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

2018AP1192-CRNM State of Wisconsin v. Justin Antonio Moore (L.C. # 2013CF2672)

Before Brash, P.J., Dugan and Donald, 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).

Justin Antonio Moore appeals from a judgment, entered upon his guilty plea, convicting him on one count of armed robbery as a party to a crime. Moore also appeals from an order denying his postconviction motion to vacate a DNA surcharge. Appellate counsel, Attorney Russell D. Bohach, 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] Moore was advised of his right to file a 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 that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and the order.

The criminal complaint alleged that at approximately 2:00 a.m. on June 7, 2013, C.V. was coming home from work when he was approached by three men. One of them pointed a gun at C.V., told him to lie on the ground, and demanded his money. When C.V. answered that he did not have any money, one of the three men struck C.V. in the back of the head. One of the men, later identified as Moore, took C.V.'s wallet, which was attached to C.V.'s pants with a chain. C.V. observed the individuals flee into a nearby duplex and called police.

Police spoke to the occupant of the duplex's lower unit. She indicated that she was awakened at 2:02 a.m. by knocking at her door. Her son Marshon, an individual named Tory Agnew, and Moore entered her residence. All three men were arrested inside the unit, and a BB gun was recovered underneath a basement stairwell.

After being advised of his rights, Moore gave a statement in which he admitted his participation in the robbery. He said that it was Marshon's idea because Marshon needed rent money. Moore said he "walked around the house" and when he returned to the front, Marshon and "Tee" had a man held at gunpoint. Moore saw the man's wallet hanging from a chain and took it. When the trio heard police approaching, Moore hid the gun under the stairs.

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

This is Moore's third no-merit appeal in this matter; we will discuss the first two appeals later in this opinion.

The State charged Moore with one count of armed robbery as a party to a crime. Moore agreed to resolve his case with a guilty plea; in exchange, the State would not make a specific sentence recommendation.[2] The circuit court conducted a colloquy and accepted Moore's plea.[3] At sentencing, the circuit court imposed seven years of initial confinement and five years of extended supervision. Moore appeals.

Appellate counsel discusses two potential issues in the no-merit report. The first of these is whether there is any arguable merit to challenging the validity of Moore's plea. "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. James E. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." ***Id.*** Thus, "the circuit court must exercise great care when conducting a plea colloquy so as to best ensure that a defendant is knowingly, intelligently, and voluntarily entering a plea[.]" *See* ***State v. Pegeese***, 2019 WI 60, ¶39, 387 Wis. 2d 119, 928 N.W.2d 590.

[2] The State had given Moore two options: it could either recommend a sentence of nine years of initial confinement and five years of extended supervision, or it could refrain from suggesting any particular length of time. At the time Moore entered his plea, he had accepted the non-specific option; at sentencing, the State made the fourteen-year recommendation.

However, there is no arguably meritorious claim for a breach of the plea agreement. Defense counsel explained to the circuit court that, after speaking with Moore, they determined it would be better to have the State recommend a specific sentence. Defense counsel advised the court that he had approached the State prior to sentencing, and the State agreed to the change. Moore personally confirmed that he wanted the switch.

[3] The Honorable Glenn H. Yamahiro conducted the plea colloquy and accepted Moore's plea; the Honorable William S. Pocan imposed sentence and denied the postconviction motion.

Here, Moore completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he indicated that his attorney had explained the elements of the offense. The form correctly specified the maximum penalties Moore faced. The form, along with an addendum, also specified the constitutional rights Moore was waiving with his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 262, 271, 389 N.W.2d 12 (1986).

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, for ensuring a valid plea. While appellate counsel concludes that the circuit court "properly questioned Mr. Moore with respect to his guilty plea," we have identified three omissions from that colloquy that warrant further discussion.

First, although the circuit court properly reviewed the elements of armed robbery with Moore, it neglected to expressly review the elements of the party to a crime modifier with him. Specifically, a person may be concerned in the commission of a crime "by either directly committing it or by intentionally aiding and abetting the person who directly committed it." *See* WIS JI—CRIMINAL 400. To intentionally aid and abet a crime, the defendant must know that another person is committing a crime and have the purpose to assist the commission of that crime. *See* ***id.*** Thus, the plea colloquy was defective on its face because if the party to a crime theory was aiding and abetting, then the circuit court should have ensured that Moore understood the intent element. This omission from the colloquy is compounded by the fact that "party to a crime" was not listed or discussed within the plea questionnaire or attached documents prepared by trial counsel, so the record is unclear as to whether Moore's trial attorney reviewed the elements of party to a crime liability with him.

Nevertheless, we conclude that the record as a whole shows this particular omission to be an insubstantial defect that does not arguably warrant plea withdrawal. *See* ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482. Moore never denied that he had committed a robbery, so to the extent that Moore could be held directly liable, it was not necessary for the circuit court to additionally explain party to a crime liability because it had already reviewed the armed robbery elements. *See* ***State v. Calvin L. Brown***, 2012 WI App 139, ¶¶12-13, 345 Wis. 2d 333, 824 N.W.2d 916.

