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DISTRICT III

June 20, 2023

To:

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Electronic Notice

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Clerk of Circuit Court
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Jason Lee Miller
1090 Reed Street
Green Bay, WI 54303

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

2022AP228-CRNM State of Wisconsin v. Jason Lee Miller (L. C. No. 2014CF177)

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 Jason Lee Miller has filed a no-merit report concluding that no grounds exist to challenge Miller's convictions for five drug-related offenses. Miller was informed of his right to file a response to the no-merit report, and he has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

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

On February 14, 2014, the State filed a criminal complaint alleging that over the course of the previous year, Miller committed eight felonies in violation of the Uniform Controlled Substances Act, WIS. STAT. ch. 961 (2013-14). Two of the eight counts were subsequently dismissed following a preliminary examination, and the remaining six counts proceeded to a jury trial in October 2014. After the parties selected a jury, however, Miller moved for a mistrial on grounds that he had lost confidence in his trial counsel and wanted a different lawyer. Over objection by the State, the circuit court granted the motion, discharged the jury, and permitted Miller's trial counsel to withdraw.

Miller remained in a trial posture for the next two and one-half years, but in March 2017, he decided to resolve this case with a plea agreement. Under its terms, which the State memorialized in a written "global offer memo," Miller entered no-contest pleas to five of the six counts pending against him in this matter, namely, four counts of delivering cocaine as a party to a crime and one count of maintaining a drug trafficking place. The State moved to dismiss an additional count of delivering cocaine, and the State also moved to dismiss and read in two pending cases filed against Miller in 2015 alleging witness intimidation and possession of cocaine as a party to a crime. The State further agreed to cap its sentencing recommendation at six years of initial confinement followed by ten years of extended supervision. Finally, the agreement "contemplate[d] consideration for a full debrief and testimony" in two homicide prosecutions in which Miller had cooperated with law enforcement during the pendency of his own charges. The agreement went on to provide that the State's offer was void if Miller committed additional crimes or violated a condition of his bail.

The circuit court accepted Miller's five no-contest pleas and dismissed the remaining charges. The matter was adjourned for sentencing.

Miller's sentencing was delayed for some time. In March 2018, after Miller had testified in one of the homicide cases, the parties told the circuit court that they were not yet ready to bring the case to a conclusion, but had agreed that Miller could be released from custody on a signature bond. On March 23, 2018, the court approved the agreement and modified Miller's bail to a signature bond with conditions, including GPS monitoring.

Miller did not testify in the second homicide case. On June 25, 2018, Miller cut off his GPS monitoring device and absconded. He returned to circuit court on a bench warrant in the instant matter on January 22, 2019. At that time, the State also filed a new complaint charging Miller with bail jumping based on his actions on June 25, 2018. The State later filed an additional complaint charging Miller with delivering heroin and bail jumping in September 2018 while at large.

Miller filed a motion for plea withdrawal in October 2019. As grounds, Miller alleged that the State had advised him that it would not make the sentencing recommendation previously promised because he had absconded from custody and committed additional crimes. Miller claimed to have been unaware when he entered his pleas that his future criminal conduct would affect the State's obligations. He further claimed that he had received an irrevocable promise that he would not be required to serve any prison time for his convictions in this case in consideration for his cooperation with law enforcement in another case. Following an evidentiary hearing, the circuit court rejected Miller's claims and denied his motion for plea withdrawal.

The five charges in this case proceeded to sentencing on February 18, 2020. The State recommended an aggregate, evenly bifurcated twenty-year term of imprisonment for the four

delivery charges followed by two years of probation on the remaining charge. Miller recommended a "significant" aggregate term of imprisonment, imposed and stayed in favor of probation. The circuit court followed Miller's recommendation. For the five convictions, the court imposed an aggregate twenty-six years and six months of imprisonment bifurcated as ten years and six months of initial confinement followed by sixteen years of extended supervision.[2] The court stayed that aggregate term of imprisonment in favor of an eight-year term of probation on all counts. The court also granted Miller the 767 days of presentence incarceration credit that he requested and found him eligible for the challenge incarceration program and the substance abuse program, *see* WIS. STAT. §§ 302.045(2), 302.05(3), in the event that he was required to serve his prison terms.

We first address an issue that appellate counsel did not discuss in the no-merit report but that Miller raised during the circuit court proceedings—namely, whether the prohibition against double jeopardy barred his continued prosecution after his jury trial ended in a mistrial. "The double jeopardy clause of both the federal and state constitutions protects a defendant's right to have his or her trial completed by a particular tribunal and protects a defendant from repeated

[2] For delivery of not more than one gram of cocaine as a party to a crime, Miller faced maximum penalties of a $25,000 fine and ten years of imprisonment. *See* WIS. STAT. §§ 961.41(1)(cm)1g., 939.05, 939.50(3)(g) (2013-14). The circuit court imposed an eight-year term of imprisonment bifurcated as three years of initial confinement followed by five years of extended supervision. For each of the three counts of delivery of more than one gram but not more than five grams of cocaine as a party to a crime, Miller faced maximum penalties of a $25,000 fine and twelve years and six months of imprisonment. *See* §§ 961.41(1)(cm)1r., 939.05, 939.50(3)(f) (2013-14). The court imposed three five-year terms of imprisonment, each bifurcated as two years of initial confinement followed by three years of extended supervision. For maintaining a drug trafficking place, Miller faced maximum penalties of a $10,000 fine and three years and six months of imprisonment. *See* WIS. STAT. §§ 961.42, 939.50(3)(i) (2013-14). The court imposed the maximum term of imprisonment bifurcated as eighteen months of initial confinement followed by two years of extended supervision. The court ordered Miller to serve the five sentences consecutively to each other and to any other sentence.

attempts by the State to convict the defendant for an alleged offense." ***State v. Jaimes***, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669. However, the double jeopardy clause does not bar a retrial after the defendant successfully requests a mistrial unless the defendant's request was based on prosecutorial overreach. *See* ***id.***, ¶¶7-8. Miller moved for a mistrial in this case based on his loss of confidence in his trial counsel. Accordingly, double jeopardy did not bar continued prosecution. *See* ***id.*** There is no merit to further pursuit of this issue.

Appellate counsel also did not examine whether Miller could pursue an arguably meritorious claim that he was not competent to proceed. The attorney who represented Miller during the abbreviated jury trial proceedings raised this issue in connection with the motion for a mistrial and the attorney's accompanying motion to withdraw. Specifically, the attorney advised that he had been approached in the courtroom by someone claiming to be Miller's half-brother who stated that he had reason to doubt Miller's competency based on their "shared family history." The circuit court questioned Miller, who acknowledged that he had received some mental health treatment in the past but stated that he was "all the way normal." The court then permitted the proceedings to continue, noting its "own observation that [Miller had] been actually articulate and clear and there's been no outward sign" of mental health problems.

The circuit court has an obligation to explore whether the defendant is competent to proceed when a reason exists to doubt the defendant's competency, but a mental health disorder alone does not render a defendant incompetent. *See* ***State v. Smith***, 2016 WI 23, ¶¶36-37, 367 Wis. 2d 483, 878 N.W.2d 135. Rather, the test for competency entails determining whether the defendant can understand the proceedings sufficiently to consult with counsel and assist in his or her defense. *See* ***id.***, ¶¶35-36. Competency proceedings are not required unless the circuit court receives evidence that gives rise to a reason to doubt the defendant's competency, and whether

such evidence exists rests in the circuit court's discretion. *See* ***id.***, ¶43. Here, the circuit court took appropriate steps when trial counsel raised a concern about Miller's competency, but the court concluded that no basis existed to further question Miller's competency in light of Miller's responses to inquiries and the court's own observations. Our review of the record confirms that the court's assessment was reasonable. Accordingly, pursuit of this issue would lack arguable merit.

We next consider whether Miller could pursue an arguably meritorious claim for plea withdrawal on the ground that the circuit court failed to fulfill its duties at the plea hearing and did not establish that his no-contest pleas were knowing, intelligent, and voluntary. *See* ***State v. Pegeese***, 2019 WI 60, ¶21, 387 Wis. 2d 119, 928 N.W.2d 590. We are satisfied that appellate counsel properly analyzed this issue and correctly concluded that Miller could not mount such a claim. The court conducted a thorough plea colloquy that fully complied with its obligations when accepting a plea other than not guilty. *See* WIS. STAT. § 971.08; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); ***Pegeese***, 387 Wis. 2d 119, ¶23. The record—including the plea questionnaire and waiver of rights form that Miller signed; the attached jury instructions describing the elements of the crimes to which he entered no-contest pleas; and the plea hearing transcript—demonstrates that Miller entered his pleas knowingly, intelligently, and voluntarily. Additional discussion of this issue is not warranted.

We next consider whether Miller could pursue an arguably meritorious claim that the circuit court erroneously denied his motion for plea withdrawal prior to sentencing. We conclude that he could not do so.

A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for plea withdrawal. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). The reason must involve more than the desire to go to trial or belated misgivings about the plea, and the circuit court must find the reason credible. *See* ***State v. Jenkins***, 2007 WI 96, ¶¶32, 43, 303 Wis. 2d 157, 736 N.W.2d 24. Whether the reason is adequate lies within the discretion of the circuit court. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). We will affirm the circuit court's decision denying plea withdrawal if that decision was based on the facts of record and the applicable law. *See* ***Jenkins***, 303 Wis. 2d 157, ¶30.

The circuit court here did not believe the veracity of Miller's proffered reasons for plea withdrawal. Miller claimed not to have known that the State would no longer be required to make the promised sentencing recommendation if he committed additional crimes.[3] He further claimed that the State had made a firm promise that he would not receive any prison time for his crimes in this case. The court found, however, that these claims were contradicted by the record. Miller had initialed a copy of the State's "global offer memo" and filed it as an attachment to his plea questionnaire when he entered his no-contest pleas. That memo stated, in bold print and capital letters directly above his initials: "non-compliance with bond or criminal activity during the pendency of this action voids the above offer." Above that text, bolded and underlined, the memo further stated: "all offers will become void if the defendant is charged with a new

[3] At the hearing on Miller's plea withdrawal motion, one of the State's exhibits was a copy of the criminal complaint alleging that Miller violated the conditions of his bail on June 25, 2018. Miller, by counsel, stipulated that he had been convicted of that offense. The parties also agreed that the charges arising in September 2018 remained pending.

criminal offense." Further, during the plea colloquy, Miller confirmed his understanding that the court was not bound by any plea agreement, and he acknowledged the court's discretion to impose any sentence up to the maximum allowed by law. In light of the foregoing, the court found that Miller's reasons for plea withdrawal were not credible and, accordingly, that Miller had failed to show a fair and just reason to withdraw his pleas.

Miller also contended that if his criminal activity relieved the State of its obligations under the plea agreement, then he was in turn entitled to relief from his pleas. We agree with appellate counsel that this claim is governed by ***State v. Reed***, 2013 WI App 132, 351 Wis. 2d 517, 839 N.W.2d 877. In ***Reed***, we held that a defendant who breaches a plea agreement by engaging in new criminal conduct deprives the State of a "substantial and material benefit" for which the State bargained, and that "[t]he determination of the appropriate remedy for a breach of a plea agreement is within the discretion of the circuit court." *See* ***id.***, ¶¶9-10, 12. Accordingly, while a circuit court may vacate a plea agreement in response to a breach, it is not required to do so. *See* ***id.***, ¶12. Here, the court concluded that given Miller's knowledge of the terms and conditions of his agreement, permitting him to withdraw his pleas was neither fair nor just. Further pursuit of this issue would lack arguable merit.

We next consider whether Miller could pursue an arguably meritorious challenge to his sentences. We conclude that he could not do so. As a preliminary matter, we observe that the circuit court imposed the disposition that Miller requested—namely, a substantial aggregate term of imprisonment that the court stayed in favor of probation. A defendant normally may not challenge a sentence that he or she affirmatively approved. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Moreover, we agree with appellate counsel that the record reflects an appropriate exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court discussed appropriate sentencing goals, placing particular emphasis on protection of the public, and the court discussed the sentencing factors that it considered in fashioning the disposition ultimately imposed. *See* ***id.***, ¶¶41-43. The court's considerations were proper and relevant and included the mandatory sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. As ***Gallion*** requires, the court considered probation as the first alternative, *see* ***id.***, ¶44, and the court concluded that the circumstances in this case warranted probation as to each conviction. In reaching that conclusion, the court put considerable weight on Miller's cooperation with law enforcement, the personal risks that he assumed by doing so, and the extent to which such cooperation benefitted the community. The ultimate disposition was well within the aggregate maximum penalty that the law allows, *see* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173, and was not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A challenge to the court's exercise of sentencing discretion would lack arguable merit.

In the no-merit report, appellate counsel discusses a number of additional matters, including the sufficiency of the complaint, the decision to bind Miller over for trial following the preliminary examination, Miller's requests for a speedy trial, and the calculation of sentence credit. Upon review of the record, we agree with appellate counsel's conclusions that any challenges based on these matters would lack arguable merit. We also agree with appellate

counsel's assessment that the record does not suggest any ground for an arguably meritorious claim of ineffective assistance of trial counsel.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of any further representation of Jason Lee Miller on appeal. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals