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DISTRICT II

December 7, 2022

To:

Hon. Mark Rohrer
Circuit Court Judge
Electronic Notice

Lynn Zigmunt
Clerk of Circuit Court
Manitowoc County Courthouse
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Jacalyn C. LaBre
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Andrew H. Morgan
Electronic Notice

Clarence L. Yelvington, Jr.
813 N. 10th Street
Manitowoc, WI 54220

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

2020AP1922-CRNM State of Wisconsin v. Clarence L. Yelvington, Jr. (L.C. #2016CF384)

Before Gundrum, P.J.[1]

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).

Clarence L. Yelvington, Jr. appeals from a judgment convicting him of two counts of negligently operating a motor vehicle contrary to WIS. STAT. § 941.01(1) (2015-16). Yelvington's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20) and ***Anders v. California***, 386 U.S. 738 (1967). Yelvington filed a response, and counsel filed a RULE 809.32(1)(f) supplemental no-merit report. Upon consideration of the report, Yelvington's response, counsel's supplemental no-merit report, and an independent

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

While the no-merit report recites the procedural history of the case, the report discusses only the issues Yelvington raised with counsel. Inexplicably, the no-merit report does not discuss either the plea or sentencing hearings or the legal standards applicable to each proceeding. For these reasons, the no-merit report is deficient and does not comply with WIS. STAT. RULE 809.32.[2]

In his response, Yelvington argues four issues: (1) Attorney Ann M. Larson, his plea counsel, was ineffective on the same grounds he alleged but then abandoned in his circuit court presentencing plea withdrawal motion; (2) the State altered or mishandled allegedly exculpatory video evidence, a claim he also made in his plea withdrawal motion but later abandoned; (3) plea counsel did not tell him that the State had notified her that some of the victims could not be located for trial, while other victims remained available for trial;[3] and (4) Judge Gary L. Bendix, who presided over a portion of the case, allegedly falsely certified in 2018 that under WIS. STAT. § 757.025(1), he did "not have any matter awaiting decision beyond 90 days of the date … on

[2] A no-merit report is supposed to "identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit." WIS. STAT. RULE 809.32(1)(a). Counsel was obligated to address possible appellate issues, including issues relating to the entry of the guilty pleas and sentencing, and state why the issues do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of RULE 809.32.

[3] Yelvington's charges arose out of his decision to drive his vehicle through an occupied area of a park, forcing people to dodge his vehicle, run, and leap up onto picnic tables. The complaint identified five victims. Yelvington argues that plea counsel did not tell him that the State had notified her that some of the victims could not be located for trial, while other victims remained available for trial. With his supplemental no-merit report, counsel submitted an affidavit of plea counsel addressing this claim.

which the matter was submitted in final form" because Yelvington's case was in final form but undecided on the certification date.

Counsel's supplemental no-merit report addresses Yelvington's response and provides an affidavit of plea counsel describing her practice of discussing witness availability issues with her clients. Plea counsel averred that she was certain she would have discussed the issue with Yelvington soon after the State notified her (a few days before the plea hearing).

In order to resolve the issues presented in the no-merit reports and Yelvington's response, we must first discuss what the record shows about how the case unfolded in the circuit court.

At the time he pled guilty to two misdemeanor counts, Yelvington was represented by Attorney Larson (hereafter plea counsel). Thereafter, plea counsel withdrew from the representation. Yelvington then filed a pro se presentencing motion to withdraw his guilty pleas due to ineffective assistance of plea counsel. Yelvington alleged that plea counsel failed to investigate and discuss with him allegedly altered exculpatory video evidence. After realizing he could not prosecute the plea withdrawal motion pro se, Yelvington agreed to have a new lawyer appointed.

Yelvington and his new counsel, Attorney Chad Fahrenkrug, appeared on the date set for an evidentiary hearing on the pending plea withdrawal motion. At that hearing, counsel informed the court that Yelvington was abandoning his plea withdrawal motion, including the claims made therein (ineffective assistance of plea counsel and issues relating to the allegedly

exculpatory video evidence) so that he could proceed to sentencing.[4] The court conducted a colloquy with Yelvington and confirmed that he had enough time to speak with his counsel about his decision to abandon his plea withdrawal motion. Counsel agreed that Yelvington was making a knowing and voluntary decision to abandon his plea withdrawal motion. Thereafter, the circuit court sentenced Yelvington to time served.