Further, Moore stipulated to the complaint as a factual basis for the plea, subject to trial counsel's clarification that Moore's statement was "that there were two other guys that were involved with him in that capacity. He is not the one that had the gun. Somebody else had the gun." The circuit court then asked Moore, "Is that a true statement?… You approached the victim, you knew what was going on, and you took property from him?" Moore answered affirmatively. Thus, the record establishes that Moore understood he committed an intentional act in aid of his co-actors, so the circuit court's failure to more explicitly explain this element to Moore in this case does not provide an arguably meritorious basis for plea withdrawal.

Second, a circuit court conducting a plea colloquy must inform the defendant of the constitutional rights that are waived by entering a plea and verify that the defendant understands those rights are being given up with the plea. *See* ***Hampton***, 274 Wis. 2d 379, ¶24. While the plea questionnaire lists seven specific rights, the circuit court only expressly reviewed two of those rights with Moore. However, the circuit court also referenced the plea questionnaire and asked Moore whether he understood "that by signing the form and filing it in court, that you are telling me that you want to give up all the Constitutional Rights listed on this form." Moore affirmatively answered that question and also affirmatively expressed his understanding that he

was waiving the specific rights that the circuit court did review. Thus, the record as a whole reflects Moore's understanding of the constitutional rights he was surrendering. *See* ***Pegeese***, 387 Wis. 2d 119, ¶¶38-40.

Finally, the circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of that particular omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. While appellate counsel's analysis is more circuitous, it is sufficient to note that the record reflects Moore was born in Milwaukee, so he is a citizen of the United States and not subject to potential immigration consequences from his plea.

Based on the foregoing, we are satisfied that the record reflects that Moore entered a knowing, intelligent, and voluntary plea, despite some gaps in the plea colloquy. *See, e.g.*, ***Taylor***, 347 Wis. 2d 30, ¶¶27-28; ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64. Therefore, there is no arguable merit to a challenge to the validity of Moore's plea.

The other issue that appellate counsel discusses in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *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 twelve-year sentence imposed is well within the forty-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). Accordingly, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

As part of the sentencing discussion, appellate counsel examines the circuit court's denial of Moore's postconviction motion to vacate a DNA surcharge. At sentencing, the circuit court directed Moore to provide a biological specimen for DNA testing and pay a mandatory $250 surcharge, as required by WIS. STAT. § 973.046(1r)(a) (2013-14); no other reason for the surcharge was given. In Moore's first no-merit appeal, case No. 2015AP1739-CRNM, the no-merit report simply indicated that the DNA surcharge had been ordered pursuant to statute.

The surcharge in question is mandatory for defendants sentenced on or after January 1, 2014. This includes Moore, but at the time Moore committed his offense, imposition of the surcharge for most felony convictions was left to the circuit court's discretion. *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393. Thus, in Moore's first no-merit appeal, we directed counsel to file a supplemental no-merit report regarding whether there might be an arguably meritorious *ex post facto* challenge to the surcharge in this case because Moore had previously paid it. *See, e.g.*, ***State v. Radaj***,

2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758, *overruled by* ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373; ***State v. Scruggs***, 2015 WI App 88, ¶1, 365 Wis. 2d 568, 872 N.W.2d 146. In response, appellate counsel moved to voluntarily dismiss the appeal and return to the circuit court to pursue a postconviction motion. We granted the motion, rejecting the no-merit report and dismissing the appeal.

Appellate counsel then filed an appropriate postconviction motion seeking to vacate the surcharge. The circuit court denied the motion, concluding that under ***Scruggs***, there was no *ex post facto* problem if only one surcharge for a felony committed prior to January 1, 2014, was imposed at a time—***Radaj***, by contrast, had involved imposition of four mandatory surcharges in one case. Appellate counsel filed a second no-merit notice of appeal and report.

In the time between dismissal of the first no-merit appeal and commencement of the second, this court released ***State v. Williams***, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310, in which we held—contrary to the circuit court's interpretation in this case—that there is an *ex post facto* violation when imposing even a single mandatory DNA surcharge under circumstances like Moore's. *See* ***id.***, ¶¶26-27. We therefore rejected the no-merit report in the second appeal, case No. 2016AP1615-CRNM, because under ***Williams***, Moore had an arguably meritorious challenge to the circuit court's refusal to vacate the surcharge.

Meanwhile, our supreme court had granted a petition for review in ***Williams***. Further proceedings in Moore's case were held in abeyance. The supreme court ultimately determined that the mandatory DNA surcharge is not punitive and, thus, its imposition does not constitute an *ex post facto* violation. *See* ***id.***, 381 Wis. 2d 661, ¶43. In light of the supreme court's ***Williams*** decision, there are no longer any arguably meritorious concerns related to the imposition of the

mandatory DNA surcharge in this case or to the circuit court's order denying the postconviction motion to vacate that surcharge.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of further representation of Moore 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