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October 22, 2020

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

2019AP899-CRNM State of Wisconsin v. Tokiee Sole (L.C. # 2017CF1714)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, 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).

Tokiee Sole appeals from a judgment of conviction for one count of delivering a controlled substance (fentanyl), contrary to WIS. STAT. § 961.41(1)(a) (2015-16).[1] Sole's appellate counsel, Leonard D. Kachinsky, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[2] Sole filed a response and Kachinsky filed a supplemental no-merit report. We have independently reviewed the record, the no-merit report, and the supplemental no-merit report, as mandated by ***Anders***. We have also reviewed an additional report from the State Public Defender (and we thank Attorney Joseph Ehmann for preparing that report). We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm.

Sole was charged with two counts of delivering a controlled substance (fentanyl) and one count of delivering amphetamine. He entered into a plea agreement with the State pursuant to which he pleaded guilty to one count of delivery of a controlled substance (fentanyl), and the other two charges were dismissed. In exchange, the State agreed "to cap its in-custody time recommendation … at 3 years." The circuit court conducted a plea colloquy with Sole, accepted his guilty plea, and dismissed the other two charges.

Before sentencing, Sole's trial counsel was allowed to withdraw after Sole asked him to do so. Represented by new counsel, Sole moved to withdraw his guilty plea, but he later withdrew that motion before it was decided, and the case proceeded to sentencing.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Kachinsky also represented Sole in postconviction proceedings.

At sentencing, the circuit court rejected trial counsel's recommendation of an imposed-and-stayed sentence. Instead, it followed the State's recommendation, sentencing Sole to three years of initial confinement and four years of extended supervision. It also declared Sole eligible for the substance abuse early release program.

Represented by appellate counsel Kachinsky, Sole filed a postconviction motion. Sole sought sentence modification based on a new factor: the fact that, after he was arrested, Sole made phone calls on behalf of the Dane County Narcotics Task Force to a man, E.J., to arrange to purchase drugs. The motion asserted that based on Sole's assistance, E.J. was arrested and charged, but the charges were later dismissed. The motion alleged that Sole told his first trial counsel about his cooperation and assumed that counsel would tell his second trial counsel about it. The motion acknowledged that Sole's cooperation and E.J. were never mentioned at any hearing or in the presentence investigation report.

The postconviction motion argued that, in the alternative, Sole was entitled to resentencing because the attorney who represented him at sentencing, Stanley Woodard, was also the attorney for E.J. at the same time as Sole's sentencing and, therefore, "had a clear conflict of interest because of the role Sole played in arranging for a controlled buy with" E.J. The motion acknowledged that Woodard may not have known about the conflict.

At the hearing on Sole's motion, Kachinsky told the circuit court that Sole was not pursuing the second issue. He explained:

> I thought through that some more since I filed the motion. There's really no evidence that Attorney Woodard knew about the conflict of interest, and it's not surprising given the way the police report was written in this case for [E.J.] and the volume of cases [Woodard] handled ….

> ….
>
> I'm pretty certain that he did not know of the conflict, but it was – And I don't think the conflict actually impeded his representation of Mr. Sole.

The circuit court accepted the withdrawal of the conflict-of-interest argument and summarized its understanding of the reason that argument was not being pursued, stating:

> There is no evidence to suggest that predecessor counsel was aware, if a conflict of interest did exist, there's no evidence to suggest that he was aware of that conflict, nor is there any evidence to support the notion that as a result of that conflict of interest, your client suffered any sort of detriment.

Kachinsky agreed with that summary.

The circuit court denied Sole's motion for sentence modification based on a new factor. The circuit court found: (1) there was no "new factor" because Sole was aware that he had cooperated with law enforcement and never mentioned the issue at sentencing; and (2) even if it was a new factor, the circuit court would not have sentenced Sole differently because he "got a really sweet deal from the prosecution" and the circuit court had decided to accept the State's recommendation even though the incarceration time was not long.[3] This no-merit appeal follows.

