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DISTRICT I

September 21, 2021

To:

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Circuit Court Judge
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Milwaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP231-CRNM State of Wisconsin v. Royal Edward Summers, II
(L.C. # 2018CF1662)

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).

Royal Edward Summers, II, pled guilty to theft from person and armed robbery. He faced maximum penalties of a $25,000 fine and a ten-year term of imprisonment for the former offense and a $100,000 fine and a forty-year term of imprisonment for the latter. *See* WIS. STAT. §§ 943.20(1)(a),(3)(e), 943.32(2), 939.50(3)(g),(c) (2017-18).[1] The circuit court imposed an

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

evenly bifurcated seven-year term of imprisonment for the theft and a consecutive, evenly bifurcated ten-year term of imprisonment for the armed robbery. The circuit court awarded Summers the 380 days of sentence credit he requested, found him eligible for the challenge incarceration program and the Wisconsin substance abuse program, and ordered him to pay $1,150 in restitution. Summers appeals.

Attorney Gabriel William Houghton filed a no-merit report on Summers's behalf pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). In that report, Attorney Houghton addressed the validity of Summers's guilty pleas, the circuit court's exercise of sentencing discretion, and Summers's concerns about judicial bias and the effectiveness of his trial counsel. At our request, Attorney Houghton filed a supplemental no-merit report to address restitution.[2] Summers did not file a response to either of the no-merit reports. Upon consideration of the no-merit reports and an independent review of the record as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal, and therefore we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, a detective responded to a Milwaukee address in the 1200 block of South 15th Place early on the morning of February 27, 2018. Upon arrival, the detective spoke to J.P., who told the detective that she was walking home when a Black male approached her, displayed a handgun, and said: "gimme all your stuff, you don't want to lose your life over that purse." J.P. said she surrendered her purse to the gunman, who took it and fled. Police subsequently viewed surveillance video recorded by an area business on

[2] The supplemental no-merit report also addressed transcripts of proceedings that were belatedly filed and transmitted to this court.

February 27, 2018. The video showed a person with a gun emerge from a Buick Le Sabre, confront J.P., take her purse, and then drive away in the vehicle.

The complaint further alleged that on April 4, 2018, detectives responded to a Milwaukee McDonalds restaurant in the 2500 block of West National Avenue. Upon arrival, they spoke to O.B.C., who said that he had arranged through Facebook to meet "Royal Summers" and sell him a gold necklace for $1,150. When O.B.C. met Summers at the McDonalds, Summers grabbed the necklace from O.B.C. and flashed a pocket knife, asking: "Do you want to die?" Summers then fled.

The complaint went on to allege that detectives arrested Summers on April 5, 2018, and questioned him after giving him the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[3] Summers admitted taking a necklace from O.B.C., stating: "I stole [O.B.C.'s] chain, it's not like I f*in robbed him for it, I stole [it] I snatched it from him." Summers added that he sold the necklace and purchased Percocet pills with the money. Summers also admitted that he was the person seen in surveillance video robbing J.P. on February 27, 2018, but he claimed that the gun he carried was "fake."

The State charged Summers in the complaint with two counts of armed robbery. The State subsequently filed an information alleging that he committed both crimes as a habitual offender.

[3] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

Summers decided to resolve the charges with a plea agreement. Pursuant to its terms, he pled guilty to an amended charge of theft from person arising from the April 4, 2018 incident, and he pled guilty to an unenhanced charge of armed robbery arising from the February 27, 2018 incident. The State agreed to recommend an aggregate, evenly bifurcated twenty-year term of imprisonment. The circuit court accepted Summers's guilty pleas, and the matters proceeded to sentencing.

We first consider whether Summers could pursue a claim for plea withdrawal on the ground that his guilty pleas were not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). We conclude that he could not do so. At the outset of the plea hearing, the circuit court established that Summers had signed a plea questionnaire and waiver of rights form and had reviewed it with his trial counsel. *See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (providing that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The form reflected that Summers was twenty-eight years old and had a high school diploma. The circuit court went on to conduct a colloquy with Summers that complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶18; *see also* WIS. STAT. § 971.08(1). The record—including the plea questionnaire and waiver of rights form and its addendum, the jury instructions that Summers signed describing the elements of the crimes to which he pled guilty, and the plea hearing transcript—demonstrates that Summers entered his guilty pleas knowingly, intelligently, and voluntarily. *See* § 971.08; *see also* ***Bangert***, 131 Wis. 2d at 266-72. We therefore agree with appellate counsel that further pursuit of this issue would lack arguable merit.

