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DISTRICT II

April 14, 2021

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

2019AP1362-CRNM State of Wisconsin v. Danny M. Andrews, Jr. (L.C. #2018CF244)

Before Neubauer, C.J., Gundrum and Davis, 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).

Danny M. Andrews, Jr. appeals from a judgment convicting him of conspiracy to manufacture/deliver cocaine while using a dangerous weapon contrary to WIS. STAT.

§§ 961.41(1x), 939.63(1)(b) and 961.41(1)(cm)4 (2017-18)¹ and being a felon in possession of a firearm contrary to WIS. STAT. § 941.29(1m)(a). Andrews' appellate counsel filed a no-merit report and supplemental no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Andrews filed two responses to counsel's no-merit reports. Upon consideration of the reports, responses and after an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

For the two offenses, the circuit court sentenced Andrews to consecutive terms totaling thirty years (twenty years of initial confinement and ten years of extended supervision). Andrews received sentence credit. The court deemed Andrews ineligible for either the Challenge Incarceration Program or the Substance Abuse Program due to the seriousness of the offenses.

The no-merit report addresses the following possible appellate issues: (1) whether Andrews' guilty pleas were knowingly, voluntarily and intelligently entered and (2) whether the circuit court misused its sentencing discretion. After reviewing the record, we conclude that counsel properly analyzed these issues and correctly determined that these issues lack arguable merit.²

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

² The no-merit report also discusses whether there would be arguable merit to a challenge arising from Andrews' lack of counsel at his preliminary hearing. Andrews experienced delays in obtaining counsel, but he refused to defer his preliminary hearing until after he obtained counsel. Therefore, at Andrews' insistence, the preliminary examination proceeded with Andrews pro se. Any issue relating to the preliminary hearing was waived by Andrews' guilty pleas. *State v. Popp*, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471 (“[A] guilty plea waives all nonjurisdictional defects and defenses.”).

The plea colloquy complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The colloquy was thorough and informed Andrews of each of the constitutional rights waived by his guilty pleas. Andrews' guilty pleas waived "all nonjurisdictional defects and defenses." *State v. Popp*, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471 (citation omitted). Any challenge to the entry of Andrews' guilty pleas would lack arguable merit for appeal.

Andrews' responses focus on sentencing and counsel's representation at sentencing.³ Andrews argues that counsel was ineffective because he did not argue mitigating circumstances, including that Andrews was just a cog in the drug operation for which he delivered cocaine and that he was homeless and destitute, which Andrews contends is not the usual condition of a drug dealer.⁴ Based on the foregoing, Andrews argues that he was sentenced based on inaccurate information. Appellate counsel's supplemental no-merit report concludes that Andrews' responses do not present issues with arguable merit.

We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).⁵ However, because appointed counsel asks

³ Andrews also argues that he did not receive effective assistance from his appellate counsel. Challenges to appellate counsel's representation are outside the scope of a WIS. STAT. RULE 809.32 no-merit appeal. Depending on the ineffective assistance of counsel claim being pursued, such claims must be raised by a petition for writ of habeas corpus in the court of appeals or by a motion filed pursuant to WIS. STAT. § 974.06 or by a petition for writ of habeas corpus in the circuit court. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678-84, 556 N.W.2d 136 (Ct. App. 1996).

⁴ Andrews characterizes drug dealers as financially well-off with personal assets.

⁵ To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing.

Our review of the sentencing transcript confirms that trial counsel argued the mitigating circumstances Andrews identifies on appeal and thoroughly advocated for a lesser sentence based on all aspects of Andrews' character and the circumstances of the offenses. Counsel argued that Andrews' addiction made him vulnerable to being involved in the drug trade, he was not a large-scale drug seller, and he delivered drugs to support his addiction rather than for personal financial gain. During allocution, Andrews told the court that his offenses arose from his drug addiction and any money he earned from delivering drugs was spent on his addiction.

The circuit court was not required to accept Andrews' explanations for his involvement in the drug trade or his alleged mitigating circumstance, including being destitute and drug-addicted. The complaint provided the factual basis for the pleas, and the complaint alleged cocaine delivery and felon in possession of a firearm. In fashioning the sentences, the court noted the extent of Andrews' involvement in the drug trade, and the amount of cocaine he delivered into the community. The court was free to deem this involvement significant and dangerous to the community. The court was also free to place greater weight on the need to protect the public and lesser weight on Andrews' addiction-related decisions and drug activities. The weight of the sentencing factors was within the circuit court's discretion. *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The court also considered Andrews' character, his lengthy history of offenses and failure to comply with rules and requirements (such as not possessing a firearm as a convicted felon), and his need for rehabilitation and AODA

treatment in a controlled setting. That the court rejected Andrews' perspective on his character and offenses does not mean he was sentenced based on inaccurate information.

The sentencing record does not contain a factual or legal basis for either an ineffective assistance of trial counsel claim or a claim that Andrews was sentenced based on inaccurate information. These claims lack arguable merit for appeal.

Having reviewed the sentencing, we conclude that the circuit court engaged in a proper exercise of sentencing discretion after considering various sentencing factors. *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (we review the sentence for a misuse of discretion); *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (sentencing objectives and factors discussed). No issue with arguable merit arises from a challenge to the sentence.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any arguably meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Bradley Lochowicz of further representation of Andrews in this matter.

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 Bradley J. Lochowicz is relieved of further representation of Danny M. Andrews, Jr. in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals