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DISTRICT I

May 17, 2022

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Circuit Court Judge
Electronic Notice

Hon. Pedro Colon
Circuit Court Judge
Electronic Notice

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

| | |
|-----------------|--|
| 2019AP1711-CRNM | State of Wisconsin v. Donald Duwan Avery (L.C. # 2017CF2307) |
| 2019AP1712-CRNM | State of Wisconsin v. Donald Duwan Avery (L.C. # 2017CF5035) |

Before Donald, P.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).

Donald Duwan Avery appeals from judgments, entered on his guilty and no contest pleas, convicting him of three felony offenses. Avery also appeals from an order denying his postconviction motion. Appellate counsel, Sara Heinemann Roemaat, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32

(2019-20).¹ Avery has filed a response, for which appellate counsel filed a supplemental no-merit report. Upon this court’s independent review of the records as mandated by *Anders*, counsel’s reports, and Avery’s response, we conclude that, subject to correction of a clerical error in one of the judgments, there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments and order.

In Milwaukee County Circuit Court case No. 2017CF2307, Avery was charged with armed robbery, fleeing or eluding an officer, and operating a motor vehicle without the owner’s consent. According to the criminal complaint, Avery approached R.E., grabbed him, flashed a gun, and demanded the keys to a car R.E. had just parked. R.E. surrendered his keys and Avery drove off. When police spotted the vehicle later that day and attempted a traffic stop, Avery led them on a two-mile chase before his apprehension. Avery later admitted his actions in a police interview.

In Milwaukee County Circuit Court case No. 2017CF5035, Avery was charged with attempted armed robbery as a party to a crime and one count of first-degree recklessly endangering safety with use of a dangerous weapon. According to the criminal complaint, A.S. was parked outside his residence when a car pulled up behind him. A man exited the vehicle, approached A.S.’s driver’s door, and said, “Give me the money!” A.S. drove off with the other car in pursuit. The car eventually cut A.S. off, forcing him to stop. A man exited the vehicle and shot at A.S.’s windshield. The bullet struck A.S. in the shoulder. The man opened the driver’s door and grabbed A.S. by the shirt while yelling, “Where’s the money?” The man then pulled

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

A.S. out of the car and threw him to the ground. The man and three others rummaged through A.S.'s vehicle before fleeing the scene. Fingerprints recovered from A.S.'s car door were matched to Avery.

Pursuant to a plea agreement, Avery agreed to plead guilty to the armed robbery and fleeing charges in his first case and no contest to the attempted armed robbery charge in the second case. The other charges would be dismissed and read in. The trial court² conducted a plea colloquy and accepted Avery's pleas before imposing concurrent and consecutive sentences totaling thirteen years' initial confinement and thirteen years' extended supervision.

Avery filed a postconviction motion seeking sentence modification or resentencing. He argued that his sentences were "unduly harsh and unconscionable." He asserted that his crimes were serious but "not particularly aggravat[ed] compared to many crimes of the same nature." He further argued that his crimes were "completely out of character" for him and that he had no criminal history, asserting that "maximum sentences are reserved for the most aggravated breaches of law[.]" Avery also argued that the trial court had sentenced him on inaccurate information. The trial court had stated that "I also know that if you are ever to mature to your full responsibility not only to [A.S.] or the court or the community or your family, you have to be honest. And I don't know where these other two guys are and I considered that." Avery contends that "the idea that [he] was not willing to give up the names of the codefendants in the attempted robbery case was inaccurate." The circuit court denied the motion. Avery appeals.

² The Honorable Pedro Colon accepted Avery's pleas and imposed sentence and will be referred to as the trial court. The Honorable David L. Borowski reviewed Avery's postconviction motion and will be referred to as the circuit court.

The first potential issue appellate counsel discusses is whether Avery's pleas were knowing, intelligent, and voluntary. Our review of the records—including the plea questionnaire and waiver of rights forms and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty or no contest pleas, pursuant to WIS. STAT. § 971.08, *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. We are satisfied that the no-merit report properly analyzes this issue as lacking arguable merit.

The second potential issue appellate counsel raises is whether the trial court properly exercised its sentencing discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Separately, appellate counsel discusses whether Avery's total sentence was unduly harsh and unconscionable, as Avery had argued in his postconviction motion. Because review of the harshness of a sentence also relates to the trial court's exercise of sentencing discretion, see *State v. Owens*, 2016 WI App 32, ¶26, 368 Wis. 2d 265, 878 N.W.2d 736, we review the issues together.

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, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and must determine which objective or objectives are of greatest importance, see *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several other factors. 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 trial court appropriately considered relevant sentencing objectives and factors.

A defendant challenging a sentence has the burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Avery argued that his sentence was harsh because the circumstances of his offenses “were not particularly aggravat[ed,]” the offenses “were completely out of character” for him, and “[m]aximum sentences are reserved for the most aggravated breaches of law,” which this was not.

A sentence is unduly harsh and excessive when it 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.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). In denying Avery’s postconviction motion, the circuit court clarified the longest portion of his sentence was based on the attempted armed robbery conviction, where the victim was shot and traumatized. The circuit court explained that although Avery may not have intended for anyone to be harmed in that incident, “there is an inherent danger in stealing property at gunpoint” and the fact that “this danger was realized with the victim being shot” did in fact make this case “‘one of the most aggravated’ attempted armed robberies,” despite Avery’s contention to the contrary.

Further, Avery “did not receive anything close to a maximum sentence.” The twenty-five and one-half-year sentence imposed is well within the sixty-three and one-half-year range

authorized by law.³ See *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. It is therefore presumptively neither harsh nor unconscionable. See *id.* Nor is the sentence so excessive so as to shock the public’s sentiment. See *Ocanas*, 70 Wis. 2d at 185. There is no arguable merit to a challenge to the trial court’s sentencing discretion or the circuit court’s rejection of Avery’s “unduly harsh” claim.

Finally, appellate counsel discusses whether Avery was sentenced on the basis of inaccurate information when the trial court implied that Avery was unwilling to name his co-actors. This “inaccurate” information is the subject of Avery’s response to the no-merit report. He contends that his prior postconviction attorney had begun “reaching out” to law enforcement about cooperating before she was replaced by Attorney Roemaat, so “time management should have been exercised as for awaiting law encouragement to contact my attorney” and Attorney Roemaat should have made further efforts to reach out to law enforcement.

“[A] criminal defendant has a due process right to be sentenced only upon materially accurate information.” *Lechner*, 217 Wis. 2d at 419. A defendant who seeks resentencing based on the circuit court’s use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. See

³ The circuit court originally imposed concurrent and consecutive sentences totaling twenty-six years of imprisonment, which included eight years of initial confinement and eight years of extended supervision for the attempted armed robbery.

However, that term of extended supervision was later commuted to the maximum allowable term of seven and one-half years’ extended supervision, slightly reducing the overall sentence. See WIS. STAT. §§ 943.32(2) (armed robbery classification); 939.50(3)(c) (penalty for Class C felony); and 973.01(2)(d)2. (maximum extended supervision term for Class C felony may not exceed fifteen years); 939.32(1m)(b) (applicable maximum term of extended supervision is one-half of the maximum term for the completed crime); 973.13 (excessive sentences cured by commutation).

State v. Tiepelman, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Proving inaccuracy is a threshold question: “A defendant ‘cannot show actual reliance on inaccurate information if the information is accurate.’” *State v. Travis*, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491 (citation omitted).

The circuit court denied Avery’s postconviction motion because Avery conceded that he had not given up the names of his co-actors. “Rather, what he presents is an excuse: he was threatened and ‘believed that if he named the codefendants, harm would come to his family.’” The circuit court considered this argument “completely self-serving” and concluded that it did not “materially refute [the trial court’s] opinion that [Avery] had not taken sufficient responsibility.” We agree that the trial court did not rely on inaccurate information; it was accurate that Avery had not disclosed, and because of the alleged threats was unwilling to disclose, the name of his co-actors. Accordingly, there is no arguably meritorious claim that Avery is entitled to resentencing because of inaccurate information.

We have, however, also considered whether there is any claim of ineffective assistance of trial or postconviction counsel for failure to bring the explanation for Avery’s reluctance to the trial court’s attention as a mitigating factor. However, there is no indication in this record of when Avery may have been threatened. If threats were made prior to the plea or sentencing hearings, Avery evidently did not tell his trial counsel, as he only mentions his two postconviction attorneys in his response to the no-merit report. But an attorney is not deficient “for failing to discover information that was available to the defendant but that defendant failed to share with counsel.” *State v. Nielsen*, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325. Thus, there is no arguably meritorious challenge to trial counsel’s performance.

In her supplemental report, Attorney Roemaat explains that her predecessor had contacted both the assistant district attorney and the detective assigned to this case. The district attorney did not respond, and the detective merely said, “Thanks for the info.” Thus, when successor counsel was appointed, she did not further pursue either agency based on their demonstrated lack of interest, and there is no evidence of record that the State or law enforcement were simply waiting for successor counsel’s contact. We are therefore also unpersuaded that there is any arguably meritorious claim that either postconviction attorney performed deficiently.

As noted, there is a scrivener’s error in one of the judgments. The judgment of conviction in Milwaukee County Circuit Court case No. 2017CF5035 indicates that Avery pled guilty to the attempted armed robbery charge.⁴ This is not correct; the plea questionnaire and plea transcript both reflect that Avery pled no contest in that case. Upon remittitur, the judgment of conviction in Milwaukee County Circuit Court case No. 2017CF5035 shall be amended to reflect Avery’s no contest plea. *See State v. Prihoda*, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that upon remittitur, the judgment of conviction in Milwaukee County Circuit Court case No. 2017CF5035 shall be modified as described herein.

⁴ The record on appeal contains four judgments: the original judgment, a “corrected” judgment, and two “amended” judgments. All of them incorrectly state that Avery entered a guilty plea.

IT IS FURTHER ORDERED that the judgment of conviction in Milwaukee County Circuit Court case No. 2017CF5035, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the judgment of conviction in Milwaukee County Circuit Court case No. 2017CF2307 is summarily affirmed.

IT IS FURTHER ORDERED that the order denying the postconviction motion in both cases is summarily affirmed.

IT IS FURTHER ORDERED that Attorney Sara Heinemann Roemaat is relieved of further representation of Avery in these matters. *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