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DISTRICT I

August 23, 2022

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

2020AP1485-CRNM State of Wisconsin v. Antown D. Smith (L.C. # 2014CF3641)
2020AP1486-CRNM State of Wisconsin v. Antown D. Smith (L.C. # 2016CF3078)

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).

Antown D. Smith appeals from amended judgments, entered upon his guilty pleas, convicting him of one count of first-degree recklessly endangering safety and two counts of armed robbery. Appellate counsel has filed a no-merit report.[1] *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[2] Smith has filed a response. Upon this

[1] The no-merit report was filed by Attorney Kaitlin Lamb, who has been replaced by Attorney David Malkus as Smith's appellate counsel.

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

court's independent review of the records, as mandated by ***Anders***, counsel's report, and Smith's response, we conclude there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgments.

On August 20, 2014, Smith was charged with one count of first-degree recklessly endangering safety with a dangerous weapon. According to the complaint, D.L. received a call from a friend he knew as "Twan," who wanted to stop by D.L.'s home because Twan was in the area. Twan called again when he arrived. D.L. went to open the door and saw a man he did not know, followed by Twan. The man said something to Twan, who asked D.L. what was in his pockets. D.L. responded that he had his cell phone in his hand. As he pulled his hands from his pockets, Twan shot him once in the right thigh. A detective spoke with D.L. at the hospital, and D.L. identified Smith as Twan through a booking photo.

On July 10, 2016, Smith was charged with two counts of armed robbery as a party to a crime, one count of attempted armed robbery as a party to a crime, and three counts of felony bail jumping. According to the complaint, Smith and two others robbed a Subway restaurant and a Jimmy John's restaurant, and had attempted to rob a Pizza Hut restaurant. When Smith was interviewed by police, he acknowledged driving his co-actors to Jimmy John's and Pizza Hut; one of the co-actors told police that Smith was also the driver for the Subway robbery. The complaint further alleged that at the time of the offenses, Smith was released on bond in the case above, as well as Milwaukee County Circuit Court case Nos. 2015CF5512 and 2016CF2610.

Smith filed a pretrial motion to suppress D.L.'s identification, alleging that the use of a single photo was unduly suggestive. Before the motion could be fully litigated, Smith agreed to resolve his four cases with a plea. In exchange for his pleas to the first-degree recklessly

endangering safety charge and the two armed robberies, the State would drop the dangerous weapon enhancer from the endangering safety charge, dismiss and read in the remaining charges in the armed robbery case, and dismiss and read in the charges from case Nos. 2015CF5512 and 2016CF2610. There were also five additional armed robberies in which Smith was a suspect that the State agreed not to prosecute. The State further agreed to make a global recommendation of twenty years' imprisonment. The circuit court conducted a plea colloquy with Smith and accepted his pleas. At sentencing, the court imposed four years of initial confinement and four years of extended supervision for each of the three counts, to be served consecutively, for a total of twenty-four years' imprisonment.

Smith filed a postconviction motion to modify the sentence or have a new sentencing hearing because the court exceeded the State's total recommendation by four years. After a brief hearing on the matter, at which postconviction counsel waived Smith's presence, the circuit court adjusted Smith's extended supervision on each of the armed robberies to two years, making the total term twenty years of imprisonment. Smith also sought additional sentence credit, which the circuit court granted. Amended judgments were entered. Smith now appeals.[3]

The first issue discussed in the no-merit report is whether Smith has grounds for plea withdrawal. Our review of the records—including the plea questionnaire and waiver of rights forms and addenda, attached jury instructions for first-degree recklessly endangering safety and

[3] The notices of appeal indicate that the appeals are also taken from the circuit court's order to amend the judgments consistent with its postconviction ruling. However, Smith cannot appeal orders that grant him the relief requested. *See* WIS. STAT. RULE 809.10(4) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and *rulings adverse to the appellant* and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." (emphasis added)).

armed robbery, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court also informed Smith of the effects of read-in offenses, as recommended by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. Thus, there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Smith's pleas were anything other than knowing, intelligent, and voluntary.

The no-merit report does not identify the pretrial suppression motion as a separate issue, but notes that "[b]y entering a plea, Mr. Smith waived his right to appeal the motion to suppress[.]" A valid guilty plea typically waives all nonjurisdictional defects and defenses, *see* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886, but a circuit court's ruling denying a motion to suppress evidence may be reviewed on appeal despite entry of a guilty plea, *see* WIS. STAT. § 971.31(10). Thus, the suppression issue could potentially be framed within a claim of ineffective assistance of counsel for failing to obtain a ruling on the motion. However, the no-merit report also explains, in a footnote, why the ineffective assistance claim would be meritless. Our review of the record satisfies us that the no-merit report properly analyzes why such an ineffective assistance claim would lack arguable merit, and we discuss it no further.

The other issue the no-merit report highlights is whether Smith has grounds for seeking additional sentencing relief. Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The consecutive sentences,

whether totaling twenty or twenty-four years of imprisonment, are well within the ninety-two 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. Neither sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, this court is satisfied that the no-merit report properly analyzes this issue as without arguable merit.

In his response, Smith raises two sentencing-related issues. The first is a claim that the circuit court sentenced him based on erroneous information. Smith's attorney told the circuit court at sentencing that the co-actors "offered [Smith] some money. He knew they were doing it with a BB gun." Later, the circuit court commented,

> Now armed robbery, and now you have safety issues. You know, any time you engage in criminality with a firearm, and *I'm not really buying the BB gun story*, not given the initial charge of capping some guy in the knee, you run the great risk of committing homicide.
>
> ….
>
> And when you engage in these things or participate, even if you weren't actually the gun man, which does appear to be the case in some of these armed robberies, not all of them, but if you facilitate that in some way, you're responsible for that action too.

Smith protests that these comments imply that the judge "was putting his opinion above the actual facts … so providing that assumption as fact [a]ffected the entire outcome of my sentencing." He contends the court's statement "should be classified as erroneous information, because there's no way to ultimately justify that statement."

"[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)).

The circuit court explained why it did not believe the BB gun story—because Smith had used an actual firearm in the recklessly endangering safety event. Still, both defense counsel and the State confirmed that a BB gun was recovered, although the State pointed out that use of a BB gun "doesn't mean there wasn't [also] a gun." The circuit court responded:

> Well thank you. I appreciate that. Nevertheless, the nature and gravity of the offenses.
>
> Okay, we take these recklessly endangering safety, again, you shoot someone in the knee … you run the risk of killing somebody.
>
> ….
>
> Then you get the armed robberies, the aggravating nature of all that, even if he is just the driver, is he's on bond already. And that is extremely troubling. It happens a second time when he's out on bond. These things just, whatever was troubling him, to begin this spree, there should have been some message and some acceptance of a message, there obviously is a better way to take care of things.

Thus, the circuit court appears to have accepted the correction, but nevertheless, felt the offenses remained aggravated due to other circumstances in the case. Accordingly, we conclude that there is no arguable merit to a claim that the circuit court sentenced Smith on inaccurate information.

Smith's other complaint is that he should have had a resentencing hearing at which he was present when the circuit court modified his sentence to match the State's recommendation. Smith cannot directly appeal the circuit court's orders on the postconviction motion because they are not adverse to him—that is, he received the relief he requested. *See* WIS. STAT. RULE 809.10(4). We will, nevertheless, address Smith's concern.

While Smith asserts that "Wiscon[sin] statue [sic] states that even if there is a mathematical error, the entire sentence should be vacated, and the defendant should be granted a new sentencing date," this is not the law. It is true that a defendant has the right to be present at the imposition of sentence. *See* WIS. STAT. § 971.04(1)(g). However, the statute "does not mandate a defendant's presence when a clerical error is corrected." *See* ***State v. Prihoda***, 2000 WI 123, ¶29, 239 Wis. 2d 244, 618 N.W.2d 857. Rather, it is within the circuit court's discretion to determine whether to hold a hearing at which the defendant should be present for correction of a minor error. *See* ***id.***, ¶31.

Smith previously had a full sentencing hearing at which he was present. *See* ***State v. Stenseth***, 2003 WI App 198, ¶19, 266 Wis. 2d 959, 669 N.W.2d 776. There is no indication that Smith's presence at the hearing—which was more of a status hearing than an evidentiary hearing—would have yielded a different modification result. *See* ***id.***, ¶¶19-20. Accordingly, we conclude there is no arguable merit to challenging the sentence modification process used here.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Smith 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