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DISTRICT I

July 26, 2022

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Circuit Court Judge
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Derrick Devon McGregory 622455
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You are hereby notified that the Court has entered the following opinion and order:

2019AP2223-CRNM State of Wisconsin v. Derrick Devon McGregory
(L.C. # 2017CF2345)

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).

Derrick Devon McGregory appeals from a judgment, entered on his guilty plea, convicting him on one count of possession with intent to deliver less than 200 grams of tetrahydrocannabinols as a second or subsequent offense. Appellate counsel, Lauren Jane Breckenfelder, 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] McGregory was advised of his right to file a response,

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

but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

On May 17, 2017, Milwaukee police officers Thomas Ozelie and Allan Tenhaken were on bicycle patrol. They were speaking to Samuel Haydin, who was sitting on the front steps of an apartment building. While the officers were speaking to Haydin, McGregory exited the building's lobby. McGregory, whom the officers knew from an arrest in the month prior, tried to engage the officers and told them to "hold on" so he could get his cell phone to record them. McGregory entered the lobby, then exited again, holding his phone as though he were recording. The officers did not speak to McGregory.

Haydin then suddenly fled up the stairs and into the lobby. Ozelie got off his bicycle to follow Haydin. Haydin became stuck in the lobby; although the exterior door to the lobby was unlocked, the interior door between the lobby and the rest of the building was locked. Haydin then exited the lobby as Ozelie approached, allowing the officer to observe "the strong smell of fresh marijuana emanating from the lobby[.]"

Ozelie grabbed the exterior lobby door. McGregory, still outside, crouched and pushed his weight into the exterior door, attempting to close it and prevent Ozelie from entering the lobby. Ozelie's hand was smashed between the door and the frame. McGregory refused to move from the door despite Ozelie's commands and despite Ozelie telling McGregory his hand was stuck. Tenhaken attempted to pull McGregory from the door, but McGregory ignored verbal commands and continued pushing on the door. Eventually, McGregory was pulled from

the door and taken into custody. During this incident Tenhaken strained his knee, and Ozelie sustained multiple abrasions to fingers on both hands.

The lobby contained the mailboxes for the six units in the building, including apartment 306, the apartment in which Ebony Bernard, the mother of one of McGregory's children, lived. Inside the mailbox for apartment 306, police found a digital scale, clear plastic sandwich bags, scissors, and a baggie containing over thirteen grams of fresh marijuana.

The criminal complaint and original information initially charged McGregory with one count of resisting or obstructing an officer causing a soft tissue injury and felony bail jumping. The information was amended three times; the final amended information charged McGregory with obstructing an officer, without the injury component; two counts of felony bail jumping; and possession with intent to deliver less than 200 grams of tetrahydrocannabinols.

After the second amended information was filed, McGregory moved to suppress the evidence from the mailbox, alleging an illegal, warrantless search. After a hearing, the circuit court concluded that McGregory lacked standing to challenge the search and denied the motion. McGregory subsequently agreed to resolve his case through a plea. In exchange for his guilty plea to the possession with intent to deliver charge, the State would agree to dismiss and read in the other three offenses and refrain from making any particular sentence recommendation. The circuit court accepted McGregory's plea and imposed one year of straight time in the House of Correction, consecutive to any other sentence. McGregory filed several *pro se* motions for sentence modification or sentence credit, all of which were denied. McGregory appeals.

DISCUSSION

The first potential issue appellate counsel discusses in the no-merit report is whether the circuit court erroneously denied McGregory's suppression motion. As noted, the circuit court denied the motion after concluding McGregory lacked standing.

A defendant must establish standing to challenge a search. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 423, 351 N.W.2d 758 (Ct. App. 1984). The question of standing involves an inquiry into whether the challenger had a legitimate expectation of privacy in the area searched. *See* ***id.*** The expectation of privacy "must not only be actual (subjective), but also one that society is prepared to recognize as reasonable." *See* ***State v. Whitrock***, 161 Wis. 2d 960, 973, 468 N.W.2d 696 (1991) (citation and quotation marks omitted). We apply a "totality of the circumstances" approach in determining whether the defendant has a legitimate expectation of privacy; relevant elements to be considered include:

> (1) whether the defendant had a property interest in the premises, (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

See ***id.*** at 974. In reviewing a denial of a suppression motion, we uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***id.*** at 973. Whether those facts establish the defendant's standing is a question of law. *See* ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434.

In his motion, McGregory sought to suppress the evidence police obtained from the warrantless search of the mailbox. He asserted that: (1) he remained outside the lobby but

Haydin went inside, so if drugs were hidden in the mailbox, they were Haydin's; (2) an officer could not have smelled the THC through the mailbox and through the baggie; (3) Tenhaken's police report implied he had to open the mailbox to observe the marijuana and other items, which was illegal tampering; and (4) the mailbox was unlocked but not open. The State responded that McGregory lacked standing to challenge the search, arguing that he had not alleged an actual expectation of privacy in the mailbox and, even if he had, that expectation was not one that society was prepared to recognize as reasonable.

