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DISTRICT II

January 25, 2023

To:

Hon. Barbara H. Key
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Timothy T. O'Connell
Electronic Notice

Deontae J. Howard, #548782
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2021AP1580-CRNM State of Wisconsin v. Deontae J. Howard (L.C. #2017CF750)

Before Neubauer, Grogan and Lazar, 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).

Deontae J. Howard appeals a judgment of conviction for burglary to a building or dwelling as a party to a crime, contrary to WIS. STAT. § 943.10(1m)(a) (2017-18).[1] Howard's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Howard has filed a response to the no-merit report, as well as a response to counsel's supplemental no-merit report. Upon consideration of the filings and our independent review of the record as mandated by ***Anders***, we conclude there is no

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

issue of arguable merit that could be raised on appeal. We therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Howard was initially charged with felony murder, armed robbery and armed burglary, all as a party to a crime, based on evidence that he was the instigator of an attempt to steal casino winnings and drugs from a friend. The thievery led to the death of one of the perpetrators, whom the victim shot. Following discovery and pretrial motions, the parties agreed that Howard would plead no contest to an amended charge of burglary of a building or dwelling as a party to a crime.[2] The remaining counts would be dismissed and read in. The parties were to jointly recommend a five-year-initial-confinement term, with the defense free to argue on extended supervision. The State agreed to take no position on the length of the extended supervision and whether Howard's sentence should be concurrent or consecutive to any other sentence. Following a personal colloquy, the circuit court accepted Howard's no-contest plea.

At a separate sentencing hearing, the prosecutor recommended five-year terms of initial confinement and extended supervision. The defense stated there was a "joint recommendation for a five-year period of initial incarceration," which it urged the circuit court to order concurrent to Howard's approximately four-year revocation sentence in other cases. The defense also argued for a five-year term of extended supervision. The court stated it would "follow the recommendations here but it's going to be on a consecutive basis." The court immediately proceeded with a restitution hearing, after which it ordered Howard responsible for the funeral expenses of the deceased jointly and severally with the other perpetrators.

[2] Howard later clarified that he wished to enter an ***Alford*** plea. *See* ***State v. Olson***, 2008 WI App 171, ¶7 n.4, 314 Wis. 2d 630, 762 N.W.2d 393. The distinction is immaterial for purposes of this appeal.

The no-merit report addresses whether Howard could raise nonfrivolous arguments regarding whether his plea was knowing, intelligent and voluntary; whether the circuit court complied with its mandatory obligations during the plea colloquy; and whether the circuit court erroneously exercised its sentencing discretion. Our review of the record satisfies us that the no-merit report thoroughly analyzes these issues and properly concludes any challenge based upon them would lack arguable merit.

The no-merit report further addresses whether Howard could raise a nonfrivolous argument that the prosecutor breached the plea agreement by recommending a five-year term of extended supervision at sentencing. As part of the plea agreement, the prosecutor promised to take no position on the length of an extended supervision term. "An accused has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Stewart***, 2013 WI App 86, ¶7, 349 Wis. 2d 385, 836 N.W.2d 456. To obtain relief on this basis, the defendant must show that any breach was material and substantial, in that it deprived the defendant of the benefit of the bargain. ***Id.***, ¶8. Here, the plea agreement—in addition to reducing the severity of count three from a Class E felony to a Class F felony—also resolved two serious charges. The five-year-extended-supervision term recommended by the State echoed the defense's own recommendation. The sentence imposed was consistent with the defense's recommendation. Accordingly, there is no arguable merit to any assertion that Howard is entitled to relief on the basis of a breach of the plea agreement.

Howard's responses assert that there is an issue of arguable merit regarding whether the circuit court adequately complied with its duties during the plea colloquy under WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). Specifically, Howard contends the plea colloquy was deficient because the court failed to inquire about his

capacity to enter his plea and failed to adequately apprise him that he was giving up his right to a unanimous jury. Based on the submissions, it appears Howard is asserting that a circuit court is required to personally inquire of a defendant during a plea hearing whether he or she is under the influence of drugs, medication, or alcohol and whether the defendant is receiving treatment for a mental illness or disorder.

We reiterate our conclusion above that no issue of arguable merit appears in this record concerning the adequacy of the circuit court's plea colloquy. Regarding the waiver of his constitutional rights, the court informed Howard that he was "giving up the right to have a trial to a jury where all 12 members of that jury" would have to conclude beyond a reasonable doubt that Howard was a party to the crime of burglary.[3] Regarding the adequacy of the colloquy as to Howard's background and capacity to enter his plea, Howard is correct that the court did not call specific attention to those matters. However, Howard was present in person for the colloquy, which allowed the court to make a real-time assessment of his demeanor and capacity. Additionally, Howard signed the plea questionnaire and waiver-of-rights form in the court's presence that included information that Howard was twenty-six years old with twelve years of schooling, understood the English language, and was not under the influence of any drugs or alcohol.[4] The court verified that Howard had reviewed the form with his attorney. It also

[3] Howard's response may be based on the fact that the circuit court segued immediately from its discussion of unanimity to its recitation of the elements of the offense and explanation of party-to-a-crime liability. We perceive no issue of arguable merit regarding the sequencing of the court's colloquy as giving rise to the potential for confusion on Howard's part. In its totality, the court's colloquy explained precisely what a jury of twelve would have to unanimously agree upon at trial.

[4] The supplemental no-merit report includes counsel's observation that, based upon counsel's discussions with Howard, Howard is not contesting the accuracy of the information contained on the form, including that he was capable of understanding the proceedings.

verified that Howard's attorney believed he was entering his plea knowingly, intelligently and voluntarily.

Howard believes the court's colloquy was insufficient under ***State v. Hoppe***, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. ***Hoppe*** is clear, however, that a "circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties." ***Id.***, ¶30. A court's reliance on the form becomes problematic when it is used as a "substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant." ***Id.***, ¶32. There is no arguable merit to an assertion that the court's reliance on the form was so great in this case that the form substituted for an in-person colloquy. Our review of the record discloses no other potentially meritorious 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 Timothy T. O'Connell is relieved from further representing Deontae J. Howard 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