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DISTRICT II

September 15, 2021

To:

Hon. Rebecca L. Persick
Circuit Court Judge
Electronic Notice

Joel Urmanski
District Attorney
Electronic Notice

Melody Lorge
Clerk of Circuit Court
Sheboygan County
Electronic Notice

Winn S. Collins
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Sarra Mae Clarkson
Electronic Notice

Avery L. Applewhite Sr., #489011
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2020AP1606-CRNM State of Wisconsin v. Avery L. Applewhite, Sr.
(L.C. #2018CF602)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Avery L. Applewhite, Sr., appeals from a judgment convicting him of possession of cocaine as a second or subsequent offense, felony bail jumping, and possession of narcotic drugs, all as a repeater. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Applewhite received a

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

copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

This case arises out of a traffic stop involving Applewhite and a woman named Carla Binsfeld. During the stop, a K-9 officer was deployed and alerted on the vehicle to the odor of controlled substances. Police searched the vehicle, but found no controlled substances. They subsequently searched Applewhite, in part for officer safety, and found a variety of controlled substances along with a knife.

Applewhite moved to suppress the evidence found in the search. Following a hearing on the matter, the circuit court denied the motion. The court found that the traffic stop, which was based on an expired registration sticker, was not unlawfully prolonged by the K-9 officer. *See Rodriguez v. United States*, 575 U.S. 348, 350-351 (2015).

Applewhite filed a demand for a speedy trial. He later waived it so that he could obtain new counsel and investigate the case further. Eventually, Applewhite entered no contest pleas to the charges of possession of cocaine as a second or subsequent offense, felony bail jumping, and possession of narcotic drugs, all as a repeater. The circuit court granted his motion for a presentence investigation (PSI) report.

At sentencing, Applewhite asked to withdraw his pleas, suggesting that they were not knowingly, voluntarily, and intelligently entered. The circuit court denied the request, citing the lengthy plea hearing and fact that nearly all of Applewhite's complaints were ones he had previously raised. The court surmised that the negative PSI report "may have something to do

with [Applewhite’s] change of heart at this point.” It proceeded to impose an aggregate sentence of four years, six months of initial confinement and three years of extended supervision. This no-merit appeal follows.

The no-merit report addresses potential issues of (1) whether the circuit court correctly denied Applewhite’s motion to suppress, (2) whether Applewhite’s right to a speedy trial was violated, (3) whether the court misused its discretion by ordering a PSI report, and (4) whether trial counsel was ineffective. We are satisfied that the no-merit report correctly analyzes the issues it raises as without merit, and we will not discuss them further.

The no-merit report does not address whether Applewhite’s pleas were knowingly, voluntarily, and intelligently entered.² The record shows that the circuit court engaged in a colloquy with Applewhite that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In addition, a signed plea questionnaire and waiver of rights form was entered into the record, along with attachments detailing the elements of the offenses. The record discloses no valid reason to withdraw the pleas. Accordingly, we conclude that a challenge to the pleas’ entry or the court’s decision denying their withdrawal would lack arguable merit.

The no-merit report also does not address whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197

² Counsel was obligated to address all possible appellate issues arising from the record and state why they do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the requirements of WIS. STAT. RULE 809.32.

(citation omitted). The court considered the seriousness of the offenses, Applewhite’s character, and the need to protect the public. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Indeed, it is roughly in line with the one requested by Applewhite’s counsel.³ We conclude that a challenge to the sentence would lack arguable merit.

Our independent review of the record does not disclose any potentially 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 and relieve Attorney Sarra Mae Clarkson of further representation in this appeal.

Upon the foregoing reasons,

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

³ Applewhite’s counsel requested an aggregate sentence of four years of initial confinement and five years of extended supervision.

IT IS FURTHER ORDERED that Attorney Sarra Mae Clarkson is relieved of further representation of Avery L. Applewhite, Sr., in this appeal. *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