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DISTRICT I

June 9, 2020

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

2019AP1407-CRNM State of Wisconsin v. Michael Basley (L.C. # 2018CF1630)

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).

Michael Basley appeals from a judgment, entered on his guilty plea, convicting him of possession with intent to deliver between five and fifteen grams of cocaine. Appellate counsel, Jeffrey W. Jensen, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Basley was advised of his right to file a

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

response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

The Milwaukee Police Department responded to a 911 call about shots fired in an apartment. When officers arrived at the building, Basley was attempting to exit. They asked Basley what apartment he was coming from, and he identified the apartment that was the subject of the call. Basley was detained.

In the course of a protective pat-down search, Basley was asked to remove an outer coat. As he removed the coat, four items fell from his sleeve: two corner cuts of suspected marijuana, a bag containing thirty-three pieces of suspected crack cocaine, and a glass pipe with steel wool and scorching, suggesting it was used to consume cocaine. During the booking process, an officer opened the cocaine bag and found a smaller bag of powder cocaine inside. The total weight of cocaine in both forms was over eleven grams.

Basley gave a statement after being advised of his rights. He told police he had not been home at the time of the shooting. When he entered his apartment, he saw blood everywhere and the bag of cocaine on the floor. It was not his, but he picked it up to get it out of the apartment and dispose of it, and he encountered police on his way out. It was ultimately verified that Basley was not home during the shooting, but he was charged with possession with intent to deliver between five and fifteen grams of cocaine.

Basley ultimately agreed to plead guilty to the charged offense. In exchange, the State would recommend a prison sentence without recommending a specific length. The circuit court

conducted a plea colloquy with Basley and accepted his guilty plea. Subsequently, it sentenced Basley to eighteen months of initial confinement and thirty-six months of extended supervision.

Appellate counsel first addresses whether there is "any arguable basis in the record to file a motion to withdraw [Basley's] guilty plea" under ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). A defendant who seeks to withdraw a plea after sentencing must prove, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. One way for a defendant to establish a manifest injustice is "by showing the plea was not entered knowingly, intelligently, and voluntarily." ***State v. Villegas***, 2018 WI App 9, ¶20, 380 Wis. 2d 246, 908 N.W.2d 198. This requires the defendant to make a prima facie case that the plea colloquy failed to comply with the requirements of WIS. STAT. § 971.08 or other mandatory procedures for accepting a guilty plea. *See* ***Villegas***, 380 Wis. 2d 246, ¶20; ***Bangert***, 131 Wis. 2d at 274.

Our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court generally complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***Bangert***, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The circuit court did not expressly review the elements of possession with intent to deliver with Basley. It did, however, take other steps to establish his understanding of the nature of the crime. *See* WIS. STAT. § 971.08(1)(a); ***Bangert***, 131 Wis. 2d at 268. It noted that the jury instructions, which listed the elements of the offense, had been provided to the court with the plea questionnaire, and it asked Basley if he had "carefully go[ne] through" them with his attorney. Basley confirmed that he had. We note that Basley appears to have initialed the

instructions next to the elements list. The court also asked Basley if he understood the elements; he answered, "Yes."

Later, when attempting to satisfy itself there was a factual basis for Basley's plea, the circuit court asked him whether he had cocaine, which he admitted, and what he planned to do with it. Basley responded that he was "trying to get it out of my apartment so I can just dismember [sic] it." He indicated that he planned to thrown the cocaine away somewhere. The court asked, "So you weren't planning to sell it or share it with anyone?" Basley answered, "No." Because delivery[2] is an element of the offense to which Basley was pleading, the court paused the hearing, saying "Why don't you talk to [defense counsel] about that?"

When the hearing resumed, Basley told the circuit court that he was planning to dispose of the cocaine by giving it to someone. The court acknowledged that this satisfied the elements of the crime to which Basley was pleading, but the court wanted to ensure that was his desire. It explained to Basley that "if you're just trying to get rid of the stuff, and you want to … have a jury trial, you can have a trial." Basley told the court that he understood but he did not want a trial, and he repeated that he planned to give the cocaine to someone else.

Therefore, based on the entirety of the record, we are satisfied that there is no arguable merit to a claim that the circuit court failed to fulfill its obligations during the plea colloquy or that Basley's plea was anything other than knowing, intelligent, and voluntary.

[2] "'Deliver' means to transfer or attempt to transfer from one person to another." WIS JI—CRIMINAL 6035.

The other issue appellate counsel addresses is whether there is any arguable merit to a motion to modify sentence. *See* WIS. STAT. § 973.19(1)(b); WIS. STAT. RULE 809.30(2)(h). In concluding that there is no arguable merit to such a motion, appellate counsel states that there is "no evidence that the court erroneously exercised its sentencing discretion, nor is there evidence of a new sentencing factor."

At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. *See* ***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 circuit court's discretion. *See* ***id.***

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The four-and-one-half-year sentence imposed is well within the fifteen-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We also agree with counsel that the record does not support a claim that the circuit court relied on inaccurate information at sentencing, nor does there appear to be any basis in the record on which to claim a new sentencing factor. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (inaccurate information standard); ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797

N.W.2d 828 (new factor standard). Thus, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of further representation of Basley 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