible for the Challenge Incarceration Program and the Substance Abuse Program, both of which are early release programs. The no-merit report thoroughly addresses each of those issues, providing citations to the record and relevant authority. For example, with respect to Clemons's pleas, the no-merit report analyzes the trial court's compliance with WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 260-72, 389 N.W.2d 12 (1986). The no-merit report also explains in detail why it would be frivolous to allege that the sentences imposed were unduly harsh, noting that "the trial court specifically explained why the maximum penalties were appropriate." Finally, the no-merit report explains why there would be no arguable merit to alleging that the trial court erroneously exercised its discretion when it declined to make Clemons eligible for the early release programs. *See* WIS. STAT. § 973.01(3g), (3m) (indicating that the trial court "as part of the exercise of its sentencing discretion" decides whether the defendant can participate in either of Wisconsin's early release programs).

This court is satisfied that the no-merit report properly analyzes the issues it raises, and based on our independent review of the record, we agree with counsel's assessment that none of those issues has arguable merit.

We will address several other issues, including those raised in Clemons's responses to the no-merit reports. We begin with the trial court's compliance with ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, the trial 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 trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider other factors. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶41-43. Here, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Accordingly, there would be no merit to challenging the trial court's compliance with ***Gallion***.

Next, we turn to the issues Clemons identified in his responses to the no-merit report and supplemental no-merit report.[4] First, in its sentencing argument, the State indicated that Clemons stipulated to a juvenile adjudication for conspiracy to commit armed robbery in connection with a 2004 incident. The trial court later expressed concern about the armed robbery and, referencing the juvenile petition that had been provided by the State, the trial court summarized an interview that Clemons gave the police in that juvenile case. Clemons told the trial court that he did not remember making that statement to the police.

In his response to the no-merit report, Clemons contends that it was his co-actor who confessed to the armed robbery, rather than Clemons. Appellate counsel addressed this claim in her supplemental no-merit report. She attached the 2004 juvenile petition that was filed against

[4] We will not further discuss issues that were specifically addressed in the no-merit report and this opinion, such as whether the sentences were unduly harsh.

Clemons. That petition explains that Clemons participated in an interview with a police detective and admitted his involvement in planning the armed robbery. We have reviewed the petition, and we agree with appellate counsel that the trial court's summation of Clemons's statements in the 2004 case, as outlined in the juvenile petition, was accurate. Therefore, there would be no arguable merit to assert that the trial court relied on misinformation when it discussed the 2004 case.

The second issue identified by Clemons concerns a photograph retrieved from Clemons's phone that shows the waist of an unidentified person who is wearing jeans and displaying three guns. The State provided a copy of this photograph to the trial court during sentencing and implied that Clemons was the person holding the guns. The State expressed concern that Clemons and the other men in the vehicle the police observed had been "sharing their guns with one another" to take a photograph, which could have led to violence or "accidental violence." Clemons told the trial court that he was not the person in the photograph, and trial counsel argued: "It's a fairly generic set of pants. And whether they look like [Clemons's jeans], there's no way that anyone could say that those were his legs wearing those jeans on that day."

Clemons argued in his response to the no-merit report that the trial court erroneously exercised its discretion "by allowing the phone photo[graph] to come in displaying the three guns." He further asserted that the trial court relied on that photograph when it imposed Clemons's sentences. Clemons is suggesting that the trial court relied on inaccurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that a defendant who seeks resentencing based on the trial court's "alleged reliance on inaccurate information" is required to "establish that there was information before the sentencing court that was inaccurate, and that the [trial] court actually relied on the inaccurate information"). We

disagree that Clemons has raised an issue of arguable merit. At minimum, there is no indication that the trial court relied on the allegedly inaccurate information. *See **id.*** Specifically, the trial court never resolved the question whether it was Clemons or someone else depicted in the photograph, and it did not discuss the photograph when it imposed Clemons's sentences. Instead, the trial court focused on the undisputed fact that police found three firearms in the vehicle, stating that it was "extremely concerned about the number of firearms located in the vehicle." For these reasons, there would be no arguable merit to alleging that the trial court relied on inaccurate information concerning the photograph.

The third issue Clemons identified was his concern that the trial court launched "an independent investigation from the trial bench to obtain criminal files from the police department of the 2006 [crime, which] … resulted in improper adversarial conduct and exceeded judicial authority." Clemons also asserts that his trial counsel should have objected to the trial court's inquiries. We conclude that Clemons has not raised an issue of arguable merit.

While it is true that "[j]udges are generally prohibited from independently gathering evidence by the rules of judicial ethics," *see **State v. Vanmanivong***, 2003 WI 41, ¶34, 261 Wis. 2d 202, 661 N.W.2d 76, the trial court in this case did not independently gather information. Instead, after the State provided information about Clemons's criminal and juvenile history, the trial court asked follow-up questions about those incidents, which was relevant to its analysis of Clemons's character. *See **State v. Williams***, 2018 WI 59, ¶46, 381 Wis. 2d 661, 912 N.W.2d 373 (holding that one of the three main factors the sentencing court must consider is the character of the defendant, and secondary factors include the defendant's "[p]ast record of criminal offense" and "history of undesireable behavior pattern") (citation omitted). This led to the State having additional information emailed to the courtroom, which the parties and the trial

court then reviewed before proceeding. There was no indication that the information discussed in court was inaccurate or that the parties or the trial court wanted to adjourn the hearing to another day in order to more thoroughly review the information. We conclude that there would be no arguable merit to challenge Clemons's sentences based on the trial court's questions about his criminal history or trial counsel's decision not to object to the trial court's questions.

Finally, in his response to the supplemental no-merit report, Clemons raises a new issue concerning sentencing. He argues that the trial court was bound to follow the negotiated settlement agreement and therefore should have sentenced him to thirty months of initial confinement, which the State recommended. He also argues that trial counsel was ineffective for not objecting when the trial court imposed sentences that exceeded the State's recommendation. Clemons has not raised an issue of arguable merit. Trial courts are not bound by plea agreements between the parties. *See* ***State v. McQuay***, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990) ("It is well established … that the sentencing court is not in any way bound by or controlled by a plea agreement between the defendant and the [S]tate."). Indeed, the plea questionnaire states, and the trial court told Clemons, that the trial court could impose the maximum sentences.[5] The State, however, is bound by the plea agreement. In this case, the State's sentencing recommendation was consistent with the plea agreement. There would be no arguable merit to an appeal based on these issues.

[5] The plea questionnaire, which Clemons signed, states: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty."

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Becky Nicole Van Dam is relieved from further representing Lewieveton R. Clemons 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