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DISTRICT I

September 8, 2021

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

Carl W. Chesshir
Electronic Notice

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Damian B. Smith 547205
Green Bay Correctional Inst.
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Green Bay, WI 54307-9033

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

2020AP1641-CRNM	State of Wisconsin v. Damian B. Smith (L.C. # 2019CF1)
2020AP1642-CRNM	State of Wisconsin v. Damian B. Smith (L.C. # 2019CF578)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Damian B. Smith appeals from judgments of conviction, following guilty pleas, of second-degree reckless homicide with the use of a dangerous weapon and second-degree reckless injury with the use of a dangerous weapon. His appellate counsel, Carl W. Chesshir, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Smith received a copy of the report, was advised of his right to file a response,

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

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

On January 2, 2019, in Milwaukee County Circuit Court case No. 2019CF1, the State charged Smith with one count of first-degree reckless homicide and one count of being a felon in possession of a firearm. The complaint stemmed from the shooting death of Kory Kobylinski. On February 7, 2019, in Milwaukee County Circuit Court case No. 2019CF578, the State charged Smith with one count of first-degree reckless injury with the use of a dangerous weapon, stemming from the shooting of J.P.L.; one count of first-degree recklessly endangering safety with the use of a dangerous weapon, stemming from the shooting of J.W.D.; one count of first-degree recklessly endangering safety with the use of a dangerous weapon, stemming from shots fired at T.Q.H.; and two counts of being a felon in possession of a firearm. The State filed a motion for joinder, which Smith opposed. At a hearing on the motion, the circuit court determined that the cases were appropriate for joinder based on the timeline of events and based on a ballistic report showing that bullet casings from all of the shootings were shot from the same gun.

When the trial was set to begin, the State informed the circuit court that it made a plea offer for Smith to enter a guilty plea to an amended charge of second-degree reckless homicide with the use of a dangerous weapon in case No. 2019CF1 and the State would recommend fifteen years of confinement with extended supervision up to the court. With regard to case No. 2019CF578, Smith would plead guilty to an amended charge of second-degree reckless injury with the use of a dangerous weapon and the State would recommend eight years of confinement with extended supervision up to the court; both sentences would run consecutive to each other.

The State would also dismiss and read in the two felon in possession charges and outright dismiss the remaining charges. The State then filed Amended Informations in both cases.

The circuit court conducted a colloquy with Smith and accepted his guilty pleas. Pursuant to the plea negotiations, Smith signed a plea questionnaire/waiver of rights form. The circuit court sentenced Smith to fifteen years of initial confinement to be followed by five years of extended supervision in case No. 2019CF1, and nine years of initial confinement and five years of extended supervision in case No. 2019CF578, to be served consecutive to one another.

Counsel's no-merit report addresses two issues: (1) whether the circuit court properly accepted Smith's guilty pleas, and (2) whether the circuit court erroneously exercised its sentencing discretion. In his response, Smith contends that he is not guilty of the second-degree reckless injury charge, the circuit court erroneously granted the State's motion for joinder, and he was under the impression that he would receive concurrent sentences.

Our review of the record—including the plea questionnaire and waiver of rights form, the addendum, the jury instructions, 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 Smith's pleas were anything other than knowing, intelligent, and voluntary.

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 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, as well as additional factors it may wish to consider. 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 sentences were within the potential maximums authorized by law, see *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are 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). As to Smith's claim that he expected concurrent sentences, nothing in the record supports this contention. At both the plea and sentencing hearings, the State recommended consecutive sentences. Neither Smith nor his counsel raised the possibility of concurrent sentences on the record.

We will also briefly discuss Smith's contention that the circuit court erroneously granted the State's motion to join case No. 2019CF1 and case No. 2019CF578. We conclude that any challenge to the circuit court's decision to grant the State's motion for joinder of the two cases would lack arguable merit. WISCONSIN STAT. § 971.12(4) permits crimes in two or more complaints to be joined for trial if the charged crimes could have been joined in a single complaint. Subsection 971.12(1) permits two or more crimes to be charged in a single complaint

when the crimes charged “are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan.” Whether joinder is proper is a question of law. *State v. Hoffman*, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Section 971.12 is to be broadly construed in favor of joinder, *Hoffman*, 106 Wis. 2d at 208, in order to promote efficient, economical judicial administration and to avoid multiple trials, *State v. Leach*, 124 Wis. 2d 648, 671, 370 N.W.2d 240 (1985).

Here, the circuit court determined that the complaints should be consolidated for purposes of trial because the allegations were relatively close in time and involved similar fact patterns. Both cases involved Smith firing shots from the same weapon, as identical casings were found at each crime scene. The shootings also occurred within a relatively short time period. Accordingly, Smith’s challenge to the circuit court’s joinder decision lacks arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of further representation of Smith 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