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DISTRICT III

November 28, 2023

To:

Hon. Maureen D. Boyle
Circuit Court Judge
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Melissa M. Petersen
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Braidyn S. Nederhoff
1645 4th Avenue
Baldwin, WI 54002

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

2021AP1956-CRNM State of Wisconsin v. Braidyn S. Nederhoff
(L. C. No. 2018CF167)

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 Braidyn Nederhoff has filed a no-merit report concluding that no grounds exist to challenge Nederhoff's convictions for three counts of possession of methamphetamine, as a repeater. Nederhoff 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 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]

Nederhoff was arrested after police executed a search warrant at a residence in Rice Lake, Wisconsin. The warrant authorized the search of the residence, all vehicles on the property, and all persons associated with the property. The warrant asserted that "vehicle(s) there may contain controlled substances and persons may be there to use, purchase or sell controlled substances." A criminal complaint alleged that upon entry into the residence, Nederhoff was standing by a couch in the living room, and he had almost $2,000 on his person, along with a small clear plastic baggie containing 3.46 grams of a white crystalline substance that later tested positive for methamphetamine. Behind the couch were two more bags of methamphetamine that were packaged in the same way as the package that was found on Nederhoff. Nederhoff was charged with one count of possession with intent to deliver more than ten grams but not more than fifty grams of methamphetamine, a Class D felony, as a repeater.

As part of plea negotiations, the State offered to amend the original charge to three counts of possession of methamphetamine, a Class I felony, with all three counts as a repeater. The State also agreed to ask the circuit court to order a presentence investigation report (PSI), but the parties remained free to argue at sentencing. Nederhoff entered guilty pleas to the amended charges.

The PSI recommended a six-year sentence on each count, consisting of three years of initial confinement followed by three years of extended supervision, to run concurrently to one

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

another and to any other sentence Nederhoff was then serving. The State recommended that the circuit court impose four years of initial confinement followed by two years of extended supervision for Count 1, consecutive to any sentence Nederhoff was then serving. With respect to the other two counts, the State asked the court to withhold sentence and impose three-year terms of probation, concurrent to each other but consecutive to Nederhoff's sentence on Count 1. Defense counsel asked the court to follow the PSI's recommendation.

Out of a maximum possible sentence of twenty-two and one-half years, the circuit court imposed five-year terms for each count, consisting of three years of initial confinement followed by two years of extended supervision, to run concurrently with each other, but consecutively to any other sentence Nederhoff was then serving. Because Nederhoff's sentences in this case were consecutive to the sentence imposed after the revocation of his extended supervision in another case, the court determined any applicable credit was applied against his revocation sentence. *See* ***State v. Rohl***, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991) ("So-called 'dual credit'—where an offender can receive credit for a single episode of jail time toward two (or more) sentences—will be granted only for sentences which are *concurrent*.").

Nederhoff filed a postconviction motion for plea withdrawal, alleging that his pleas were not knowing, intelligent, and voluntary because his trial counsel told him he would be entitled to sentence credit in this case and misinformed him about the terms of the State's plea offer. To withdraw a guilty plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow plea withdrawal would result in manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44.

As relevant here, a defendant may demonstrate manifest injustice by showing that his or her plea was not knowing, intelligent, and voluntary or by showing that his or her trial attorney was constitutionally ineffective. ***Id.***, ¶¶37, 84. A plea that was not entered knowingly, intelligently, and voluntarily violates fundamental due process, and a defendant may therefore withdraw the plea as a matter of right. ***Id.***, ¶37. A defendant is entitled to plea withdrawal based on misinformation that he or she received if the defendant presents a "persuasive account" of why, absent the misinformation, he or she would not have entered a plea and would have instead gone to trial. ***Id.***, ¶52.

To establish ineffective assistance of trial counsel, a defendant must prove that his or her trial attorney performed deficiently and that the deficient performance prejudiced the defense. ***Id.***, ¶85. To establish deficient performance, the defendant must show that trial counsel's performance fell outside the wide range of professionally competent assistance. ***Id.***, ¶88. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.***, ¶95. In the plea withdrawal context, this requires the defendant to establish a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have instead insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

At a postconviction motion hearing, trial counsel conceded that he mistakenly told Nederhoff that the State agreed to follow the PSI's sentence recommendation and to recommend concurrent sentences. With respect to sentence credit, Nederhoff's trial counsel could not recall exactly what he told Nederhoff, but he acknowledged it was "possible" he stated Nederhoff would receive "substantial credit." In turn, Nederhoff testified that he would not have accepted the State's plea offer had he known that "it was going to be just three Class I Felonies, with no

other deal." He testified that he accepted the plea deal, as communicated to him by his trial counsel, because he "thought [he would] get concurrent time, and [he] thought that sounded like a good deal." In addition, he testified that he would not have taken the deal if he had known it was possible that he would not receive any sentence credit.

The circuit court denied the plea withdrawal motion, reasoning that Nederhoff's knowledge that the court was not bound by the terms of the plea agreement cured any misinformation he received about the plea agreement. Nederhoff appealed. In that appeal, the State conceded that the circuit court employed an incorrect legal analysis when denying Nederhoff's postconviction motion, as the court's power to reject a sentencing recommendation made pursuant to a plea agreement does not cure misinformation provided to a defendant about his or her plea. *See* ***State v. Dawson***, 2004 WI App 173, ¶15, 276 Wis. 2d 418, 688 N.W.2d 12.

The State argued that this court could nevertheless affirm the order under the correct analysis. We disagreed, noting that because the circuit court did not employ the proper legal analysis, it did not make factual findings relevant to that analysis. *See* ***State v. Nederhoff***, No. 2020AP1285-CR, unpublished slip op. ¶38 (WI App Sept. 14, 2021). We therefore reversed the order denying Nederhoff's postconviction motion for plea withdrawal, and we remanded the matter to the circuit court to reconsider the motion using the correct legal analysis. ***Id.***, ¶39. We directed that, in particular, the court should make factual findings regarding Nederhoff's motivation for accepting the State's plea offer, the credibility of his testimony that he would not have accepted the State's offer had he been correctly informed of its terms, and the credibility of defense counsel's testimony regarding the overall defense strategy when negotiating the plea agreement. ***Id.*** We added that, having made those findings, "the court must then determine whether Nederhoff has satisfied his burden to show that, absent the misinformation he received

about the plea offer, he would not have accepted the offer and would have instead gone to trial." ***Id.***

On remand, the circuit court found that it was incredible for Nederhoff to claim that he would not have entered guilty pleas if he knew the State would not recommend concurrent sentences when he was aware that the district attorney's recommendation was not dispositive. The court found, based on the record, that Nederhoff's desire for an agreement similar to a codefendant, who was convicted of a Class I felony, motivated him to accept the plea offer. The court further found that the record supported the "reasonableness of [trial counsel]'s overall strategy of minimizing total prison exposure." Based on its findings, the court ultimately determined that it was incredible for Nederhoff to claim that he would not have accepted the plea deal and would have gone to trial had he been correctly advised of its terms. The court found that Nederhoff was advised of the actual terms of the plea offer—"i.e.[,] plead to three amended charges and PSI"—and he still entered his pleas. The court added that "[w]hile [Nederhoff] may have hoped that the sentences would be concurrent [to his revocation sentence], there was no guarantee that any credit would be applied." Appointed counsel then filed the present no-merit appeal.

The no-merit report addresses whether trial counsel was ineffective by failing to move for the suppression of evidence found during execution of the search warrant; whether any grounds remain to pursue plea withdrawal; and whether the circuit court properly exercised its sentencing discretion. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that there is no arguable merit to any of these issues. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further. Moreover, with some exceptions not relevant here, Nederhoff's valid

guilty pleas waived all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶¶18 & n.11, 34, 294 Wis. 2d 62, 716 N.W.2d 886.

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 Melissa Petersen is relieved of her obligation to further represent Braidyn Nederhoff in this matter. *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