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DISTRICT I

March 12, 2020

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

2019AP800-CRNM State of Wisconsin v. Immanuel William McCarty
(L.C. # 2017CF5275)

Before Brash, P.J., Dugan and Donald, 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).

Immanuel William McCarty pled guilty to armed robbery as a party to a crime. He faced maximum penalties of a $100,000 fine and forty years of imprisonment. *See* WIS. STAT. §§ 943.32(2) (2017-18),[1] 939.05, 939.50(3)(c). The circuit court imposed a fifteen-year term of imprisonment bifurcated as five years of initial confinement and ten years of extended

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

supervision. The circuit court also found McCarty eligible for the challenge incarceration program and the Wisconsin substance abuse program, awarded him the 173 days of sentence credit that he requested, and determined that he did not owe any restitution. McCarty appeals.

Assistant State Public Defender Carly Cusack filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32.[2] McCarty did not file a response. Based upon our independent review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, a Milwaukee police detective responded to a report of an armed robbery at approximately 4:15 p.m. on October 6, 2017, in the 1100 block of North Van Buren Street in Milwaukee, Wisconsin. Upon arrival at the scene, the detective spoke to K.K., who said that she was loading groceries into her car when two men approached her. One man seized her and pointed a handgun at her head. The second man searched her purse and removed her wallet and cellphone. The men then got into her car with her keys and drove away. On October 9, 2017, a police officer found K.K.'s car parked on a Milwaukee city street. A latent print examiner located four fingerprints on the car and determined that one of them matched McCarty's right index finger. A second print matched that of Lamar Smalls.

Police arrested Smalls in late October 2017, and he gave an inculpatory statement in which he admitted his participation in robbing K.K. and implicated McCarty in the crime. Police

[2] After Attorney Cusack filed the no-merit report, this court received notice that the State Public Defender had appointed Assistant State Public Defender Leon W. Todd, III, as successor counsel for McCarty. This court is aware that Attorney Cusack left her position as an assistant state public defender while the instant appeal was pending.

arrested McCarty on November 11, 2017. After McCarty received the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966), he too gave a statement about the robbery. McCarty said that he and Smalls went to a grocery store together and when McCarty left the store, he saw Smalls pointing a gun at the victim. McCarty admitted that he took K.K.'s phone from her purse, that he and Smalls then left the scene in K.K.'s car, and that Smalls was the driver. The State charged McCarty with one count of armed robbery as a party to a crime.

We first consider whether McCarty could raise an arguably meritorious claim that he was not competent to proceed in the circuit court. The circuit court referred McCarty for a competency examination early in the proceedings after his trial counsel advised that he had suffered a traumatic brain injury as a child. The examining psychologist filed a report stating that McCarty was "capable of ... a rational and productive exchange" and showed no signs of either "psychosis, acute mood disturbance, or cognitive limitation interfering with his capacity to communicate meaningfully." Further, the psychologist determined that McCarty "displayed factual knowledge of ... the alleged misconduct and possible penalties," that he "indicated motivation to legally strategize with defense counsel," and that he "exhibited familiarity" with terms and concepts relevant to the pending criminal proceedings. The psychologist concluded that McCarty was competent to proceed. Neither the State nor McCarty challenged the psychologist's conclusions, and the circuit court found that he was competent.

"[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychologist's

report and the standard of review, any further proceedings in regard to McCarty's competence would lack arguable merit.

We next consider whether McCarty could pursue an arguably meritorious challenge to the validity of his guilty plea. During a plea hearing, the circuit court must conduct a colloquy with the defendant and fulfill a number of mandatory duties. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. When the circuit court does not conduct a colloquy that fulfills the requirements of WIS. STAT. § 971.08 and other duties mandated at a plea hearing, the defendant may have grounds for plea withdrawal. *See* ***Brown***, 293 Wis. 2d 594, ¶36.

In the no-merit report, Attorney Cusack asserts that the guilty plea colloquy that the circuit court conducted in this case was insufficient in various ways. Specifically, she shows that the circuit court did not ask McCarty whether he was threatened or promised anything to force him to plead guilty, nor did the circuit court advise him on the record that the range of punishments that he faced upon conviction included a fine. *See* ***id.***, ¶35. The circuit court also did not explain the elements of the offense or elicit detailed responses from McCarty establishing his understanding of the elements. *See* ***id.***; *see also* ***State v. Howell***, 2007 WI 75, ¶¶53-54, 301 Wis. 2d 350, 734 N.W.2d 48

As Attorney Cusack correctly explains, however, a prima facie violation of WIS. STAT. § 971.08 or other court-mandated duties does not automatically lead to the withdrawal of a plea. McCarty must also allege that he "did not know or understand the information that should have been provided at the plea hearing." *See* ***Brown***, 293 Wis. 2d 594, ¶39. On this point, Attorney Cusack states:

> counsel has concluded that she would be unable to meet the second requirement necessary for a *prima facie* case for plea withdrawal.... [C]ounsel bases this conclusion on her entire review of the case and discussions with Mr. McCarty. Counsel believes she cannot reveal the contents of her discussion with Mr. McCarty unless in the context of a supplemental no-merit report, in reply to a response from Mr. McCarty.

Attorney Cusack provided McCarty with a copy of the no-merit report. This court informed McCarty that he could respond to the no-merit report. McCarty has not filed a response. We therefore accept Attorney Cusack's representation that a motion to withdraw the guilty plea would not be viable under ***Brown***. Accordingly, any further challenge to the plea would lack arguable merit.[3]

Last, we agree with Attorney Cusack's conclusion that the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that protection of the community and McCarty's rehabilitation were the primary sentencing objectives, and the circuit court discussed appropriate factors that it deemed relevant to achieving those objectives. *See* ***id.***, ¶¶41-43. The sentence imposed was well within the maximum sentence that McCarty faced upon conviction, and he therefore cannot mount an arguably meritorious claim that his sentence is excessive or shocking.

[3] We observe that, before McCarty entered his guilty plea to armed robbery as a party to a crime, his trial counsel moved the circuit court to appoint a psychiatrist to evaluate whether McCarty could pursue a special plea that he was not guilty by reason of mental disease or defect. The circuit court made the appointment. The appointed psychiatrist subsequently filed a report concluding that he could not support the special plea. McCarty then advised the circuit court that he did not wish to pursue the special plea but rather wished to plead guilty. No arguably meritorious basis exists to disturb that decision. *See* ***State v. Francis***, 2005 WI App 161, ¶¶26-27, 285 Wis. 2d 451, 701 N.W.2d 632 (holding that a defendant who is apparently competent may withdraw a plea of not guilty by reason of mental disease or defect by entering a guilty plea).

See ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. Accordingly, a challenge to the sentence would be frivolous within the meaning of ***Anders***.

Our independent review of the record does not disclose any other issue warranting discussion as a potential basis for appeal. We therefore accept the no-merit report and relieve Attorney Carly Cusack and successor counsel, Attorney Leon W. Todd, III, of further representation of McCarty.

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

IT IS FURTHER ORDERED that Attorney Carly Cusack and Attorney Leon W. Todd, III, are relieved of any further representation of Immanuel William McCarty. *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