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DISTRICT III

March 21, 2023

To:

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Circuit Court Judge
Electronic Notice

Sheila Dudka
Clerk of Circuit Court
Marinette County Courthouse
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P.O. Box 19033
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1842-CRNM State of Wisconsin v. Brian John Vollmer
(L. C. No. 2018CF166)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Brian Vollmer filed a no-merit report concluding that no grounds exist to challenge Vollmer's conviction for delivering three grams or less of heroin, as a party to a crime. Vollmer filed a response raising several challenges to his conviction, and counsel filed a supplemental no-merit report addressing Vollmer's concerns. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

The State charged Vollmer with delivering three grams or less of heroin, knowingly distributing or delivering the imitation of a controlled substance, and maintaining a drug trafficking place, all three counts as a repeater and the first two counts as a party to a crime. The complaint alleged that Vollmer sold heroin to a confidential informant and, one week later, he sold the informant an imitation of heroin. The complaint also alleged that Vollmer maintained a vehicle used for delivering controlled substances and that he was convicted of a prior felony, warranting the repeater enhancer.

At the outset of his initial appearance, Vollmer asked to represent himself. After a colloquy with the circuit court, the court found that Vollmer freely, voluntarily and intelligently waived his right to counsel and that he was making a deliberate choice to proceed pro se. Vollmer subsequently filed several motions, including motions to suppress "show-up confrontation evidence" and the transcribed audio recordings of the controlled buys; a motion to test or inspect the drug evidence; and a motion to dismiss the complaint. Before the motions were decided, Vollmer entered into a plea agreement.[2]

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] WISCONSIN STAT. § 971.31(10) provides that an order denying a motion to suppress evidence may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest. Because Vollmer's suppression motions were never decided, the statute is inapplicable, and we need not address any claim arising from the motions. With respect to Vollmer's other pretrial motions, a valid guilty plea waives all non-jurisdictional defects and defenses. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

In exchange for Vollmer's guilty plea to delivering three grams or less of heroin as a party to a crime, the State agreed to dismiss the repeater enhancer and to recommend that the remaining counts be dismissed outright. The State also agreed that it would make no recommendation regarding the sentence, though it would be able to comment on the facts of the case and Vollmer's criminal history. Vollmer remained free to argue at sentencing. Before accepting Vollmer's guilty plea, the circuit court engaged Vollmer in a lengthy plea colloquy, and Vollmer reiterated his desire to waive his right to an attorney at the plea hearing.

Vollmer appeared at sentencing with counsel. Out of a maximum possible sentence of twelve and one-half years, the circuit court imposed an eight-year term, consisting of four years of initial confinement followed by four years of extended supervision, concurrent to a sentence that Vollmer was serving in another case. The court also awarded 107 days of sentence credit.

Vollmer subsequently filed a pro se motion seeking additional sentence credit. At the time the complaint was filed in this case, Vollmer was serving a prison sentence arising from a separate case. He nevertheless claimed that he was entitled to 218 days of credit in this case based on a purported detainer from August 20, 2018—when the complaint was filed—until March 26, 2019—when his cash bond paperwork was given to the circuit court clerk. Vollmer further asserted that he was entitled to eighty-five days of credit from the time his bond was revoked on September 19, 2019, until his December 12, 2019 sentencing.

The State responded that Vollmer had not been subject to a detainer, but it conceded that he was entitled to credit for the twenty-seven days from February 28, 2019, when his cash bond was set, to March 26, 2019, when the bond paperwork was given to the circuit court clerk. The State also agreed that Vollmer was entitled to credit for the eighty-five days from the revocation

of his bond to his sentencing. The State therefore argued that Vollmer was entitled to a total of 112, rather than 107, days of sentence credit. The circuit court agreed and amended the judgment accordingly.

The no-merit report addresses whether Vollmer knowingly, intelligently and voluntarily entered his guilty plea, whether the circuit court erroneously exercised its sentencing discretion, and whether Vollmer received the appropriate amount of sentence credit. Upon reviewing the record, we agree with counsel's description, analysis and conclusion that any challenge to Vollmer's plea or sentence would lack arguable merit.

In his response to the no-merit report, Vollmer claims that the State breached the part of its agreement to make no sentence recommendation when it worked with the presentence investigation report (PSI) writer to make an "end-run" around the agreement. However, nothing in the record supports Vollmer's contention that the State was working in concert with the PSI writer to subvert the plea agreement. Rather, the record shows that, consistent with the plea agreement, the State made no sentence recommendation.

