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DISTRICT I

June 21, 2022

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

2019AP1895-CRNM State of Wisconsin v. Dewayne A. Hill (L.C. # 2017CF5583)
2019AP1896-CRNM State of Wisconsin v. Dewayne A. Hill (L.C. # 2017CF5776)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Dewayne A. Hill appeals from judgments, entered on his guilty pleas, convicting him of three counts of burglary. Hill also appeals from an order denying his postconviction motion to withdraw his plea. Appellate counsel, Carl W. Chesshir, 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] Hill has filed two responses. Upon this court's independent review of the record as mandated by ***Anders***,

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

counsel's report, and Hill's responses, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments and order.

BACKGROUND

On October 23, 2017, Milwaukee police responded to a burglary call at the home of M.J.P. Many items had been taken from the home, including five firearms. A window near the patio had been broken to gain entry, and the intruder evidently cut himself because blood was found on the patio door handle. Samples of the blood were collected and sent for analysis.

On November 6, 2017, Wauwatosa police responded to a burglary call. Homeowner J.D. reported that thirteen guns had been stolen from his gun safe, along with gun accessories and "thousands of rounds of ammunition." The safe had been knocked over and pried open.

On November 28, 2017, Wauwatosa police were contacted by G.S., who was watching live video on his phone from his home security system, showing someone walking through his house. Police rapidly responded to G.S.'s residence, but no one was there. While securing G.S.'s residence, one officer noted that a window screen in the next door residence had been cut. Suspecting the burglar might be in the home next door, they contacted owner B.M., who said no one should be in the house. She gave police permission to enter and search her home. Police found Hill in the house, hiding in a closet. He was wearing the same clothes that he was wearing in G.S.'s video.

When Hill was taken into custody, he had a cell phone in his possession. The phone belonged to his girlfriend, who said she often let him use it. She gave permission for police to look through the phone and download files. There were numerous photos of firearms and related

accessories. Police showed the photos to J.D., and he identified his property. Metadata on the phone indicated that the photos of J.D.'s property had been taken on November 6, 2017.

On December 6, 2017, Hill was charged in Milwaukee County Circuit Court case No. 2017CF5583 for the burglaries of J.D., G.S., and B.M. The complaint also put Hill on notice that, based on the underlying facts, he could face multiple additional charges of possession of a firearm by a felon and theft of a firearm. Shortly thereafter, the DNA results from M.J.P.'s house came back, identifying Hill as the source. On December 19, 2017, Hill was charged with the burglary of M.J.P. in Milwaukee County Circuit Court case No. 2017CF5776.

Hill entered pleas of not guilty and not guilty by reason of mental disease or defect (NGI). However, the appointed examiner concluded that an NGI plea was not supported. Hill then wanted to proceed to trial. The State filed an amended information in both cases, adding a total of thirty-six additional charges—eighteen counts of possession of a firearm by a felon and eighteen counts of theft of a firearm. Eventually, the cases were resolved with Hill pleading guilty to the burglaries of J.D., G.S., and M.J.P. The remaining burglary charge would be dismissed and read in. In exchange, the State agreed to withdraw the amended informations, and would simply argue for a prison term, without recommending a particular amount of time.

The circuit court accepted Hill's pleas and ultimately imposed four years' initial confinement and three years' extended supervision on each of the three burglary charges. The sentences from case No. 2017CF5583 were concurrent to each other, but consecutive to the sentence in case No. 2017CF5776, resulting in a total sentence of eight years' initial confinement and six years' extended supervision.

Hill filed a postconviction motion seeking plea withdrawal, claiming his pleas were not knowing, intelligent, and voluntary. Additional facts about the motion will be discussed herein. The circuit court denied the motion. Hill appeals.

DISCUSSION

I. Guilty Pleas

Appellate counsel discusses four potential appellate issues in the no-merit report. The first of these is whether the circuit court properly accepted Hill's guilty pleas. When accepting a defendant's pleas, a circuit court must engage the defendant in a colloquy and fulfill several duties set forth by WIS. STAT. § 971.08 and judicial mandates, in order to ensure that the pleas are constitutionally sound. *See* ***State v. Howell***, 2007 WI 75, ¶26, 301 Wis. 2d 350, 734 N.W.2d 48; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Our review of the records—including the plea questionnaire and waiver of rights forms and plea hearing transcript—confirms that the circuit court generally complied with the prescribed obligations for taking guilty or no contest pleas.[2] Thus, we agree with appellate counsel that there is no arguable merit to a claim that the circuit court improperly conducted the plea colloquy or improperly accepted Hill's pleas.

[2] The circuit court neglected to provide Hill with the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of that particular omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. There is nothing in this record to suggest that Hill is not a citizen of the United States.

II. Sentencing Discretion

The second issue appellate counsel discusses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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 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 several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider additional 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 court appropriately considered relevant sentencing objectives and factors. It specifically rejected a probationary sentence, noting that it would unduly depreciate the seriousness of the offenses but also that Hill had been on extended supervision at the time of these burglaries. The circuit court additionally declined to make Hill eligible for either the substance abuse or challenge incarceration early release programs because, it explained, the total sentence was "the minimal amount of time necessary to protect the public under all of the facts and circumstances."

The fourteen-year sentence imposed is well within the thirty-seven and one-half-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***,

70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the court's sentencing discretion.

III. Inaccurate Sentencing Information

The third issue appellate counsel discusses in the no-merit report, and the issue that Hill highlights in his responses, is whether the circuit court sentenced him on inaccurate information. "[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). 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* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the [circuit] court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)). 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).

At sentencing, the circuit court commented that "the most important fact in this whole scenario is you put 13 or 14 firearms out on the street and we have no idea where they are now." In response, Hill says that he "never agreed to me having any firearms, or taking any firearms." He also argues that he was "never being charged with possession of firearms" and that the State "was never able to prove I had any firearms in my possession or if I stole any firearms out of 'said' homes."

In its exercise of sentencing discretion, the circuit court may draw reasonable inferences from the record. *See* ***Gallion***, 270 Wis. 2d 535, ¶19. We must accept the reasonable inferences drawn by the sentencing court. *See* ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). It was more than reasonable for the circuit court to infer that Hill had sold or otherwise disbursed the guns into the community, regardless of whether Hill admitted possessing them.

Hill stipulated to the use of the criminal complaints as the factual basis for his pleas. The complaint in case No. 2017CF5776 states that Hill admitted selling one of M.J.P.'s guns, a World War II-era machine gun from Japan. The complaint in case No. 2017CF5583 alleged that Hill had taken thirteen firearms from J.D.'s home. After Hill was apprehended in B.M.'s home, Hill's girlfriend gave police permission to search her phone, which Hill had with him at the time of his arrest. Police founds photos of J.D.'s guns and accessories on the phone. Hill's girlfriend had also given police consent to search her home; police recovered the gun accessories, but not the guns. Hill had to possess the weapons to remove them from the burgled homes, and it is reasonable to infer that the guns were not recovered because Hill had sold them.

It is also inaccurate for Hill to claim that he was never charged with possession of the firearms when the amended informations charged him with eighteen counts of possession of a firearm by a felon. The fact that those informations were withdrawn as part of the plea agreement is irrelevant; a sentencing court may consider uncharged and unproven offenses, regardless of whether the defendant agrees to have the charges read in. *See* ***State v. Sulla***, 2016 WI 46, ¶32, 369 Wis. 2d 225, 880 N.W.2d 659; *see also* ***State v. Frey***, 2012 WI 99, ¶48, 343 Wis. 2d 358, 817 N.W.2d 436. In addition, Hill's pleas relieved the State of its burden of proof.

Hill also complains that if the circuit court was going to count guns released into the community, it relied on the wrong number—thirteen or fourteen, when it should have been seventeen or eighteen once M.J.P.'s guns were added to the total. Even if this was an error, it is harmless as a matter of law. *See* ***State v. Coffee***, 2020 WI 1, ¶17, 389 Wis. 2d 627, 937 N.W.2d 579; *see also* ***Tiepelman***, 291 Wis. 2d 179, ¶26. Hill would not have received a lesser sentence had the circuit court considered his introduction of *more* firearms into the community. Based on the foregoing, there is no arguable merit to a claim that Hill was sentenced on inaccurate information.

IV. The Postconviction Motion

The final issue appellate counsel discusses is whether the circuit court erred in denying Hill's postconviction motion to withdraw his guilty pleas. A defendant who seeks to withdraw his or her pleas after sentencing must prove that the withdrawal is necessary to correct a manifest injustice. *See* ***State v. Villegas***, 2018 WI App 9, ¶18, 380 Wis. 2d 246, 908 N.W.2d 198. There are two routes available. *See* ***id.*** One is to argue that the plea was infirm based on a factor extrinsic to the plea colloquy, like ineffective assistance of trial counsel. *See* ***Howell***, 301 Wis. 2d 350, ¶74; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The other is to show a plea was not knowing, intelligently, and voluntarily entered, which includes making a prima facie case that the circuit court failed to comply with mandatory procedures during the plea colloquy. *See* ***Villegas***, 380 Wis. 2d 246, ¶20; *see also* ***Bangert***, 131 Wis. 2d at 274.

Hill's postconviction motion alleged that his trial attorney failed to: (1) discuss the option of pleading to two of the burglary charges and setting the two other charges for trial;

(2) inform Hill that the charges in the amended informations would be considered at sentencing; and (3) inform Hill that the dismissed and read-in burglary charge would be considered at sentencing. Thus, Hill alleged, trial counsel deficiently provided incorrect information, or counsel deficiently omitted important information, and Hill prejudicially relied on those errors. Hill also asserted that these failures of trial counsel meant that his plea "clearly was not made legitimately" and that "the plea colloquy failed to meet the requirements set out in ***State v. Bangert***."

The circuit court denied the motion, stating that Hill's challenge to the colloquy was "premised upon an erroneous belie[f] that the charges in the amended informations were dismissed and read in for sentencing." However, the informations were withdrawn, and the only actual read-in offense was the fourth burglary. The circuit court also explained that the facts underlying the possession and theft charges, were not new facts, even if the informations were dismissed; rather, the facts were based on the allegations in the complaints to which Hill had stipulated, meaning the circuit court could consider those facts in the context of the burglaries. Further, the circuit court stated, the record indicates that Hill "understood the consequences of having that count dismissed and read in[.]" Finally, the circuit court noted that Hill "was not in a position to pick and choose which counts to plead to and which counts to take to trial because that was not the deal on the table" and because "[t]he court was not amenable to that arrangement and neither was the State."

We agree with the circuit court's analysis, and to that analysis, we add the following points. Hill has not identified which mandatory obligation the circuit court failed to comply with during the plea colloquy. Though it is recommended that a circuit court advise a defendant about the effects of read-in offenses, *see* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750

N.W.2d 835, that recommendation has not been incorporated as an affirmative duty. Thus, the postconviction motion does not adequately allege a ***Bangert*** violation. Further, to succeed on a claim of ineffective assistance of counsel, the defendant must show both deficient performance by counsel and prejudice from the deficiency. Here, the postconviction motion does not even allege, much less show, any prejudice from trial counsel's advice. That is, Hill has not alleged that but for counsel's deficient performance, he would have rejected the State's offer and headed to trial on forty felony charges.[3] We thus conclude that there is no arguable merit to a claim that the circuit court erred when it denied Hill's postconviction motion.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of further representation of Hill 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

[3] The total exposure on the forty counts—four Class F felonies, eighteen Class G felonies, and eighteen Class H felonies—would have been 338 years' imprisonment and $730,000 in fines. *See* WIS. STAT. § 939.50(3)(f)-(h).