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

2019AP1215-CRNM State of Wisconsin v. James E. Dewberry (L.C. # 2017CF2809)

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

James E. Dewberry appeals from a judgment of conviction for one count of second-degree reckless homicide by use of a dangerous weapon, contrary to WIS. STAT. §§ 940.06(1)

and 939.63(1)(b) (2017-18).[1] Dewberry's appellate counsel, Christopher P. August, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Dewberry was served with a copy of the no-merit report and advised of his right to file a response, but he has not filed a response. We have independently reviewed the record and the no-merit report, 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 judgment.

The criminal complaint alleged that two individuals, including Dewberry's girlfriend, were in a home arguing when another individual, A.L.P., joined in the argument. Dewberry entered the home and had an altercation with A.L.P. that led to Dewberry shooting A.L.P. three times, killing him. An amended information charged Dewberry with one count of first-degree reckless homicide by use of a dangerous weapon and one count of being a felon in possession of a firearm.

Ultimately, Dewberry entered into a plea agreement with the State. The State agreed to amend count one to second-degree reckless homicide by use of a dangerous weapon and to dismiss and read in the felon-in-possession count. Under the terms of the plea agreement, both parties were free to argue for an appropriate sentence.

The trial court conducted a plea colloquy with Dewberry and accepted his guilty plea.[2] It reviewed with Dewberry his plea questionnaire and a written addendum outlining additional rights being waived, and it also referred to the attached jury instructions for the crime. The trial

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

[2] The Honorable David Borowski conducted the plea colloquy and accepted Dewberry's guilty plea.

court reviewed with Dewberry the maximum potential sentence, which included twenty-five years of imprisonment plus an additional five years because the crime was committed by use of a dangerous weapon. Dewberry indicated that he understood that he was facing thirty years of imprisonment, including up to twenty years of initial confinement and ten years of extended supervision, and a fine up to $100,000.

After conducting the plea colloquy, the trial court found that Dewberry had "freely, voluntarily and intelligently entered his plea and freely, voluntarily and intelligently waived his rights in this matter." Consistent with the plea agreement, the trial court dismissed count two (felon in possession of a firearm) and indicated that the count would be considered a read-in offense.

At sentencing, the State urged the trial court to impose the maximum sentence: twenty years of initial confinement and ten years of extended supervision. In contrast, trial counsel argued that a sentence including twelve to fifteen years of initial confinement would be appropriate. The trial court sentenced Dewberry to eighteen years of initial confinement and ten years of extended supervision.[3] It granted Dewberry 478 days of presentence credit.[4] It also ordered Dewberry to pay the amount of restitution to which he had stipulated: $6695 to the victim's family as reimbursement for funeral and related expenses. It did not impose a fine.

The no-merit report addresses two issues: (1) whether Dewberry's guilty plea was "knowingly, voluntarily, and intelligently" entered; and (2) whether the trial court erroneously

[3] The Honorable Mark A. Sanders sentenced Dewberry.

[4] Appellate counsel later filed a motion seeking one additional day of presentence credit. The trial court granted the motion.

exercised its sentencing discretion. The no-merit report thoroughly discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court agrees that there would be no arguable merit to seek plea withdrawal or to challenge the sentence.

With respect to Dewberry's guilty plea, the no-merit report analyzes the trial court's compliance with WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). Appellate counsel concludes that there would be no arguable merit to asserting that Dewberry's plea was not knowingly, voluntarily, and intelligently entered. Having reviewed the records, including the plea hearing transcript, we agree with appellate counsel, but we also conclude that it is necessary to provide additional explanation of one aspect of the plea hearing.

As noted, the trial court explicitly told Dewberry that he was "facing a maximum of 25 years in the Wisconsin state prison system plus the five year enhancer, the maximum on count one as amended of 30 years in the Wisconsin State Prison system, 20 years of initial confinement, ten years of what's known as extended supervision." In addition, the trial court told Dewberry that it could impose a fine of up to $100,000. Further, the trial court confirmed with trial counsel the State's recitation of the plea agreement, which included the reduction in the homicide count, the dismissal of the felon-in-possession count, and the provision that both sides "would be free to argue." The trial court also spoke directly to Dewberry about the reduced and dismissed charges, and it added: "[S]o the plea agreement is that both sides, your attorney and the State, are free to make an argument to [the sentencing court] as to what's appropriate." However, the trial court did not "advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and,

concomitantly, ascertain whether the defendant understands this information." *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

While the omission of the ***Hampton*** warning in this case does present a *prima facie* ***Bangert*** violation, we conclude that no issue of arguable merit arises from the defect. To withdraw a guilty plea after sentencing, a defendant must show that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the trial court accepted the guilty plea, which included a reduced homicide charge, and it also dismissed and read in count two—all consistent with the parties' plea agreement. Further, at sentencing, both parties were permitted to argue for the sentence they believed was appropriate, and the trial court imposed a sentence slightly less than that urged by the State and slightly more than that urged by the defense. We conclude that Dewberry was not affected by the defect in the plea colloquy and cannot show that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (holding that the defendant had not demonstrated that plea withdrawal was necessary to remedy a ***Hampton*** violation where the defendant "was not affected by the defect in his plea colloquy" and "received the benefit of the plea agreement"); *see also* ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64 ("[R]equiring an evidentiary hearing for every small deviation from the [trial] court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights."). For these reasons, we conclude that there would be no arguable merit to pursue plea withdrawal based on the ***Hampton*** violation.

Next, we turn to the sentencing. The no-merit report addresses the sentence that was imposed, providing citations to the sentencing transcript and analyzing the trial court's

compliance with applicable case law. Appellate counsel concludes that there would be no arguable merit to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was unduly harsh or excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with these assessments. The trial court thoroughly explained the sentence. Further, we discern no basis to allege that the sentence, which was less than the maximum that could have been imposed, was unduly harsh. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Not only was the crime very serious, Dewberry—who had three prior felony convictions—had benefitted significantly from the reduction in the homicide charge (which lowered his exposure by thirty-five years) and the dismissal of the felon-in-possession count (which eliminated ten years of exposure).

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Christopher P. August is relieved from further representing James E. Dewberry 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