Appellate counsel suggests that Summers wishes to pursue a claim that trial counsel was ineffective for failing to tell him that the criminal complaint would not be amended in conjunction with his guilty pleas. We agree with appellate counsel's conclusion that the claim would lack arguable merit. To bring a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The record does not suggest any basis to claim a deficiency. A defense attorney is required to keep the defendant reasonably informed about the status of the criminal prosecution. *See* SCR 20:1.4(a)(3) (2021). However, "[t]he information"—not the complaint—"is the charging document to which a defendant must enter a plea," *see* ***State v. Copening***, 103 Wis.2d 564, 576, 309 N.W.2d 850 (Ct.App.1981), and the plea hearing transcript and plea questionnaire reflect Summers's knowledge that the operative charging document had been amended. No case or statute requires trial counsel to advise the defendant of all the minutiae of procedure involved in a criminal case.

We next consider whether Summers could pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that protection of the community and Summers's rehabilitation were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The circuit court's discussion included consideration of the mandatory sentencing factors, namely, "the gravity of the offense, the character of the defendant, 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. The sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and the sentences were not so excessive as to shock the public's sentiment,

see ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). No arguably meritorious basis exists to challenge the circuit court's exercise of sentencing discretion.

We next consider appellate counsel's advisement that Summers wishes to pursue a claim of judicial bias based on remarks that the judge made at sentencing. We agree with appellate counsel that a claim of judicial bias—subjective or objective—would lack arguable merit.

A judge is subjectively biased when the judge believes that he or she cannot act impartially. Because the judge in this case did not disqualify herself, however, we presume that she did not question her own impartiality, and the inquiry into subjective bias ends. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). Accordingly, there is no arguable merit to a claim of subjective bias.

A judge is objectively biased when the "'judge in fact treated the defendant unfairly'" or "when a reasonable person could question the court's impartiality based on the court's statements." ***State v. Goodson***, 2009 WI App 107, ¶9, 320 Wis. 2d 166, 771 N.W.2d 385 (citation and brackets omitted). Here, the sentences that the circuit court imposed were more lenient than the State recommended and do not suggest unfair treatment. Moreover, we have reviewed the entirety of the circuit court's remarks, and we are satisfied that nothing in them suggests judicial bias. According to appellate counsel, Summers believes that some of the circuit court's sentencing remarks were not captured by the court reporter, but appellate counsel advises this court that he has contacted the court reporter and cannot substantiate Summers's allegation. In light of appellate counsel's advisements, and because the record does not reveal a basis to allege judicial bias, we conclude that there is no arguable merit to further pursuit of this issue. *Cf.* ***State v. Tillman***, 2005 WI App 71, ¶17, 281 Wis. 2d 157, 696 N.W.2d 574.

Last, we conclude that Summers could not pursue an arguably meritorious challenge to the restitution order. Near the outset of the sentencing hearing, the circuit court acknowledged receipt of a signed restitution request form from O.B.C. seeking $1,150 for the loss of his necklace and $15 for the cost of an Uber ride. The circuit court concluded that the Uber cost was not related to the offense and ordered restitution of $1,150. Summers did not object. A defendant constructively stipulates to restitution by not objecting when it is ordered, if the defendant had notice of the amount of restitution sought. *See* ***State v. Hopkins***, 196 Wis. 2d 36, 43-44, 538 N.W.2d 543 (Ct. App. 1995). Here, the record shows that the State filed O.B.C.'s restitution request form one month before the sentencing hearing, but the record is silent as to whether Summers received actual notice of the request.[4] However, appellate counsel advises in the supplemental no-merit report that he explored whether Summers could pursue an arguably meritorious claim either that he lacked notice of the restitution request or that trial counsel failed to discuss the request with him. Appellate counsel further advises that, based on his investigation, Summers could not mount such claims. In light of appellate counsel's advisements, and because the record does not reveal a basis for further proceedings to challenge the restitution order, we conclude that there is no arguable merit to further pursuit of this issue. *Cf.* ***Tillman***, 281 Wis. 2d 157, ¶17.

Our independent review of the record does not disclose any other potential issues warranting discussion. We therefore conclude that further postconviction or appellate

[4] O.B.C.'s restitution request form includes the handwritten date of "May 18, 2019." The record shows that the State filed the form on March 18, 2019, and the circuit court conducted the sentencing hearing on April 19, 2019. The handwritten date of May 18, 2019, that appears on the restitution request form is therefore clearly a scrivener's error.

proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Gabriel William Houghton is relieved of any further representation of Royal Edward Summers, II. *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