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DISTRICT I

April 4, 2023

To:

Hon. Dennis Flynn
Reserve Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Winn S. Collins
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John D. Flynn
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David Malkus
Electronic Notice

Adrian Henry
2525 S. Garfield Ave.
Milwaukee, WI 53205

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

2021AP810-CRNM State of Wisconsin v. Adrian Henry (L.C. # 2019CF4997)

Before Donald, P.J., Dugan and White, 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).

Adrian Henry appeals from his judgment of conviction entered after he pled guilty to armed robbery. His appellate counsel, Attorney David Malkus, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Henry was advised of his right to file a response, but did not do so. Upon this court's independent review of the record as mandated by ***Anders***, and counsel's report, we conclude there are no

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

issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, in November 2019 officers from the Milwaukee Police Department (MPD) responded to a call regarding an armed robbery at a liquor store. An employee of the store told the officers that a man had pointed a black handgun at him and demanded the cash that was in the store's two cash registers. The suspect then left the store with the cash he put into a bag that he had demanded from the employees. The amount taken was estimated to be between $3,000 and $4,000.

Two days later, MPD received another call from the same liquor store, where employees reported that the robbery suspect was across the street from the store. An officer made contact with the suspect, who identified himself as Henry. Photos from the store's surveillance camera had been distributed to officers who patrol that area, and Henry was wearing the same clothing that the robbery suspect had been wearing.

Henry was arrested. At the time of his arrest, he was in possession of a .22 caliber handgun, for which he had a valid concealed carry permit. An MPD detective conducted a custodial interview of Henry. After being read his ***Miranda***[2] rights and waiving them, Henry was shown the photos from the liquor store taken at the time of the robbery; Henry admitted he was the person in the photos. He stated that he had argued with the store employees, and then grabbed a bag of money and walked out of the store. He said that once outside the store, he had

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

tossed the bag of money and fled. He asserted that although it "look[ed] like a robbery," he had not actually taken anything, but rather was just trying to "scare" the employees.

Henry chose to resolve the matter with a plea. In return for pleading guilty to armed robbery, the State agreed to recommend two years of initial confinement and two years of extended supervision. The trial court accepted Henry's plea and imposed a sentence of fifteen months of initial confinement followed by two years of extended supervision. This no-merit appeal follows.

The no-merit report first addresses whether Henry has an arguably meritorious claim for plea withdrawal. There is a constitutional requirement that a guilty plea be "affirmatively shown" to be knowing, voluntary, and intelligent. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). To ensure that this requirement is met, the trial court must engage the defendant in a personal colloquy, during which the court must fulfill certain duties to ascertain the defendant's understanding of the charge against him or her, and the constitutional rights that are waived upon entering a plea. ***State v. Brown***, 2006 WI 100, ¶¶28-29, 35, 293 Wis. 2d 594, 716 N.W.2d 906. If these duties are not fulfilled, the defendant may move to withdraw his or her plea. ***Id.***, ¶36.

Appellate counsel points out that during the plea colloquy, the trial court did not explicitly review the elements of the offense with Henry; rather, it confirmed that trial counsel had gone over the elements of the charge with Henry when she reviewed the plea questionnaire

and waiver of rights form, as well as the addendum.[3] Appellate counsel also observes that when going over the potential maximum punishment for the charge, the trial court did not reference the fine that could be imposed. Additionally, we note that the trial court did not specifically reference the right to a unanimous jury verdict during its explanation of the constitutional rights that are waived upon entering a plea.

However, all of this information was included on the plea questionnaire and waiver of rights form and addendum, which Henry confirmed he had reviewed with his trial counsel and understood. These forms may be utilized to "lessen[] the extent and degree of the colloquy otherwise required between the trial court and the defendant[.]" ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation omitted).

Furthermore, appellate counsel notes that in order to demonstrate an arguable basis for seeking plea withdrawal due to these omissions, it would have to be alleged that Henry did not in fact understand the information that should have been provided at the plea hearing. *See* ***Bangert***, 131 Wis. 2d at 274. Appellate counsel represents that for reasons outside of the record, he is not able to make any such allegation. Therefore, in the absence of an objection from Henry, we accept this representation by appellate counsel, and conclude that there are no issues of arguable merit relating to Henry's plea.

The other issue addressed in the no-merit report is whether there could be arguable merit to a claim that the trial court erroneously exercised its sentencing discretion. The record reflects

[3] These forms were not signed by Henry because, as explained by trial counsel during the plea hearing, she reviewed the forms with Henry over Zoom due to restrictions related to the COVID-19 pandemic.

that the court considered relevant sentencing objectives and factors. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Specifically, the trial court discussed Henry's lack of a prior record and other positive characteristics, but noted the aggravated nature of the crime based on his use of the handgun.

Furthermore, the sentence of three years and three months imposed by the trial court is well within the maximum sentence of forty years authorized by law, *see* WIS. STAT. §§ 943.32(2), 939.50(3)(c) (2019-20), and thus is not unduly harsh or unconscionable, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Therefore, this court agrees with appellate counsel that there would be no arguable merit to a claim that the trial court erroneously exercised its sentencing discretion.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Henry 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