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September 10, 2020

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

2019AP723-CRNM State of Wisconsin v. Joenellie C. Martinez (L.C. # 2016CF463)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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 Len Kachinsky, counsel for Joenellie Martinez, has filed a no-merit report concluding that no arguably meritorious grounds exist for challenging Martinez's robbery conviction or his sentencing following revocation of probation. Martinez was sent a copy of the report, and has not filed a response. Upon review of the no-merit report and the entire record as

mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there are no arguably meritorious appellate issues.

Martinez was charged with armed robbery as a party to a crime. *See* WIS. STAT. §§ 939.05, 943.32(2) (2017-18).[1] Pursuant to a negotiated plea agreement, the State amended the information to charge Martinez with robbery, battery, and theft, all as a party to a crime. Under the plea agreement, Martinez pled guilty to the two misdemeanors, battery and theft, as well as a less severe felony robbery count. *See* WIS. STAT. §§ 940.19(1), 943.20(1)(a) and (3)(a), 943.32(2). On the felony count, the parties entered into a deferred entry of judgment agreement which provided that, should Martinez successfully complete two years of probation on the misdemeanor counts, the felony count would be dismissed. As recommended by the parties, the circuit court entered judgment on the misdemeanor counts, withheld sentence in favor of probation, and deferred entry of judgment on the felony.

Martinez's probation was revoked in 2018.[2] The circuit court entered judgment on the felony count and sentenced him after revocation to five years of initial confinement followed by three years of extended supervision. The court also imposed nine months of concurrent jail time on each of the misdemeanor counts, consistent with the parties' joint recommendation.

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

[2] The validity of Martinez's probation revocation decision is not before us on appeal. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (probation revocation is independent from the underlying criminal action); *see also* ***State ex rel. Johnson v. Cady***, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (judicial review of probation revocation is by way of certiorari to the court of conviction).

Counsel asserts that this court lacks jurisdiction to consider any issue in this appeal which Martinez could have or did raise in postconviction proceedings after the original conviction, citing ***State v. Drake***, 184 Wis. 2d 396, 400, 515 N.W.2d 923 (Ct. App. 1994). While we agree with this assertion generally, we note that no final written judgment was entered on the felony robbery count until June 28, 2018, which was the same day Martinez was sentenced after the revocation of probation on all three counts. Therefore, we will consider at this time whether there is any arguable merit to challenging the robbery conviction.[3]

The record discloses no arguable basis for withdrawing Martinez's guilty plea on the robbery count. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Martinez completed, informed Martinez of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas. The court confirmed Martinez's understanding that it was not bound by the terms of the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The court also found that a sufficient factual basis existed in the criminal complaint to support Martinez's plea. The record shows that the plea was knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Therefore, the plea was valid and operated to waive all nonjurisdictional defects and defenses, including constitutional claims. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

[3] Any challenge to the underlying convictions for battery and theft are outside the scope of this appeal because a final judgment of conviction was entered with respect to those counts on August 9, 2016, and Martinez did not appeal the judgment. Under WIS. STAT. RULE 809.10(4), "[a]n appeal from a final judgment or final order brings before the court all prior *nonfinal* judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." (Emphasis added.) Because the judgment of conviction entered on August 9, 2016, was a final judgment that could be appealed as of right, it is not a "prior nonfinal judgment."

The no-merit report addresses one such potential constitutional claim, which is whether there would be any arguable merit to a double jeopardy/duplicity argument. The record reflects that the circuit court questioned the parties at the plea hearing about whether the theft charge might have to be dismissed if Martinez's probation was revoked because of duplicity concerns, based on theft being a lesser included offense of robbery. Martinez was present for the discussion. The prosecutor acknowledged the court's concern and said, "I think I would have to dismiss the theft in that case." Nonetheless, the State did not further amend the information, and defense counsel did not raise any objection or request any modification to the agreement. Rather, both defense counsel and Martinez himself confirmed the terms of the agreement as originally stated. Martinez went on to plead guilty to all three charges even after the discussion of the duplicity issue.

Despite his valid guilty plea, Martinez could still attempt to argue that he received ineffective assistance of counsel with regard to the potential duplicity issue. ***Kelty***, 294 Wis. 2d 62, ¶43 (a guilty plea waives constitutional trial rights, but not a challenge that the defendant received ineffective assistance of counsel in deciding to enter a plea). For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Martinez cannot make a showing of prejudice here.

It is no surprise that Martinez's defense counsel did not pursue an argument related to the duplicity challenge when the court raised the issue at the plea hearing. Martinez's successor defense counsel stated at the sentencing after revocation hearing that the plea agreement Martinez had entered into was "a great deal." Martinez originally faced a charge of armed robbery, a Class C felony carrying a potential maximum imprisonment term of 40 years. WIS.

STAT. §§ 943.32(2), 939.50(3)(c). When the State amended the information pursuant to the plea agreement, Martinez's potential maximum imprisonment term was reduced significantly. He faced a maximum of 15 years of imprisonment for robbery, a Class E felony, and up to 9 months of imprisonment on each of the misdemeanor counts. *See* WIS. STAT. §§ 943.32(1), 939.50(3)(e), 940.19(1), 939.51(3)(a), 943.20(1)(a) and (3)(a). Further, despite the lengthy prison terms he faced, Martinez received two years of probation on the misdemeanor count and deferred entry of judgment on the robbery count, pursuant to the negotiated plea agreement. We agree with counsel's assertion in the no-merit report that Martinez's trial counsel probably did not pursue the duplicity issue "to avoid the possibility of unraveling a very favorable plea agreement for Martinez." Further, there could be no prejudice because of the concurrent sentences on the misdemeanor counts. Any claim that Martinez received ineffective assistance of counsel with respect to the duplicity issue would be without arguable merit.

There also would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. As discussed above, the court followed the joint sentencing recommendation for nine concurrent months in prison on the misdemeanor counts. The court also granted the sentence credit requested by Martinez through his attorney. A defendant who affirmatively joins or approves a sentence recommendation cannot attack the sentence on appeal. ***State v. Scherrieks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

In imposing a sentence on the robbery count, the court considered the seriousness of the offense, Martinez's character, and Martinez's failure to avail himself of opportunities to be rehabilitated. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197. The court ordered five years of initial confinement and three years of extended supervision on the robbery count, to be served concurrently with the sentences on the misdemeanor counts. The

sentence Martinez received was well within the maximum penalty ranges permitted by statute, which we discussed above. There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

The no-merit report also concludes that any motion for sentence modification would be without arguable merit. We agree. Sentence modification involves a two-step process. ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609, 611 (1989). First, a defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. ***Id.*** A "new factor" is a fact highly relevant to the imposition of sentence, but not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Id.*** If the defendant has demonstrated the existence of a new factor, the circuit court must then determine in the proper exercise of its discretion whether the new factor justifies sentence modification. ***Id.*** Counsel asserts that Martinez has not provided him with any facts that would constitute a new factor to support sentence modification and, based on our review of the record before us, we are not aware of any such factor.

Our independent review of the record discloses no other potential issue for appeal.

Accordingly,

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

IT IS FURTHER ORDERED that attorney Len Kachinsky is relieved of any further representation of Joenellie Martinez in this matter pursuant to 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