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DISTRICT I

August 24, 2021

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

2020AP2134-CRNM State of Wisconsin v. Desmond Ellis (L.C. # 2019CF3720)

Before Brash, C.J., Dugan and White, 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).

Desmond Ellis appeals from a judgment of conviction, following a guilty plea, of homicide by intoxicated use of a vehicle. *See* WIS. STAT. § 940.09(1)(a) (2019-20).[1] His appellate counsel, Mark A. Schoenfeldt, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Ellis received a copy of the report, was advised of his right to file a response, and did not do so. We have independently reviewed

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the record and no-merit report as mandated by ***Anders***. We conclude that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm.

A criminal complaint dated August 21, 2019, charged Ellis with one count of injury by intoxicated use of a vehicle, one count of injury by intoxicated use of a vehicle with a prohibited alcohol concentration, and one count of knowingly operating a motor vehicle while suspended, causing great bodily harm. An amended information later charged Ellis with one count of homicide by intoxicated use of a vehicle, homicide by intoxicated use of a vehicle with a prohibited blood alcohol concentration, and operating a motor vehicle while suspended, causing death.

On October 31, 2019, pursuant to a plea agreement, Ellis signed a plea questionnaire/waiver of rights form. The form stated that the State would dismiss and read in the operating while suspended charge and would recommend a total of ten years of incarceration, consisting of six or seven years of initial confinement and the balance on extended supervision.

At the plea hearing, the State informed the circuit court that pursuant to plea negotiations, Ellis could plead guilty to either of the homicide by intoxicated use of a vehicle charges, the State would dismiss the other charge, and the State would dismiss and read in the operating while suspended charge. The State also told the circuit court that it would recommend ten years of incarceration, consisting of six or seven years of initial confinement and the balance on extended supervision. The State also informed the circuit court that it would request restitution. The circuit court conducted a plea colloquy with Ellis and accepted his guilty plea. The circuit court subsequently accepted the State's sentencing recommendation, sentencing Ellis to a total sentence of ten years, consisting of six years of initial confinement and four years of extended

supervision. The circuit court also ordered restitution in the amount of $2,000, to be paid to the Crime Victim Compensation Fund.

The no-merit report addresses four potential issues: (1) whether Ellis's plea was knowing, voluntary, and intelligent; (2) whether there was sufficient evidence to form a factual basis for a finding of Ellis's guilt; (3) whether the circuit court properly exercised its discretion during sentencing; and (4) whether Ellis was denied the effective assistance of counsel.

Our review of the record—including the plea questionnaire and waiver of rights form, the addendum, the jury instructions that were signed by Ellis, and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. These obligations exist specifically to help ensure the validity of any plea. We thus agree with appellate counsel's conclusion in the no-merit report that there is no arguable merit to seeking plea withdrawal based on a claim that Ellis's plea was anything other than knowing, intelligent, and voluntary.

We also agree with counsel that the record confirms that there was a factual basis supporting a finding of Ellis's guilt. The criminal complaint stated that on the evening of August 19, 2019, Milwaukee police responded to the scene of an accident, where Ellis told police that he struck a pedestrian. Police detected a strong odor of alcohol on Ellis's breath, Ellis's eyes were bloodshot and glassy, Ellis failed field sobriety tests, and Ellis admitted that he had been drinking. Ellis's vehicle also showed damage consistent with striking a pedestrian. Subsequent blood testing revealed that Ellis's blood alcohol concentration was .214. The complaint further stated that the victim was transported to a local hospital with substantial

injuries. At the plea hearing, the State reminded the circuit court that the victim ultimately succumbed to his injuries, leading to the amended charges. Ellis admitted guilt at the hearing. Relying on the complaint and the State's supplemental information at the hearing, the circuit court found that a factual basis existed to find Ellis guilty. Accordingly, there would be no arguable merit to a challenge to the evidence forming the factual basis for the circuit court's acceptance of Ellis's plea.

With regard to the circuit court's sentencing decision, we note that sentencing is a matter for the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It must also determine which objective or objectives are of greatest importance. *See* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider additional factors. *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 resulting ten year sentence is well within the potential maximum 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). Further, Ellis did not object to the imposition of

restitution; indeed, counsel told the circuit court that Ellis felt restitution was "part of his responsibility."

The no-merit report addresses whether Ellis received ineffective assistance from his trial counsel. We normally decline to address an ineffective assistance of trial counsel claim if the claim was not raised in a postconviction motion in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks 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.

To establish ineffective assistance of counsel, Ellis must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Ellis must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

Our independent review of the record prompts us to address one other matter that the no-merit report does not discuss: whether a challenge to the denial of Ellis's postconviction motion for sentence modification would have arguable merit. We conclude that it does not. Ellis filed a *pro se* motion for sentence modification arguing that the COVID 19 pandemic constituted a new factor warranting sentencing modification. Ellis argued that he had an underlying health condition—sickle cell anemia—which made him more susceptible to contracting the virus while

incarcerated. We agree with the postconviction court that the Department of Corrections (DOC) "has a legal obligation to take the necessary steps to keep inmates safe and healthy," and any failure of the DOC to do so should be directly addressed with the institution.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction, and discharges appellate counsel of the obligation to represent Ellis further in this appeal.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of further representation of Ellis 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