The circuit court conducted a motion hearing at which both McGregory and Ozelie testified. McGregory testified that he lived in apartment 306 between January and May 2017 and that he received mail at that address. He testified that the mailbox was broken and had been since at least January 3, 2017, when he started living there. He explained that "from the apartment building, double doors, the mailbox come open by itself because it's unlocked. Sometimes coming up the building or walking out, the mailbox be open. I can look see if anything in there. If not, if it's closed, then I open it." McGregory also acknowledged that he was not on the apartment lease; other people stayed at the apartment and had access to the mailbox; if the mailbox had been repaired, he would have needed a key to access it, but only Bernard had the key; and that the mailbox would regularly be "wide open for everyone to see." Ozelie testified that McGregory had provided a different address when he was arrested the month before this incident.

The circuit court determined that, although a close call, McGregory had established an actual expectation of privacy to satisfy the first part of the test. However, the circuit court also concluded that the interest was not one that society was prepared to recognize as reasonable. It noted that the general lobby area was "open to everyone coming and going to the building."

McGregory did not have exclusive possession of the mailbox; Bernard and "every other person who was staying in the apartment" was allowed by Bernard to access it. Further, it was "very clear" that McGregory lacked control over the mailbox; because Bernard was the only person on the lease, McGregory could not ask the landlord or the post office to repair the mailbox, and McGregory had no right to exclude people from using the box. McGregory's access was also limited because only Bernard had the key. Finally, the circuit court noted, "[n]o precautions were taken to maintain privacy. No testimony indicat[ed] any request had been made to fix the mailbox or any attempt had been made to maintain privacy of this particular mailbox."[2]

The circuit court's findings of fact are not contrary to the great weight and clear preponderance of the evidence. *See* ***Whitrock***, 161 Wis. 2d at 973. Based on those findings, we agree with counsel's analysis in the no-merit report and her conclusion that there is no arguable merit to claiming McGregory had a legitimate expectation of privacy in the mailbox. *See* ***Curbello-Rodriguez***, 119 Wis. 2d at 423. Thus, there is no arguable merit to a claim that the circuit court erroneously denied the suppression motion.

The second potential issue appellate counsel discusses is whether McGregory "has a basis to withdraw his guilty plea because it was not knowingly, voluntarily, and intelligently entered, or because it was not supported by a factual basis." "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100,

[2] Trial counsel argued that the landlord, not tenants, had an obligation to repair the mailbox. That may be true, but the question is not one of actual repair but whether some action was taken to secure the mailbox. In McGregory's case, for example, this could have included asking Bernard to inform the landlord that the box was in need of repair.

¶18, 293 Wis. 2d 594, 716 N.W.2d 906. "One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." ***Id.*** Thus, "the circuit court must exercise great care when conducting a plea colloquy so as to best ensure that a defendant is knowingly, intelligently, and voluntarily entering a plea[.]" *See* ***State v. Pegeese***, 2019 WI 60, ¶39, 387 Wis. 2d 119, 928 N.W.2d 590.

Here, McGregory completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he indicated that his attorney had explained the elements of the offense. The form correctly specified the maximum penalties McGregory faced. The form, along with an addendum, also specified the constitutional rights McGregory was waiving with his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 262, 271, 389 N.W.2d 12 (1986).

The circuit court additionally conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, for ensuring a valid plea. One of the circuit court's obligations during a plea colloquy is to "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge[.]" *See* § 971.08(1)(a). Here, the circuit court did not expressly review the elements of possession with intent to deliver with McGregory. Nevertheless, the no-merit report appropriately identifies the alternative steps the circuit court took to establish McGregory's understanding of the nature of the crime. *See* ***Bangert***, 131 Wis. 2d at 272. Specifically, the applicable jury instruction, WIS JI—CRIMINAL 6035, was submitted with the plea questionnaire. The instruction sheet includes a statement, initialed by McGregory, that says, "I reviewed and understand these elements." The circuit court asked McGregory if he understood what the State would have to prove, and he answered affirmatively.

The circuit court then noted that the elements were set forth in the jury instruction and asked if McGregory had any questions about those elements. McGregory answered, "No." Thus, the record as a whole indicates that McGregory was aware of the elements of his offense.

A circuit court conducting a plea colloquy must also inform the defendant of the constitutional rights that are waived by entering a plea and verify that the defendant understands those rights are being given up with the plea. *See* ***Hampton***, 274 Wis. 2d 379, ¶24. While the plea questionnaire lists seven specific rights, the circuit court only expressly reviewed two of those rights with McGregory. However, the circuit court also referenced the plea questionnaire and noted that the constitutional rights "are on the front side of the plea form. There's a check mark in each of the boxes that precede those rights. Does that mean your lawyer explained them to you in detail?" McGregory answered affirmatively. Thus, the record as a whole reflects McGregory's understanding of the constitutional rights he was surrendering. *See* ***Pegeese***, 387 Wis. 2d 119, ¶¶38-40.

A circuit court must also ascertain whether a factual basis exists to support the plea. *See* ***Brown***, 293 Wis. 2d 594, ¶35. At the colloquy, McGregory, through counsel, stipulated that the criminal complaint was "adequate for a factual basis." However, the complaint itself does not directly allege McGregory's possession of the marijuana in the mailbox, nor does it contain any evidence of McGregory's prior drug convictions that would justify the second-or-subsequent modifier. When the circuit court realized this and pointed it out, the State explained that the possession with intent charge was issued when "fingerprints came back" and noted that the case of prior conviction was identified in the amended informations. McGregory acknowledged and agreed that the circuit court could consider this additional information. Accordingly, the record as a whole establishes a sufficient factual basis for the plea.

Based on the foregoing, we are satisfied that the record reflects that McGregory entered a knowing, intelligent, and voluntary plea, despite some gaps in the plea colloquy. *See, e.g.*, ***State v. Taylor***, 2013 WI 34, ¶¶27-28, 347 Wis. 2d 30, 829 N.W.2d 482; ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64. There is no arguable merit to a challenge to the validity of the plea.

The final potential issue appellate counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. 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* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. 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 court appropriately considered relevant sentencing objectives and factors. The one-year jail sentence is well within the 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). Therefore, there would be no arguable merit to a challenge to the court's sentencing discretion.

Finally, we note that after his conviction, McGregory filed four *pro se* motions seeking sentence modification or sentence credit. The no-merit report does not discuss any of these motions except to say that counsel is unaware of any basis for a new-factor sentence modification motion.[3]

McGregory's requests for sentence credit sought credit for essentially two time periods: the first ran from May 17, 2017 to October 10, November 4, or November 6, 2017, and the second ran from January 8, 2018 to May 14, 2018. In addition, at least two of the motions also asked that the sentence in this case be modified to run concurrently with a revocation sentence he was serving, rather than consecutively as the circuit court had ordered.

"A convicted person should be given sentence credit for presentence incarceration for time spent in custody in connection with the course of conduct for which sentence was imposed." ***State v. Amos***, 153 Wis. 2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989). "[T]he intent of sentence credit is 'to make sure that no prisoner failed to get credit for pretrial detention'; sentence credit is not intended as a workaround, reducing aggregate lengths of sentences through 'dual credit for multiple charges.'" ***State v. Lira***, 2021 WI 81, ¶30, 399 Wis. 2d 419, 966 N.W.2d 605 (citations omitted). Thus, "[t]he total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences." *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). When two consecutive sentences are

[3] Six months after filing the no-merit report, appellate counsel moved to supplement the record with another motion for sentence modification McGregory filed on July 8, 2020. Counsel's motion to supplement the record was denied, because McGregory's motion and the resulting order postdated the November 2019 notice of appeal. However, denial of that motion does not foreclose discussion or review of the motions and orders entered prior to the notice of appeal.

imposed, jail credit for custody that is connected to both sentences reduces the term of confinement of the "first" sentence to be served. *See* ***id.***

Our review of the record satisfies us that McGregory is not entitled to sentence modification or additional credit. The decision to make sentences concurrent or consecutive is a matter of sentencing discretion, *see* ***State v. Davis***, 2005 WI App 98, ¶27, 281 Wis. 2d 118, 698 N.W.2d 823, and we have already explained that the circuit court properly exercised that discretion.

With respect to the sentence credit, we note that this case was consolidated for a time with Milwaukee County Circuit Court case No. 2017CF1808,[4] until McGregory decided to enter a plea in that case while this matter continued. McGregory was sentenced in that case on September 25, 2017. Thus, the time period of May 17, 2017 through September 25, 2017, was credited as an award in case No. 2017CF1808. Because the sentence in the instant case is consecutive to the sentence in case No. 2017CF1808, and because that sentence was imposed first, McGregory is not entitled to an award of duplicate credit in this matter. *See* ***Boettcher***, 144 Wis. 2d at 100. The remainder of the first time period, from September 25, 2017 to October 10, November 4, or November 6, 2017, is also properly attributed to case No. 2017CF1808, where McGregory was serving sixty days of conditional jail time. Finally, the time period starting January 8, 2018 began when McGregory was taken into custody on new charges. At the time, he was released on a signature bond in the instant matter, and there is no indication that the

[4] The plea and sentencing proceedings in case No. 2017CF1808 overlapped with status hearings in this matter; consequently, both the plea and sentencing transcripts from case No. 2017CF1808 are in this record.

signature bond was revoked. Thus, McGregory's custody for that time period—which ended when he was sentenced in this case—is time served in that new case, not time served in connection with this case. *See* ***Amos***, 153 Wis. 2d at 280. Therefore, there is no arguable merit to a claim for additional sentence credit in this matter.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Lauren Jane Breckenfelder is relieved of further representation of McGregory 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