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DISTRICT IV

January 29, 2020

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

2018AP2093-CRNM State of Wisconsin v. Tyrone A. Flood (L.C. # 2016CF1337)

Before Fitzpatrick, P.J., Blanchard and Graham, 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 Kristopher Ellis, appointed counsel for Tyrone Flood, has filed a no-merit report seeking to withdraw as appellate counsel.¹ See WIS. STAT. RULE 809.32 (2017-18)² and *Anders*

¹ By order dated January 3, 2019, we allowed Attorney Ellis to withdraw and Attorney Katie Babe was appointed as successor counsel. Attorney Babe has not amended or supplemented the no-merit report of Attorney Ellis.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

v. California, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Flood's plea or sentence, or the circuit court order denying trial counsel's motion to withdraw. Flood was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Flood was charged with strangulation and suffocation, false imprisonment, and misdemeanor battery, all as a repeater. Pursuant to a plea agreement, Flood pled guilty to false imprisonment without the repeater enhancer and the other counts were dismissed. The parties jointly recommended a withheld sentence and a term of probation with participation in Veteran's Court. The court declined to accept the joint recommendation, and instead sentenced Flood to two years of initial confinement and three years of extended supervision.

The no-merit report addresses whether there would be arguable merit to a challenge to Flood's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Flood signed, satisfied the court's mandatory duties to personally address Flood and determine information such as Flood's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Flood's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Flood's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Flood's character and criminal history, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Flood faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (citation omitted)). The court awarded Flood 321 days of sentence credit, on counsel's stipulation. We discern no other basis to challenge the sentence imposed by the circuit court.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court decision denying Flood's request for his second appointed State Public Defender to withdraw. We agree with counsel that this issue lacks arguable merit. The circuit court held a hearing on the motion and inquired into the basis for the motion from both Flood and his counsel. Counsel explained that he and Flood did not always see eye to eye and that Flood was not happy with the way counsel was handling things. Flood stated that he wanted a speedy trial and that he believed that his counsel was "not going out and getting what we need

to get ... the trial over with.” The court also considered that trial was scheduled for the following week. It would be wholly frivolous to argue that the circuit court erroneously exercised its discretion. *See State v. Jones*, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378 (“Whether trial counsel should be relieved and a new attorney appointed is a matter within the circuit court’s discretion.”); *State v. Lomax*, 146 Wis. 2d 356, 359-60, 432 N.W.2d 89 (1988) (on review of request to allow appointed counsel to withdraw, we consider adequacy of court’s inquiry into defendant’s complaint, timeliness of motion, and whether alleged conflict resulted in total lack of communication between defendant and counsel).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Katie Babe is relieved of any further representation of Tyrone Flood 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