Vollmer also claims there was no factual basis for accepting his guilty plea because he denied being present at the crime scene. The record belies this claim. During the plea colloquy, Vollmer acknowledged that by entering a guilty plea, he was admitting that he committed each of the elements of the offense of delivering three grams or less of heroin as a party to a crime. Moreover, when the State informed the circuit court that it was relying on the probable cause section of the complaint as the factual basis for the plea, Vollmer confirmed he had no objection. The court ultimately found that a sufficient factual basis existed in the criminal complaint to support a conclusion that Vollmer committed the crime charged.

Vollmer also appears to argue that his withdrawal from medication hindered his ability to understand the proceedings. Again, the record belies his claim. Vollmer confirmed during the plea colloquy that he was not feeling the effects of any mental health issues, and that he did not have any physical or psychological disabilities affecting his ability to understand what was happening in court or to communicate his position or views on the case. Noting that he had been in jail for twenty-one days, Vollmer added that he is "probably the most sane" when he is behind bars. Ultimately, nothing in the record supports a nonfrivolous challenge to the plea on this ground.

Next, Vollmer claims that he was forced to tell his probation agent information that was included in the PSI and used against him, characterizing the information as "compelled testimony." To the extent Vollmer is claiming that compelled testimony was used against him in another case, that issue is not before us in this appeal. It may be that Vollmer is claiming that compelled testimony was improperly used by the circuit court when imposing the sentence in this case. Because a defendant's Fifth Amendment privilege against self-incrimination continues through sentencing, "a circuit court employs an improper factor in sentencing if it actually relies on compelled statements made to a probation agent." ***State v. Alexander***, 2015 WI 6, ¶24, 360 Wis. 2d 292, 858 N.W.2d 662. We review the court's articulation of its basis for sentencing in the context of the entire sentencing transcript to determine whether the court gave "explicit attention" to an improper factor and whether the improper factor "formed part of the basis for the sentence." *See* ***id.***, ¶25 (citations omitted).

Here, Vollmer does not specify what information was purportedly compelled or how any such information formed the basis for the sentence imposed. Even assuming compelled testimony

was included in the PSI, nothing in the record supports a nonfrivolous claim that Vollmer's sentence was based on compelled, self-incriminating statements to his probation agent.

Vollmer also claims the circuit court erred by awarding only five additional days of sentence credit. Under WIS. STAT. § 973.155(1)(a), "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." The statute defines "days spent in custody" as "confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct." ***Id.*** Additionally, confinement occurs: (1) "[w]hile the offender is awaiting trial"; (2) "[w]hile the offender is being tried"; and (3) "[w]hile the offender is awaiting imposition of sentence after trial." ***Id.*** Thus, for sentence credit to be awarded, a defendant must show that he or she was "in custody" and that "the custody 'was in connection with the course of conduct for which the sentence was imposed.'" ***State v. Friedlander***, 2019 WI 22, ¶23, 385 Wis. 2d 633, 923 N.W.2d 849 (citing § 973.155(1)(a)).

In his response to the no-merit report, as in his motion for sentence credit, Vollmer claims he is entitled to credit from the date the detainer was placed on him until the date his cash bond was posted. "A 'detainer' is not executed against a person, nor, standing alone, can it legally authorize custody." ***State v. Demars***, 119 Wis. 2d 19, 24, 349 N.W.2d 708 (Ct. App. 1984), *abrogated on other grounds by* ***State v. Harr***, 211 Wis. 2d 584, 595, 568 N.W.2d 307 (Ct. App. 1997). Its function "is to give notice to an institution where a subject is held that his [or her] custody is desired elsewhere and, also, to give notice to the subject of the other charges so that he [or she] might demand a speedy trial." ***Id.*** As noted above, the State disputed Vollmer's claim that he was subject to a detainer in this matter. Even assuming a detainer had been issued at the time the complaint was filed, notice that Vollmer's custody was desired in Marinette County while

he served a prison sentence arising from a separate case "did not occasion" Vollmer's custody in the present matter. *See* ***id.*** at 26. Therefore, any claim that Vollmer is entitled to additional sentence credit on this basis would lack arguable merit.

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

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of his obligation to further represent Brian Vollmer 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