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DISTRICT IV

April 21, 2022

To:

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Circuit Court Judge
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
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Katie Babe
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Barquis Dmoin McKnight 523594
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1274-CRNM State of Wisconsin v. Barquis Dmoin McKnight
(L.C. #2017CF1843)

Before Blanchard, P.J., Kloppenburg, and Fitzpatrick, 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).

Attorney Katie Babe, appointed counsel for appellant Barquis McKnight, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). McKnight has filed a no-merit response, and Attorney Babe has filed two supplemental no-merit reports. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit reports, we

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

agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

McKnight was charged with first-degree intentional homicide and possession of a firearm by a felon based on a shooting in Janesville. Pursuant to a plea agreement, McKnight pled guilty to an amended charge of homicide by reckless handling of a dangerous weapon and possession of a firearm by a felon. The court imposed consecutive maximum sentences for a total of ten years of initial confinement and ten years of extended supervision.

The parties stipulated that McKnight was entitled to resentencing due to a conflict of interest with his counsel at the time of sentencing. The resentencing court imposed the same maximum consecutive sentences for a total of ten years of initial confinement and ten years of extended supervision, but made McKnight eligible for the Challenge Incarceration and Substance Abuse Programs on the felon in possession charge after serving three years of confinement.[2]

The no-merit report addresses whether there would be arguable merit to a challenge to McKnight's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that McKnight signed, satisfied the court's mandatory duties to personally address McKnight and determine information such as McKnight's understanding of the nature of the charges and the

[2] The Honorable James Daley presided over the original sentencing. The Honorable Karl Hanson presided over the resentencing.

range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. We agree with counsel's assessment that a challenge to the validity of McKnight's plea would lack arguable merit. A valid guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

The no-merit report also addresses whether there would be arguable merit to a challenge to McKnight's sentence. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained at the resentencing hearing that it considered facts pertinent to the standard sentencing factors and objectives, including the severity of the offenses, McKnight's rehabilitative needs, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. An argument that the circuit court erroneously exercised its sentencing discretion would lack arguable merit. Given the facts of this case, there would be no arguable merit to a claim that the maximum consecutive sentences were unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (quoted source omitted)). Additionally, the court awarded McKnight 808 days of sentence credit, on counsel's stipulation. We discern no basis to challenge the circuit court's sentencing.

The no-merit report notes that McKnight believes that he received ineffective assistance of counsel based on counsel's failure to request a different judge to conduct his resentencing because the resentencing judge had been present in the courtroom during the original sentencing. Counsel concludes that there is no basis in law or the facts in the record to support an argument that a different judge was required at the resentencing. McKnight maintains this argument in his no-merit response. We are aware of no settled authority for the proposition that a judge who was present in the courtroom to observe an original sentencing should not preside over a subsequent resentencing. McKnight's attorney had no obligation to make a novel legal argument. *See* ***Ronald J.R. v. Alexis L.A.***, 2013 WI App 79, ¶11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments).

Finally, the no-merit report addresses whether there would be arguable merit to a claim that trial counsel was ineffective by failing to seek a change of venue based on media coverage of the shooting. We agree with counsel's assessment that this issue would lack arguable merit, and we do not address it further.

McKnight also asserts the following in his no-merit response as grounds for further proceedings: (1) the state public defender switched McKnight's appointed counsel; (2) McKnight's prior counsel was named on the State's witness list; (3) the circuit court did not allow McKnight to discuss motions at one of the pretrial hearings; and (4) McKnight believes that his prior counsel and the circuit court judge who sentenced him should have been reported to the Office of Lawyer Regulation for violations. Counsel concludes in a supplemental no-merit report that none of those assertions would support a claim of arguable merit. We agree with counsel that none of those assertions provides a basis for a non-frivolous postconviction argument.

McKnight further asserts that his trial counsel should have objected when the charges against McKnight were dismissed and refiled in September 2017. By prior order, this court noted that, at the initial appearance on September 22, 2017, the State indicated that the prior case against McKnight had been dismissed the previous day based on a speedy trial demand because the circuit court did not find good cause for a continuance. This court directed no-merit counsel to address whether there would be arguable merit to a claim of ineffective assistance of counsel for failing to move to dismiss the refiled charges based on a speedy trial violation. *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 575, 578, 297 N.W.2d 808 (1980) (circuit court has authority to dismiss a criminal case with prejudice when a defendant's constitutional speedy trial right is violated); *see also* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972) (setting forth test for whether a constitutional speedy trial violation has occurred); ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense).

Counsel concludes in a second supplemental no-merit report that a claim of ineffective assistance of counsel based on failure to argue a speedy trial violation would lack arguable merit. Counsel has provided this court with a transcript of the September 21, 2017 hearing in the prior case. Our review of that transcript indicates that both defense counsel and the State indicated they would not be ready to proceed with the scheduled trial date in compliance with McKnight's speedy trial demand, and requested a sixty-day continuance. McKnight personally addressed the court and stated his desire to maintain his speedy trial demand. The circuit court dismissed the case without prejudice and ordered McKnight held in custody pending the State refiling the charges the following day.

We conclude that it would be wholly frivolous to argue that trial counsel was ineffective by failing to move to dismiss with prejudice for a speedy trial violation after the charges were refiled. A speedy trial inquiry involves four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." ***Barker***, 407 U.S. at 530. The threshold inquiry is whether the length of delay is presumptively prejudicial. ***Id.*** If it is, we balance the four factors under the totality of the circumstances. ***Id.*** at 530-31. However, if the length of the delay is not presumptively prejudicial, then there was no violation of the speedy trial right and we do not proceed to the balancing of the four factors. ***Id.*** at 530.

When the length of delay approaches one year, it is generally considered presumptively prejudicial. *See* ***State v. Leighton***, 2000 WI App 156, ¶8, 237 Wis. 2d 709, 616 N.W.2d 126 (citing case law recognizing that courts have generally considered delay from arrest or formal accusation to trial presumptively prejudicial if it approaches one year). Here, it appears that McKnight was arrested on the same date as the offenses, May 28, 2017. McKnight pled guilty on January 18, 2018. The eight-month lapse between McKnight's arrest and the plea falls short of what case law recognizes as presumptively prejudicial. *See* ***id.*** We therefore conclude that McKnight's trial counsel was not ineffective by failing to move to dismiss with prejudice for a speedy trial violation after the State reissued the charges. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless motion).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate 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 Katie Babe is relieved of any further representation of Barquis McKnight 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