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DISTRICT I/II

January 3, 2013

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

2012AP171-CRNM State of Wisconsin v. Michael J. Ford (L.C. # 2010CF5923)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Michael Ford appeals from a judgment convicting him of five counts of armed robbery contrary to WIS. STAT. § 943.32(2) (2009-10)¹ as a party to the crime. Ford's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Ford received a copy of the report and has responded to it. Appointed counsel has filed a reply to Ford's response. Upon consideration of the no-merit report, Ford's response,

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

counsel's reply, and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues which would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Ford knowingly, voluntarily and intelligently entered his guilty plea; and (2) whether the circuit court misused its sentencing discretion.

Counsel's no-merit report identifies an arguable defect in the plea colloquy arising from the circuit court's failure to confirm that Ford understood the elements of the crime. The circuit court asked counsel whether he explained the elements of armed robbery and party to the crime liability to Ford. Counsel stated that he had, and Ford concurred that counsel had provided an explanation. However, the circuit court did not summarize the elements of the crime, ask trial counsel to place his explanation on the record or expressly refer to the record or other evidence that Ford understood the nature of the charges against him. *State v. Brown*, 2006 WI 100, ¶¶46-48, 293 Wis. 2d 594, 716 N.W.2d 906. This was a duty of the circuit court at the plea hearing, *id.*, ¶35, which it arguably did not fulfill.

Counsel states in her no-merit report that after reviewing the case and discussing the case with Ford, there is no basis for a plea withdrawal motion. Ford filed a response to counsel's no-merit report, but his response does not allege that he did not understand the elements of armed

robbery or party to the crime liability.² Because Ford does not claim that he did not understand the elements, this issue lacks arguable merit for appeal.

Other than this arguable defect, the plea colloquy complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Ford's guilty pleas had a factual basis. *State v. Harrington*, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the guilty plea questionnaire and waiver of rights form Ford signed is competent evidence of knowing and voluntary pleas. *State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Any other possible appellate issues are waived because a guilty plea waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984).

The circuit court imposed five concurrent sixteen-year terms consisting of eight years of initial confinement and eight years of extended supervision. With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Ford. In fashioning the sentences, the court considered the seriousness of the offenses, Ford's prior offenses, Ford's character, and Ford's participation in the robberies to obtain money to support his drug habit. The court also considered the impact on the victims and the need for deterrence. The court found that the seriousness of the offenses argued against making Ford eligible for the Challenge

² A plea withdrawal motion must allege that Ford did not understand the nature of the charges. *State v. Brown*, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906.

Incarceration Program or the Earned Release Program. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

In his response to counsel's no-merit report, Ford states that the circuit court mistakenly believed that he was not eligible for the Challenge Incarceration Program and the Earned Release Program and that this mistaken belief constitutes a new factor. Appellate counsel filed a supplemental no-merit report addressing this issue. We agree with appellate counsel that this issue lacks arguable merit for appeal.

At sentencing, the circuit court decides a defendant's eligibility for the Challenge Incarceration Program and the Earned Release Program. WIS. STAT. § 973.01(3g) and (3m). Here, the circuit court stated that Ford would not be eligible due to the seriousness of his offenses. Ford attempts to argue that the circuit court mistakenly thought Ford was statutorily ineligible for the crimes. We need not address this argument because the circuit court was aware of the possibility of the Challenge Incarceration Program and the Earned Release Program, and the court declined to make Ford eligible for the programs. Ford's issue lacks arguable merit for appeal.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we affirm the judgment of conviction and relieve Hannah Blair Schieber of further representation of Ford in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hannah Blair Schieber is relieved of further representation of Michael Ford in this matter.

*Diane M. Fremgen
Clerk of Court of Appeals*