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June 30, 2020

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

2016AP1109-CRNM	State of Wisconsin v. Mark Anthony Girtler (L.C. # 2014CF3214)
2016AP1110-CRNM	State of Wisconsin v. Mark Anthony Girtler (L.C. # 2014CF3215)
2016AP1254-CRNM	State of Wisconsin v. Mark Anthony Girtler (L.C. # 2014CF197)

Before Dugan, Donald 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).

In these consolidated appeals, Mark Anthony Girtler appeals from judgments of conviction for four felonies and one misdemeanor. The crimes, which involved the mother of Girtler's son, were committed between 2013 and 2014. Girtler's convictions were the result of a plea agreement with the State pursuant to which additional crimes were dismissed and read in.

At the sentencing hearing in 2015, the trial court imposed mandatory DNA surcharges for each conviction.[1] *See* WIS. STAT. § 973.046(1r) (2013-14).[2]

Girtler's appellate counsel, Becky Nicole Van Dam, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Girtler filed a response and a supplemental response. At this court's direction, appellate counsel filed a supplemental no-merit report, and Girtler filed another response. We have independently reviewed the record, the no-merit reports, and Girtler's responses, 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 judgments.

The no-merit report provides a detailed history of the charges and proceedings in these cases. At one point, Girtler was facing criminal charges in five separate criminal cases, all involving the same victim. While the cases were pending, the trial court ordered a competency

[1] Our review of these consolidated appeals was delayed because we held the appeals in abeyance pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument. We subsequently delayed review of these cases pending a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. ***Freiboth*** holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. *See* ***id.***, ¶12. Based on this court's holding in ***Freiboth***, there would be no arguable merit to seek plea withdrawal based on the imposition of the mandatory DNA surcharges in Girtler's cases. Further, based on the Wisconsin Supreme Court's holding in ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, there would be no arguable merit to challenge the imposition of those surcharges in Girtler's cases.

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

evaluation, which included an inpatient examination. The trial court conducted a competency hearing and found Girtler competent to proceed.[3]

Ultimately, Girtler entered into a plea agreement with the State pursuant to which multiple counts were dismissed and read in. Girtler agreed to plead guilty or no contest to seven counts.[4] In exchange, the State agreed to recommend a global sentence of twelve and one-half years of initial confinement and twelve and one-half years of extended supervision. The defense was "free to argue" for a different sentence.

The trial court conducted a plea colloquy and found Girtler guilty. At sentencing, the trial court granted the State's motion to dismiss two of the convictions because the State concluded that there was an inadequate factual basis for those convictions based on case law. The State also lowered its recommendation for extended supervision to ten and one-half years after concluding that the original recommendation exceeded the maximum allowed. Trial counsel indicated that she did not object to dismissing the two convictions or reducing the recommended period of extended supervision.

The trial court discussed with Girtler other concerns he expressed about the plea agreement. The trial court confirmed that Girtler wished to proceed to sentencing.

[3] Having reviewed the doctor's report and the transcript concerning this issue, we conclude that there would be no arguable merit to challenging the competency evaluation and the trial court's finding that Girtler was competent to proceed.

[4] The judgment of conviction for Milwaukee County Circuit Court case No. 2014CF197 states that Girtler pled guilty to count two. However, the plea transcript indicates that Girtler pled no contest. We direct the trial court to correct this scrivener's error in that judgment of conviction upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶29, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that "[i]n Wisconsin, an unambiguous oral pronouncement of sentence controls over a written judgment of conviction").

The sentencing hearing took place over two days. The trial court imposed five sentences, including four consecutive sentences, totaling ten years of initial confinement and ten years of extended supervision.[5] These appeals follow.

The no-merit report addresses five issues:

> I. Whether the trial court erred in granting the State's motion for joinder of cases for trial.
>
> II. Whether Mr. Girtler's pleas were knowing, intelligent and voluntary.
>
> III. Whether Mr. Girtler admitted to or the State proved the basis for the penalty enhancers at or before sentencing.
>
> IV. Whether Mr. Girtler's sentence was [unduly] harsh and excessive.
>
> V. Whether the trial court's finding that Mr. Girtler was not eligible for the Earned Release Program and Challenge Incarceration Program was an abuse of discretion.

The no-merit report thoroughly discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court is satisfied that the no-merit report properly analyzes the issues it raises, and we will not discuss these issues further except to address one aspect of the plea hearing.