With this procedural history in mind, we return to the issues Yelvington raises in his response: ineffective assistance of plea counsel, including an alleged failure to disclose the availability of witnesses for trial and that the State allegedly tampered with or otherwise mishandled allegedly exculpatory video evidence of Yelvington driving his vehicle through the occupied areas of the park. We conclude that Yelvington cannot pursue these issues on appeal because he abandoned them in the circuit court when he withdrew his plea withdrawal motion. Furthermore, Yelvington does not challenge the assistance rendered by Attorney Fahrenkrug, who represented him at the hearing at which he abandoned these issues by withdrawing his plea withdrawal motion. Finally, Yelvington does not otherwise show good cause for being able to pursue on appeal issues he abandoned in the circuit court. *See* ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987) (a party cannot take inconsistent positions);[5] *see also* ***State v. Woods***, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988) (motion made but not pursued is abandoned).

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[4] As part of the plea agreement, the parties jointly recommended sentences amounting to time served after application of sentence credit.

[5] We have held that Yelvington's abandonment of his circuit court plea withdrawal motion precludes raising an ineffective assistance of plea counsel claim on appeal. Therefore, we conclude that plea counsel's affidavit accompanying counsel's supplemental no-merit report is not relevant to an issue before this court. Accordingly, we neither consider the affidavit's contents nor address any factual dispute arising from Yelvington's attempt to refute the affidavit.

We turn to the issues we have considered after our independent review of the record: the plea colloquy and the sentencing. During the plea colloquy, Yelvington affirmed that he understood all matters related to entering his guilty pleas. Based on the record before this court, any challenge to the entry of Yelvington's guilty pleas would lack arguable merit for appeal. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794 (plea colloquy requirements); *see* ***State v. Howell***, 2007 WI 75, ¶7, 301 Wis. 2d 350, 734 N.W.2d 48 (allegations required to seek plea withdrawal); *see* ***State v. Pegeese***, 2019 WI 60, ¶¶37, 40-41, 387 Wis. 2d 119, 928 N.W.2d 590 (record shows defendant's understanding of matters to be addressed during plea colloquy).[6] "[A] guilty … plea 'waives all nonjurisdictional defects, including constitutional claims[.]'" ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (footnote omitted; second alteration in original).

The circuit court imposed the parties' recommended concurrent terms of six months in jail, which amounted to time served after sentence credit was applied. The circuit court engaged in a proper exercise of sentencing discretion after considering various sentencing factors. ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (we review the sentence for a misuse of discretion); ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76

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[6] During the plea colloquy, the circuit court did not review the specific elements of the crimes with Yelvington. Nevertheless, we do not deem the plea colloquy defective. During the colloquy, the circuit court confirmed that the elements of the crimes were stated in the jury instructions attached to the plea questionnaire, Yelvington signed the plea questionnaire, Yelvington had adequate time to consult with counsel about the questionnaire, and he reviewed the elements with counsel and understood them. Counsel confirmed that he discussed the elements with Yelvington, and he understood them. We conclude that the plea colloquy was not defective. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶37, 40-41, 387 Wis. 2d 119, 928 N.W.2d 590 (similar colloquy regarding the constitutional rights waived by a plea deemed adequate). No issue with arguable merit is presented.

(sentencing objectives and factors discussed). A challenge to the sentence would lack arguable merit.

Finally, we briefly address Yelvington's claim that Judge Gary Bendix, who presided over a portion of the case, allegedly falsely certified in 2018 that under WIS. STAT. § 757.025(1), he did "not have any matter awaiting decision beyond 90 days of the date … on which the matter was submitted in final form."

Yelvington contends he should have been sentenced on September 22, 2017, when he entered his pleas. There is no such requirement in Wisconsin law.

Yelvington claims that his case was in final form as of September 22, 2017, and therefore Judge Bendix falsely certified in 2018 that he did not have any matter in final form pending for over ninety days. The record does not support the claim. After Yelvington entered his guilty pleas on September 22, 2017, he filed a pro se plea withdrawal motion on April 25, 2018. He withdrew that motion on November 26, 2019, and was sentenced on that date. Yelvington's case was not "submitted in final form" until he was sentenced on November 26, 2019. This issue lacks arguable merit.

To the extent we have not specifically addressed any other issue raised in the no-merit reports and the response, we have concluded that the issue lacks merit. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (appellate court is not required to address issues that "lack sufficient merit to warrant individual attention").

Our independent review of the record did not disclose any arguably meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be

raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Andrew H. Morgan of further representation of Yelvington in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Andrew H. Morgan is relieved of further representation of Clarence L. Yelvington, Jr. in this matter.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals