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DISTRICT IV

October 29, 2020

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

2019AP287-CRNM State of Wisconsin v. Dante R. Voss (L.C. # 2015CF353)

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).

Dante Voss appeals a judgment sentencing him after revocation of his probation. Dennis Schertz, Voss's appointed counsel, filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2017-18) and ***Anders v. California***, 386 U.S. 738 (1967).[1] Voss filed a response. After reviewing the record, counsel's report, and Voss's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Voss was convicted following a plea of no contest to one count of felony bail jumping and one count of possession of a firearm by a felon. The circuit court adopted the joint sentencing recommendation by withholding sentence, placing Voss on probation for four years on each count, to run concurrently, and imposing six months of jail time on the firearm count. Voss's probation was later revoked. The circuit court sentenced him after revocation to three years of initial confinement and three years of extended supervision on each count, to run concurrent with one another.

The no-merit report addresses whether the circuit court imposed an excessive sentence after revocation.[2] As stated above, Voss was sentenced to three years of initial confinement and three years of extended supervision, out of a possible maximum of eight years of initial confinement and eight years of extended supervision.[3] The record reveals that the circuit court's sentencing decision had a "'rational and explainable basis.'" ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d

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

[2] We note that an appeal from a sentence following revocation does not bring an underlying conviction before this court. ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Nor can an appellant challenge the validity of any probation revocation decision in this proceeding. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978).

[3] *See* WIS. STAT. §§ 941.29(1m)(a) (classifying possession of a firearm by a felon as a Class G felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 946.49(1)(b) (classifying felony bailing jumping as a Class H felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony).

535, 678 N.W.2d 197 (quoted source omitted). In imposing sentence, the court considered the gravity of the offense, Voss's character, and the need to protect the community. There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and we agree with counsel that 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).

We next address the argument in Voss's no-merit response that he was sentenced based on inaccurate information. A defendant moving for resentencing on the basis that the circuit court relied upon inaccurate information must show both that there was information before the sentencing court that was inaccurate and that the circuit court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Here, Voss cannot make that showing.

Voss asserts that the following statement by the district attorney at the sentencing after revocation hearing was inaccurate:

> While he has not been convicted of the charges yet, I think it's worth mentioning that Mr. Voss has accumulated five new criminal referrals while he has been placed on probation. Many of those come from Marathon County cases, and they include allegations of felon in possession of a firearm, child abuse, second degree sexual assault, incest, as well as other counts of felony bail jumping.

Voss contends that the criminal referrals mentioned by the district attorney accumulated *prior* to Voss's probation in this case, not during his probation. He asserts that the five new criminal

referrals he received *during* his probation in the instant case were for four counts of felony bail jumping and one count of resisting or obstructing an officer.

Our independent review of the record reveals that Voss appears to be correct in his assertion that the district attorney mistakenly stated the nature of the five new criminal referrals that he accumulated while on probation. His probation in this matter began on January 13, 2016. Other than the bail-jumping charges, all of the Marathon County charges referenced above by the district attorney appear from the record to have arisen in 2015.

However, Voss cannot support a non-frivolous argument that the circuit court relied on the district attorney's misstatement. Whether the court "'actually relied'" on the incorrect information at sentencing "turns on whether the [sentencing] court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" ***State v. Travis***, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491 (quoted source omitted). Nothing in the record suggests that the sentencing court did so here. Although the court considered Voss's criminal history and history of violence, the court did not mention or give specific consideration to any of the Marathon County charges from 2015 that were identified by the district attorney, erroneously, as having accumulated during Voss's probation in this case. The only specific incidents the court drew attention to were convictions for carrying a concealed weapon, battery to law enforcement, disorderly conduct, and resisting or obstructing officers—all arising out of cases initiated in 2000. The court also considered Voss's history of failing to successfully complete probation, but only made specific reference to an "'01 case and some '00 cases" in concluding that "clearly probation is not a situation the court is going to impose here today, which seems to be recognized by the parties." Accordingly, any claim that Voss was sentenced based on inaccurate information would be without arguable merit.

Voss also argues in his response that he received ineffective assistance of counsel. Voss asserts that, if his trial counsel had done a more thorough investigation of his background, counsel could have provided mitigating factors to the trial court that may have led to a lesser sentence. Specifically, Voss argues that he has had mental health problems throughout his life and that, prior to the commission of the crimes at issue, he was placed on Wellbutrin and was experiencing suicidal thoughts as a side effect. Voss argues that, if counsel had investigated more thoroughly and had presented Voss's mental health issues as a mitigating factor, it is likely that the court would have imposed a lesser sentence.

A claim of ineffective assistance of counsel requires a showing of both deficient performance and prejudice. ***State v. Anderson***, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998).[4] A reviewing court may choose to address either the deficiency component or the prejudice component; if a defendant makes an insufficient showing on one component, a reviewing court need not examine the other component. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). Here, we need not consider whether counsel's performance may have been deficient because Voss cannot show that he was prejudiced. The record establishes that the court was provided information at sentencing about Voss's mental health history, both by Voss himself and his counsel. Voss's trial counsel argued at the sentencing hearing that mental health had been a pervasive issue in Voss's life. Voss addressed the court personally prior to sentencing, and stated that the reason he had been carrying a pistol was because he was planning to kill himself with it.

[4] This court normally declines to address claims of ineffective assistance of counsel in the context of a no-merit review if the issue was not raised postconviction in the circuit court. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Voss's claim has sufficient merit to require appointed counsel to file a postconviction motion and request a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The record reflects that the court considered Voss's statement that he was having suicidal thoughts, but ultimately concluded that protection of the community warranted the sentence it imposed. Because the record reflects that Voss's mental health was raised and considered as a factor at sentencing, any claim of ineffective assistance of counsel for failure to investigate or raise the issue is without arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Voss 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