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DISTRICT II

April 27, 2022

To:

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Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2018AP1962-CRNM State of Wisconsin v. Darryl W. Clay (L.C. #2016CF147)

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

Darryl W. Clay appeals a judgment of conviction entered upon Clay's no-contest plea to one count of first-degree recklessly causing injury. 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, 744 (1967). Clay received a copy of the report and filed a response. Upon consideration of the report, response, and an independent review of the record, we conclude that the judgment may be

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

summarily affirmed because there are no arguably meritorious issues for appeal. *See* WIS. STAT. RULE 809.21.

The State filed a two-count complaint charging Clay with attempted first-degree intentional homicide and attempted robbery by use of force, both as a repeat offender. According to the complaint, a male and a female invited Clay into their house and a dispute over crack cocaine ensued. It is undisputed that Clay stabbed the male victim in the abdomen, causing him serious injury. According to the female victim, Clay then squeezed her neck and demanded money before fleeing the house.

Pursuant to a plea agreement, the State filed an amended information charging a single count of first-degree reckless injury. Upon Clay's guilty or no-contest plea to the amended charge, the State would recommend fifteen years of initial confinement followed by ten years of extended supervision. At sentencing, the circuit court imposed a bifurcated sentence totaling twenty-five years, with fifteen years of initial confinement followed by ten years of extended supervision. Clay commenced this no-merit appeal.

Appellate counsel's no-merit report discusses (1) whether Clay's no-contest plea was knowing, intelligent, and voluntary, and if it was supported by a factual basis; and (2) whether the circuit court properly exercised its discretion in imposing sentence. This court is satisfied that the no-merit report correctly analyzes the issues it raises as without merit, and this court will not discuss them further except as necessary to address Clay's response.

In his response to the no-merit report, Clay asserts that the plea-taking court's colloquy was deficient in the following three ways: it failed to "consider the 'Facts' in the criminal complaint as the factual [basis]" when accepting Clay's no-contest plea; it failed to inform Clay

that he had the right to a unanimous jury verdict; and it failed "to determine if [Clay] had in fact been threatened or offered any promises other than the plea agreement in-order (sic) to force him to enter a plea of guilty…."

We conclude that none of these alleged deficiencies gives rise to an arguably meritorious plea withdrawal claim under ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986) (in order to set forth a prima facie case, a defendant seeking plea withdrawal due to a defective colloquy must demonstrate that the circuit court failed to comply with WIS. STAT. § 971.08 or other mandatory procedures, and must allege that he or she did not understand the information that should have been provided).

Starting with Clay's complaint that the circuit court failed to ascertain a factual basis, the legal grounds and factual support for his claim are unclear. WISCONSIN STAT. § 971.08 (1)(b) requires the plea-taking court to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." The factual basis requirement is separate from the voluntariness requirement, and its purpose is to protect a defendant from pleading guilty "without realizing that his conduct does not actually fall within the charge." ***State v. Thompson***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. The court is not required to make a factual basis determination "in one particular manner[,]" and may consider the entire record, including hearsay evidence and the preliminary examination. ***State v. Black***, 2001 WI 31, ¶¶11-12, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted).

Here, the plea-taking court specifically and correctly found that there was a factual basis for Clay's no-contest plea. We observe that both the complaint and the preliminary hearing testimony contain ample facts supporting the charge of conviction. Clay does not explain how

his conduct fails to satisfy the elements of first-degree reckless injury, the crime to which he pled after acknowledging the requisite elements on the record. Further, because Clay pled pursuant to a plea bargain, the circuit court was "not required to go to the same length to determine whether the facts would sustain the charge as it would if there was no plea bargain." ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994). Any potential challenge to Clay's no-contest plea on this basis is frivolous.

Next, Clay's assertion that the plea-taking court failed to inform him of his constitutional right to a unanimous jury is contradicted by the record. As part of its colloquy, the plea-taking court expressly told Clay that by pleading, he was giving up rights including "the right to have a jury of 12 find you guilty or not guilty." Additionally, a checked box on the plea questionnaire signed by Clay states: "I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty." As such, there was no ***Bangert*** violation and any challenge on this basis lacks arguable merit.

Clay's third asserted plea-colloquy defect concerns the circuit court's failure to specifically ask if any threats or promises, other than the plea agreement, were made to coerce his no-contest plea. We observe that appellate counsel pointed this out in the no-merit report, and asserted that "present counsel is unaware of any information that would give rise to a meritorious" plea-withdrawal motion on this ground. Appellate counsel's analysis along with our independent review of the record satisfies us that no meritorious challenge arises from the plea-taking court's failure to use magic words. "[N]ot all small deviations from the requirements in our ***Bangert*** line of cases equate to a ***Bangert*** violation and require a formal evidentiary hearing." ***State v. Cross***, 2010 WI 70, ¶38, 326 Wis. 2d 492, 786 N.W.2d 64. "We do not embrace a formalistic application of the ***Bangert*** requirements that would result in the abjuring

of a defendant's representations in open court for insubstantial defects." ***Cross***, 326 Wis. 2d 492, ¶32.

Here, the circuit court's failure to expressly ask about threats and promises does not give rise to an arguably meritorious ***Bangert*** claim. First and foremost, the court's failure to use these magic words is not enough to trigger a ***Bangert*** hearing; Clay must be able to allege that threats and promises other than the plea agreement induced his plea or rendered it infirm. He has not done so. The suggestion in Clay's response "that his trial counsel indicated he would receive an initial confinement [term] of 10 year[s] and 15 year[s] of extended supervision" is insufficient. Trial counsel's inaccurate prediction about a defendant's ultimate sentence does not render the no-contest plea unknowing or involuntary. Clay does not assert that trial counsel promised he would receive a certain sentence. Indeed, for at least two reasons, the record would not support such an assertion. First, Clay acknowledged at the plea hearing that the State would be recommending, and the court could impose, the maximum sentence. Second, Clay signed a plea questionnaire in which he represents: "I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. …."

In addition to the above potential plea-withdrawal claims, Clay asserts that his trial counsel "was in error for failing to specifically point out to the" sentencing court Clay's version of events and contradictions in the victims' versions of facts, especially the male victim's statement at sentencing that he was asleep when Clay stabbed him. We agree with the discussion in appellate counsel's no-merit report analyzing these potential sentencing claims as without arguable merit. Most pertinent to our conclusion is that trial counsel *did* present Clay's version

at sentencing, and *did* inform the sentencing court that the male victim's earlier statements to police contradicted the notion that he was asleep when the stabbing occurred.

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

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

IT IS FURTHER ORDERED that Attorney Jaymes Fenton is relieved from further representing Darryl W. Clay in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published

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Sheila T. Reiff
Clerk of Court of Appeals