The no-merit report addresses three issues: (1) whether Sole's plea was knowingly, intelligently, and voluntarily entered; (2) whether the circuit court erroneously exercised its sentencing discretion; and (3) whether the circuit court erroneously exercised its discretion when it denied Sole's postconviction motion for sentence modification. The no-merit report discusses

[3] The presentence investigation report recommended four to five years of initial confinement, but the circuit court followed the State's recommendation of three years of initial confinement.

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, to challenge the sentence that was imposed, or to challenge the court's denial of Sole's postconviction motion for sentence modification based on a new factor. We will briefly discuss those issues, as well as the issues Sole raises in his response.

We begin with the plea hearing. Appellate counsel concludes that the circuit court complied with both WIS. STAT. § 971.08 (2017-18) and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), for reasons outlined in the no-merit report. We agree, except for one aspect of the circuit court's colloquy with Sole.[4] When a circuit court accepts a defendant's guilty plea, the court is required to "[e]stablish the defendant's understanding of the nature of the crime with which he is charged[.]" *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). ***Brown*** recognized a non-exhaustive list of ways a circuit court can satisfy that requirement, including: (1) "summariz[ing] the elements of the crime charged by reading from the appropriate jury instructions"; (2) "ask[ing] defendant's counsel whether he explained the nature of the charge to the defendant and request[ing] him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing"; and (3) "expressly refer[ring] to the record or other evidence of defendant's knowledge of the nature

[4] We also recognize that the circuit court did not personally warn Sole that if he is not a citizen of the United States, his guilty plea may lead to deportation or exclusion from this country. *See* WIS. STAT. § 971.08(1)(c). However, there would be no arguable merit to pursue postconviction proceedings based on that omission because the record indicates that Sole was born in Illinois and is, therefore, an American citizen. Accordingly, Sole could not demonstrate that his guilty plea is likely to result in his deportation and that he was harmed by the lack of the statutory warning. *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶19, 378 Wis. 2d 504, 904 N.W.2d 773 (holding that harmless error analysis should be applied when the circuit court fails to read the statutory warning concerning deportation).

of the charge established prior to the plea hearing." *See* ***id.***, ¶¶46-48 (quoted source and emphasis omitted).

In this case, the circuit court did not use any of those methods to establish Sole's understanding of the charges. Therefore, the circuit court's colloquy was insufficient. However, to make a prima facie case that would entitle Sole to a hearing on a postconviction motion to withdraw his guilty plea, he would have to be able to "allege he did not enter a knowing, intelligent, and voluntary plea because he did not know or understand information that should have been provided at the plea hearing." *See* ***id.***, ¶59 (emphasis omitted). In an order dated September 2, 2020, we directed appellate counsel to discuss this issue with Sole and file a supplemental no-merit report with this court.

In response, appellate counsel moved for a lengthy extension of time to respond, citing his unavailability until December 2020. We held the extension motion in abeyance and directed the State Public Defender to notify this court whether new counsel should be appointed. In response, Attorney Joseph N. Ehmann, Regional Attorney Manager for the State Public Defender, filed a report with this court on October 2, 2020.

In his report, Ehmann said that, in addition to speaking with Attorney Kachinsky, he personally spoke with Sole about the issue this court identified. Ehmann states: "Based upon that conversation [with Sole], undersigned counsel informs the court that appellate counsel would not be able to assert that Mr. Sole did not understand the elements of the offense to which he pled guilty." Ehmann also notes that Sole "is not interested in withdrawing his plea, but is interested in being resentenced" for reasons outlined in Sole's response to the no-merit report.

We accept Ehmann's representation that Sole could not pursue plea withdrawal despite the circuit court's deficient plea colloquy.[5] Therefore, we conclude there would be no arguable merit to pursue this issue.

Next, we turn to the sentencing. We agree with appellate counsel that there would be no arguable merit to assert that the circuit court erroneously exercised its sentencing discretion. At sentencing, the circuit 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 it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider additional factors. ***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* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

In this case, the circuit court applied the required sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. For instance, the circuit court discussed Sole's criminal history, noting that Sole had been to prison multiple times. The circuit court also addressed the seriousness of the offense and the need to protect the

[5] Because Ehmann has addressed the issue that this court directed Kachinsky to address, a supplemental no-merit report from Kachinsky is no longer needed. We deny Kachinsky's extension motion as moot and relieve him of the obligation to file a supplemental no-merit report.

public, stating: "We've got people whose lives have been ruined by the drugs that you're selling."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the circuit court's compliance with ***Gallion***. Further, there would be no basis to assert that the sentence was excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Sole was facing up to ten years of initial confinement and five years of extended supervision. *See* WIS. STAT. §§ 939.50(3)(e), 973.01(2)(b)5. and (2)(d)4. The sentence of three years of initial confinement and four years of extended supervision was well within the maximum sentence, and we discern no erroneous exercise of discretion. *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."). This is especially true where Sole benefitted from having two other counts dismissed and was declared eligible for the substance abuse early release program.

Next, we consider whether there would be arguable merit to appeal the denial of Sole's postconviction motion for sentence modification based on the existence of a new factor: Sole's cooperation with law enforcement. A circuit court may modify a sentence "upon the defendant's showing of a 'new factor,'" which is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶¶35, 40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoted sources omitted). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.***, ¶36. "[I]f a new factor is present,"

the circuit court exercises its discretion to determine if the "new factor justifies modification of the sentence." ***Id.***, ¶¶37-38.

We agree with appellate counsel that there would be no arguable merit to challenge the circuit court's conclusion that Sole failed to demonstrate a new factor. Sole knew he had provided assistance to law enforcement. Therefore, his assistance was not a new factor. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (stating information overlooked by the circuit court but known to the defendant at the time of sentencing is not a new factor).

We turn to Sole's response to the no-merit report. Sole makes several allegations, including: (1) he thought the drugs were heroin, not fentanyl; (2) a detective promised him probation; (3) he should have been given consideration for assisting law enforcement; and (4) Attorney Woodard had a conflict of interest because he represented E.J. Appellate counsel has addressed each of those issues in a supplemental no-merit report, and we agree with both his analysis and his conclusion that Sole has not identified issues of arguable merit. Sole pleaded guilty to selling a controlled substance, and he knew the State's recommendation was for a term of initial incarceration not to exceed three years. There would be no arguable merit to seek relief based on Sole's disappointment that he was not offered a better plea deal for assisting law enforcement.

As for Sole's claim about Woodard, we note that the issue of Woodard's representation of E.J. was raised in Sole's postconviction motion and then explicitly abandoned, on the record, before the circuit court considered Sole's motion for sentence modification. As explained above, Kachinsky told the circuit court that, after filing the motion, he concluded that the conflict-of-

interest issue lacked merit. We agree with that assessment. To show that a defendant's right to effective counsel has been violated based upon a conflict of interest, a defendant who failed to raise an objection during his criminal proceedings "must demonstrate by clear and convincing evidence" that his counsel "was actively representing a conflicting interest, so that the attorney's performance was adversely affected." ***State v. Love***, 227 Wis. 2d 60, 71, 594 N.W.2d 806 (1999). Here, as the circuit court noted at the hearing, there was no evidence that Woodard was aware of a potential conflict of interest. The police reports concerning E.J.'s arrest that were attached to Sole's postconviction motion identify the confidential informant who arranged to meet with E.J. as "TK," not "Tokiee Sole." Further, Sole admitted that he did not tell Woodard about his assistance to law enforcement. Thus, there is no indication that Woodard was aware of the conflict or that his performance was affected by that conflict. There would be no arguable merit to assert that Sole could satisfy the test outlined in ***Love***.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit reports, affirms the conviction, and discharges appellate counsel of the obligation to represent Sole 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 (2017-18).

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky's motion to extend the deadline to file an additional supplemental no-merit report is denied as moot, and Kachinsky is relieved of the obligation to file a supplemental no-merit report.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved from further representing Tokiee Sole in this appeal. *See* WIS. STAT. RULE 809.32(3) (2017-18).

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

Sheila T. Reiff
Clerk of Court of Appeals