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DISTRICT IV

October 6, 2022

To:

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Circuit Court Judge
Electronic Notice

Lori Banovec
Clerk of Circuit Court
Adams County Courthouse
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Daniel J. Schwersenska 506650
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You are hereby notified that the Court has entered the following opinion and order:

2021AP50-CRNM State of Wisconsin v. Daniel J. Schwersenska (L.C. # 2018CF107)

Before Blanchard, P.J., Fitzpatrick, and Nashold, 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).

Attorney Roberta Heckes, appointed counsel for Daniel Schwersenska, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Schwersenska was sent a copy of the report and has not filed a response. We conclude that this case is appropriate for summary disposition. See WIS. STAT. RULE 809.21. Upon consideration of the report and an independent

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

review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Schwersenska was charged with seven felonies. He pled no contest to Count One, robbery. As part of the plea deal, the State agreed to amend Count One from armed robbery to robbery. The remaining counts were either dismissed outright or dismissed and read in. Pursuant to the plea agreement, the parties were free to make any sentencing recommendations. The plea agreement reduced Schwersenska's total sentence exposure from 88 years to 15 years. The circuit court accepted Schwersenska's plea and sentenced him to ten years of initial confinement and five years of extended supervision.

The no-merit report addresses whether Schwersenska's plea was entered knowingly, voluntarily, and intelligently and whether there was a factual basis for the plea. This court's independent review of the record reveals that the plea colloquy sufficiently complied with the requirements of *State v. Bangert*, 131 Wis. 2d 246, 255-73, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08 relating to the nature of the charge, Schwersenska's understanding of the proceedings and the voluntariness of the plea decision, the penalty ranges and other direct consequences of the plea, and the constitutional rights being waived. The circuit court found, based on the factual allegations in the criminal complaint, that there was a sufficient factual basis to support Schwersenska's plea and a finding of guilt. Any claim that Schwersenska did not knowingly, voluntarily, and intelligently enter his plea, or that the plea lacked a factual basis, would be without arguable merit.

We consider next whether the circuit court erroneously exercised its discretion when it denied Schwersenska's motion to withdraw his guilty plea prior to sentencing. “[T]he criterion

for withdrawal of a guilty plea prior to sentencing is whether defendant has shown a fair and just reason for withdrawal.” *State v. Shanks*, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). The circuit court’s decision on whether to grant a motion for plea withdrawal prior to sentencing is discretionary, and we will uphold the decision if the record shows a process of reasoning dependent on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards. *Id.* at 288-89.

Schwersenska moved for plea withdrawal at the conclusion of the plea hearing, immediately after the circuit court remanded Schwersenska to jail until sentencing. Schwersenska also moved at the end of the plea hearing for his counsel to withdraw. The court reserved ruling on the motion for counsel to withdraw, noting that Schwersenska was on his third appointed attorney. However, the court stated that it would allow counsel to withdraw later if the office of the public defender was willing to appoint successor counsel. The court denied the motion for plea withdrawal on the basis that Schwersenska had not provided any legal basis to withdraw his plea. Our review of the transcript of the plea hearing confirms that Schwersenska did not provide the court at that time with any reason why the court should allow him to withdraw his plea, let alone a fair and just reason. Therefore, any challenge to the court’s denial of Schwersenska’s motion to withdraw his plea at the end of the plea hearing would be without arguable merit.

Schwersenska appeared with successor counsel at a later date for a hearing on a renewed request for plea withdrawal. Schwersenska testified that he “felt [he] was pressured into taking a deal[.]” Yet Schwersenska also testified that his attorney did not force or threaten him, and acknowledged that he had confirmed that fact during the plea colloquy. Schwersenska admitted during his testimony that he did not have a problem with the plea until the State requested that he

be remanded to jail at the end of the plea hearing. Schwersenska also testified that he accepted the proposed deal

[b]ecause the only way to get new counsel for my trial was to accept the plea and withdraw it and then there'd be a conflict of interest to get a new attorney [and] then, the attorney would have to withdraw, then I would get granted new counsel.

Schwersenska further testified that he entered into the plea deal because it reduced his incarceration exposure.

The circuit court denied the motion for plea withdrawal on the basis that Schwersenska had failed to show a fair and just reason. The court applied the proper legal standard, stating that, although a defendant should be allowed freely to withdraw his or her plea before sentencing for any fair and just reason, “freely does not mean automatic.” The court found that Schwersenska “was not coerced, that he knew what he was doing when he made his plea.” The court did not find Schwersenska’s testimony that he was coerced to be credible, finding that he was not “coerced [in any] way, shape, or form.” Generally, this court will not disturb a circuit court’s credibility determination on appeal. *See State v. Turner*, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). The record and no-merit report provide no basis for doing so here. The record reflects that the court applied the relevant facts to the proper standard of law, such that any argument that the circuit court erroneously exercised its discretion in denying Schwersenska’s motion for plea withdrawal would be wholly frivolous within the meaning of *Anders*, 386 U.S. at 744.

The no-merit report also addresses whether the circuit court erroneously exercised its sentencing discretion. As explained in the no-merit report, the sentence imposed is within the legal maximum. The standards for the circuit court and this court on discretionary sentencing

issues are well-established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. Any argument that the court erroneously exercised its sentencing discretion is without arguable merit on appeal.

Finally, the no-merit report discusses whether Schwersenska could raise a claim of ineffective assistance of trial counsel. We agree with appellate counsel's conclusion in the no-merit report that any such claim would be without arguable merit. To establish ineffective assistance of counsel, Schwersenska must establish that his trial counsel's actions constituted deficient performance, and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing trial counsel's performance, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court's review of the record and the no-merit report discloses no arguably meritorious basis for challenging trial counsel's performance.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Roberta Heckes is relieved of any further representation of Daniel Schwersenska 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