At the plea hearing, the trial court neglected to "advise [Girtler] personally that the terms of the plea agreement, including a prosecutor's recommendations, are not binding on the court,"

[5] The sentences imposed included: (1) three years of initial confinement and three years of extended supervision for solicitation of burglary; (2) five years of initial confinement and five years of extended supervision for intimidating a victim; (3) one year of initial confinement and one year of extended supervision for disorderly conduct; (4) nine months in the house of correction for battery; and (5) one year of initial confinement and one year of extended supervision for one count of domestic violence. All five of the convictions were considered acts of domestic abuse and four included the domestic abuse repeater enhancer. *See* WIS. STAT. §§ 968.075(1)(a) and 939.621(1)(b) and (2) (2013-14).

a warning required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. While the omission of the ***Hampton*** warning does present a *prima facie* ***Bangert*** violation,[6] 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 both the plea and charge concessions (including dismissing and reading in numerous counts) and imposed a total sentence shorter than that recommended by the State. Therefore, Girtler was not affected by the defect in the colloquy, and he 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; *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 circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights."). We are satisfied that the record establishes that Girtler's pleas were knowing, intelligent, and voluntary. There would be no arguable merit to challenging the pleas' validity.

We turn to the issues Girtler raises in his response to the initial no-merit report. Girtler enumerates sixteen issues. Some of Girtler's claims are directly contradicted by the record. For instance, he asserts that he should not have been subject to the domestic abuse repeater provisions because he did not have a child with the victim. However, at the plea hearing, both trial counsel and Girtler told the trial court that he was the father of the victim's child.

We directed appellate counsel to file a supplemental no-merit report addressing each of the issues in Girtler's response, and she has done so. Appellate counsel has included an affidavit

[6] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

concerning her conversation with Girtler's trial counsel about Girtler's belated request to substitute judges and the photographs trial counsel showed Girtler. We agree with appellate counsel that none of the issues Girtler raises in his response presents an issue of arguable merit, for the reasons appellate counsel offers in her supplemental no-merit report. We will briefly discuss two of those issues.

First, Girtler raises an issue with respect to his conviction for one count of disorderly conduct as a domestic abuse repeater, in Milwaukee County Circuit Court case No. 2014CF197.[7] A second charge that was related to the same incident—battery as a domestic abuse repeater—was dismissed and read in pursuant to the plea agreement. Girtler's response asserts that he was not shown photographs of the victim that were taken after the incident. He indicates that he has now seen the photographs, and he claims that they do not show bruises or injuries on the victim. Girtler asserts that if he had known this, he would have proceeded to trial. In her affidavit, appellate counsel disputes Girtler's characterization of the photographs, asserting that the photographs show the victim with "blood on her right cheek" and "left hand." In his response to the supplemental no-merit report, Girtler asserts that "acne could easily be mistaken for blood." (Capitalization omitted.)

We conclude that regardless of what is depicted in the photographs, Girtler has not identified an issue of arguable merit. First, evidence of injury is not required to support a conviction for disorderly conduct, so it is not clear why the photographs would have impacted

[7] At the plea hearing, the trial court asked trial counsel and Girtler about the factual basis for this disorderly conduct charge. Trial counsel told the trial court that Girtler was not contesting allegations that he engaged in "name-calling and arguing" that "could cause or provoke a disturbance." Girtler personally indicated that he was "not contesting those facts."

Girtler's decision to have a trial on the disorderly conduct charge. Second, Girtler's bald assertion that he would have rejected the entire plea agreement if he had seen the photographs for one incident is insufficient to provide a basis for a postconviction motion. Girtler was facing numerous charges, six of which were dismissed and read in pursuant to the plea agreement. In addition, six other charges had been dismissed without prejudice after the preliminary hearing, and the State agreed not to reissue those charges as part of the plea agreement. Under these facts, there would be no arguable merit to assert that Girtler's allegations about the photographs from one incident would provide a basis to seek withdrawal of all of his pleas.

Another issue Girtler raises is his claim that the Department of Corrections "has not and will not provide [Girtler] with any of his program needs" until he is closer to his release date. Girtler asserts that this undermines the trial court's sentencing directive. He suggests that sentence modification would be appropriate. We conclude that Girtler has not raised an issue of arguable merit. At sentencing, the trial court did not suggest that Girtler had to complete specific programming at specific times while in prison. Moreover, the programming that an inmate receives in prison is up to the Department of Corrections. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (after prison term is selected, the control over the care of prisoners is vested by statute in the overseeing department). Accordingly, there would be no arguable merit to seek sentence modification based on the programming that Girtler is or is not being provided in prison.

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 Girtler further in these appeals.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Becky Nicole Van Dam is relieved from further representing Mark Anthony Girtler in these appeals. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that upon remittitur, the trial court shall correct a scrivener's error in the judgment of conviction for Milwaukee County Circuit Court case No. 2014CF197, as outlined in this decision.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals