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DISTRICT II

September 7, 2022

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Ralph F. Marsiliano, #465673
Fox Lake Correctional Inst.
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1352-CRNM State of Wisconsin v. Ralph F. Marsiliano (L.C. #2018CF406)

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

Ralph F. Marsiliano appeals from a judgment of conviction entered upon his guilty pleas to two counts of burglary as a repeater. Appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Marsiliano received a copy of the report and filed a response. Upon consideration of the no-merit report, Marsiliano's response, and an independent review of the record, we conclude that

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

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

The State filed a ten-count complaint charging Marsiliano with three counts of burglary, three counts of possessing burglarious tools, three counts of felony criminal damage to property, and one count of misdemeanor theft, all as a repeater. The charges arose from burglaries to three businesses occurring on two different days. Pursuant to a negotiated settlement, Marsiliano pled guilty to two of the burglary counts as a repeater and the remaining eight counts, along with a separate misdemeanor case, were dismissed.[2] The State agreed to recommend prison without specifying the length or whether the sentences should run concurrent with or consecutive to each other or any previously imposed sentence. The parties also stipulated to restitution in the amount of $8,961.68. At sentencing, the circuit court imposed seven years' initial confinement followed by three years' extended supervision on both counts, to run consecutive to each other and to "any previous sentence for Walworth and Kenosha County cases." This no-merit appeal follows.

Appointed counsel's no-merit report addresses whether Marsiliano knowingly, intelligently, and voluntarily entered his guilty pleas, and whether the circuit court properly exercised its discretion at sentencing. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that neither of these issues has arguable merit. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further, except where appropriate to address Marsiliano's response.

[2] The remaining counts in this case were dismissed but read in. The separate misdemeanor case was dismissed outright.

Turning to Marsiliano's response, he asserts that the judgment of conviction reflects the wrong offense date for his burglary of the Texas Roadhouse restaurant. He states that the burglary was committed on March 31, 2018, not on March 26, 2018. Marsiliano misunderstands the judgment. While it is true that the Texas Roadhouse offenses occurred on March 31, Marsiliano pled to counts one and five, which represent the two burglaries he committed on March 26, to State Farm Insurance and the Gemini Spa. The Texas Roadhouse crimes are charged in counts eight, nine, and ten of the complaint and information, and were dismissed but read in for sentencing.

Next, Marsiliano's response sets forth several complaints concerning the effectiveness of trial counsel's representation, including that counsel did not spend enough time investigating the case or meeting with Marsiliano, and that counsel provided bad advice about whether Marsiliano should waive his preliminary hearing and if he should request judicial substitution. Marsiliano asserts that "with all [of trial counsel's] errors, I knew I would be found guilty and given the maximum sentences." Marsiliano further asserts that if not for trial counsel's "terrible representation and lack of any investigative procedures," he would not have pled guilty and would have insisted on proceeding to trial.

Our consideration of these issues is limited because claims of ineffective assistance of counsel must first be raised in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Marsiliano's claims have sufficient potential merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

To establish a claim of ineffective assistance, Marsiliano must show that trial counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As to deficient performance, Marsiliano must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, Marsiliano must show that, but for counsel's unprofessional errors, a reasonable probability exists that the result of the proceeding would have been different. ***Id.*** at 694. Here, Marsiliano must show a reasonably likelihood that, but for trial counsel's deficient acts or omissions, he would not have pled guilty and would have gone to trial.

Our review of the record and Marsiliano's response to the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for no-merit counsel to request a ***Machner*** hearing. Marsiliano's assertion that he would not have pled guilty but for trial counsel's allegedly deficient performance is wholly speculative and contradicted by the record. First, Marsiliano does not provide facts explaining what trial counsel would have discovered had he engaged in additional communication and investigation and how that would have changed Marsiliano's decision to enter into a favorable plea agreement. Similarly, Marsiliano does not provide nonconclusory facts showing how he was potentially prejudiced by waiving his preliminary hearing and not exercising his right to judicial substitution. Second, Marsiliano's assertions are contradicted by the record, including the preliminary hearing and plea hearing transcripts, the preliminary hearing waiver form, and the guilty plea questionnaire with

attachments.[3] Third, by entry of his guilty pleas, Marsiliano forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Next, with regard to appointed appellate counsel, Marsiliano complains that she did not take action when he told her to ask for a restitution hearing, and that he was never ***Mirandized***.[4] We conclude that neither point gives rise to an arguably meritorious issue.

As to the lack of a restitution hearing, Marsiliano stipulated to restitution in the amount of $8,961.68 as part of his plea agreement. This is reflected at numerous points in the record, including his signed guilty-plea paperwork at pages two and five, the plea-hearing transcript at page three, and the sentencing transcript at pages five and six. The receipts supporting the amount of restitution are also in the record. We will discuss this no further.

With regard to ***Miranda***, Marsiliano writes that he "knew nothing" about this potential issue until after sentencing, when he read the complaint and discovered that it contained "no mention of Detective Falk Mirandizing me before, during, or at any time interviewing me."

[3] The preliminary hearing transcript and signed waiver form show no irregularities and reflect that Marsiliano was provided relevant information before choosing to waive his preliminary hearing in exchange for a particular plea offer from the State. Further, during the plea-taking colloquy and in his signed plea paperwork, Marsiliano confirmed that he understood all the information provided, believed he had enough time to discuss the case with trial counsel, was entering his pleas without threats, force, or coercion, and was entering them "of [his] own free will after talking it over with" trial counsel.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966). Under ***Miranda***, prior to interrogating a suspect who is in custody, the police must advise the suspect of the right to remain silent, that anything the suspect says may be used against him or her in court, that the suspect has the right to an attorney, and that if the suspect cannot afford an attorney one will be provided free of charge. ***Id.*** at 444.

According to his response, Marsiliano mentioned this to appellate counsel, who later told him that when asked, trial counsel informed her that Marsiliano reported that he was, in fact, ***Mirandized***.

We conclude that no issue of arguable merit arises from this claim. First, Marsiliano's guilty pleas forfeited his right to challenge his statements to law enforcement. *See* ***Kelty***, 294 Wis. 2d 62, ¶18 & n.11; ***Lasky***, 254 Wis. 2d 789, ¶11. Second, Marsiliano signed the April 24, 2018 Preliminary Hearing Waiver/Plea Offer form, which stated that the filing of "any motions challenging the arrest and/or prosecution voids this offer." Third, the notion that Marsiliano did not read the complaint or discover the alleged lack of ***Miranda*** warnings until after sentencing strains credulity and is contradicted at several points in the record. Fourth, had Marsiliano proceeded to trial, he could have requested a ***Miranda-Goodchild***[5] hearing on the issue, which cuts against both ***Strickland*** prongs. Fifth, even if we assume that Marsiliano was not ***Mirandized***, the record shows no potential for prejudice. As set forth in counsel's no-merit report and the criminal complaint, there was a plethora of physical, video, and eyewitness evidence against Marsiliano, including that he was found hiding in the Texas Roadhouse cooler. The probable cause section of the complaint does not depend on Marsiliano's custodial statements and it states that Marsiliano denied his involvement in the State Farm and Gemini Spa burglaries to Detective Falk.

[5] A circuit court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Finally, Marsiliano asserts potential claims concerning his sentence. His primary complaint is that it is too long. Marsiliano takes issue with appointed counsel's statement in the no-merit report that his sentence does not "shock the conscience." The shock-the-conscience standard is used to determine whether a sentence is unduly harsh. A sentence is unduly harsh only if its length 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." ***State v. Davis***, 2005 WI App 98, ¶15, 281 Wis. 2d 118, 698 N.W.2d 823 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). Here, eight charges were dismissed but read in, significantly lowering Marsiliano's exposure, and on the two counts to which he pled guilty, the circuit court could have imposed up to twenty-seven years' initial confinement followed by ten years' extended supervision. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people …." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). There is no merit to a claim that Marsiliano's sentence, including its fourteen-year term of initial confinement, is unduly harsh or excessive.[6]

[6] Marsiliano also asserts that the sentencing court stated that he was convicted of both criminal damage to property and possession of burglarious tools in a 2016 case when, in fact, the burglarious tools charge was dismissed and read in. However, the sentencing court then corrected itself, noting that "they read-in the burglary tools."

Our independent review of the record discloses no other potential issues for appeal.[7] Accordingly, this court accepts the no-merit report, affirms the judgment of conviction, and discharges appellate counsel of the obligation to further represent Marsiliano in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved from further representing Ralph F. Marsiliano in this appeal. *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

[7] To the extent we have not expressly addressed the claims in Marsiliano's response, they are deemed to lack arguable merit. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").