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DISTRICT I

January 16, 2013

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

2012AP582-CRNM State of Wisconsin v. Earl L. Diehl
(L.C. # 2004CF188)

Before Curley, P.J., Fine and Brennan, JJ.

Earl L. Diehl appeals from a judgment convicting him of one count of perjury, contrary to WIS. STAT. § 946.31(1)(a) (2003-04).[1] Assistant State Public Defender Katie R. York has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Diehl responded. After independently reviewing the Record, the no-merit report,

[1] The Honorable John M. Ullsvick presided over Diehl's combined plea and sentencing hearing, entered the judgment of conviction, and subsequently entered the order allowing Diehl's appellate counsel to withdraw.

Diehl's response along with his other filings, and the supplemental no-merit report, we conclude that further proceedings would lack arguable merit.[2] Consequently, we summarily affirm. *See* WIS. STAT. RULE 809.21.

BACKGROUND

The procedural history of this no-merit appeal is unique. In a prior decision resolving a *pro se* appeal by Diehl, we set forth some of the relevant background.

> An Information charged Diehl with perjury. The State alleged that during a trial that resulted in Diehl's conviction for theft by contractor, Diehl knowingly made a false material statement when he testified that he placed $3,400 from a cashed check in a lock[]box at his home. In exchange for his no[-]contest plea to the crime charged, the State agreed to dismiss a felony bail jumping charge in another case. The court ultimately sentenced Diehl to one year of initial confinement followed by two years' extended supervision.

See ***State v. Diehl***, No. 2006AP2860-CR, unpublished slip op. ¶2 (WI App Mar. 13, 2008) (***Diehl I***).

Following his conviction, Diehl filed a notice of intent to pursue postconviction relief. He was appointed a lawyer. The circuit court later allowed Diehl's appellate lawyer to withdraw without engaging Diehl in the colloquy required under ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721 (1997).

[2] We ordered counsel to provide a supplemental no-merit report. In our order, we identified three missing transcripts. The Record has since been supplemented. Meanwhile, Diehl filed an addendum to his original response and a supplemental reply.

Diehl subsequently represented himself in state and federal court, to no avail. In ***Diehl I***, he appealed an order denying his postconviction motion to withdraw his no-contest plea. We rejected his claims of ineffective assistance of counsel and affirmed the order. ***Id.***, No. 2006AP2860-CR, unpublished slip op. ¶1. In 2010, Diehl filed a second *pro se* appeal, this time asserting he did not knowingly, intelligently, and voluntarily waive his right to postconviction/appellate counsel. The State conceded that the circuit court erred, and we summarily reversed the postconviction order and remanded for a hearing. *See* ***State v. Diehl***, No. 2010AP875, unpublished op. and order (WI App Aug. 4, 2010) (***Diehl II***).

On remand, the circuit court concluded that Diehl did not knowingly, intelligently, and voluntarily waive his right to counsel.[3] Diehl's present counsel was subsequently appointed. Meanwhile, the circuit court also granted Diehl a new trial in the underlying theft-by-contractor case.[4]

Counsel identifies three potential issues for appeal: (1) whether the circuit court properly accepted Diehl's plea; (2) whether the circuit court appropriately exercised its sentencing discretion; and (3) whether Diehl's prior postconviction motions presented arguably meritorious issues. We will address each issue in turn along with the related issues Diehl raises.

[3] Diehl was appointed counsel to represent him at the hearing on remand. The Honorable Jacqueline R. Erwin presided over the hearing. Initially, the circuit court found that Diehl's waiver was knowing, intelligent, and voluntary and consequently, denied his motion. At that point, Diehl's appointed counsel believed his representation of Diehl had ended. Consequently, Diehl, *pro se*, filed the motion for reconsideration that prompted the circuit court to reach the conclusion set forth above.

[4] According to Wisconsin's Consolidated Court Automation Programs, which reflects information entered by court staff, this case was ultimately dismissed.

PLEA

There is no arguable basis for challenging whether Diehl's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12, 20 (1986). Diehl completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 828, 416 N.W.2d 627, 630 (Ct. App. 1987), attached to which was the jury instruction setting forth the elements for perjury. The form listed, and the court explained, the maximum imprisonment terms Diehl faced. The form further specified the constitutional rights that Diehl was waiving with his plea and that the judge was not bound by any plea agreement or recommendations and could impose the maximum penalty. *See* ***Bangert***, 131 Wis. 2d at 270–272, 389 N.W.2d at 24–25. During the plea hearing, Diehl confirmed for the circuit court that he read and understood the form before he signed it. A criminal case settlement form signed by Diehl and his trial lawyer, which was attached to the plea questionnaire and waiver of rights form, made clear that the parties were free to argue regarding the length of Diehl's sentence and further specified that a felony bail jumping charge in another case against Diehl was to be dismissed outright in exchange for his plea.

In his response, Diehl argues the circuit court failed to personally advise him that it was not bound by the plea agreement and claims he did not understand this fact. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24 ("reaffirm[ing] the rule that a circuit court must advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and, concomitantly, ascertain whether the defendant understands this information").

"'When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in manifest injustice.'" ***State v. Johnson***, 2012 WI App 21, ¶8, 339 Wis. 2d 421, 426, 811 N.W.2d 441, 443 (one set of internal quotations and citation omitted). Here, given that the circuit court accepted the plea agreement, we conclude that Diehl has not made the requisite showing. *Cf.* ***id.***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 430, 811 N.W.2d 441, 445 (Defendant was not affected by the defect in his plea colloquy where he received the benefit of the agreement. As such, "the circuit court's failure to inform him that it was not bound by the plea agreement was an 'insubstantial defect[].'") (citation omitted; brackets in ***Johnson***).

This court further notes that an argument could be made that the circuit court failed to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a no-contest plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 182, 646 N.W.2d 1, 5 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). Here, the circuit court stated: "And if you were not a citizen of the United States, you could be deported or denied citizenship. Do you understand those things?" Diehl responded affirmatively. To be entitled to plea withdrawal on this basis, Diehl would have to show "that the plea is likely to result in [his]

deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the Record that Diehl can make such a showing.

Finally, Diehl asserts that that State breached the plea agreement by referring to a bail jumping charge that had been dismissed outright. Diehl also argues that he received ineffective assistance of counsel when his trial lawyer failed to stop and advise Diehl of Diehl's right to withdraw his plea based on the breach. Diehl, however, raised these same issues in ***Diehl I***. In that decision, we explained:

> Diehl additionally claimed the prosecutor breached the plea agreement and counsel was ineffective for failing to inform Diehl of the consequences of that breach. At sentencing, the prosecutor referred to a bail jumping charge that had been dismissed outright pursuant to the plea agreement. While commenting on Diehl's character, the prosecutor stated that Diehl had failed to appear for sentencing on the underlying theft case and was consequently charged with bail jumping. The prosecutor emphasized, however, that the bail jumping charge had been dismissed. Diehl contends that reference to the dismissed charge elevated the charge into a "read-in" for sentencing purposes. Diehl, however, provides no authority for his claim that reference to the dismissed charge breached the plea agreement. Further, "[i]n determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct." ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377[, 381] (1990). "Evidence of unproven offenses involving the defendant may be considered by the court for this purpose." ***I[bi]d.*** We therefore conclude that reference to the dismissed charge did not breach the plea agreement. Because there was no breach to discuss, counsel was not ineffective.

Diehl I, No. 2006AP2860-CR, unpublished slip op. ¶12 (first set of brackets in ***Diehl I***). Although Diehl did not have the benefit of appellate counsel when he filed his appeal in ***Diehl I***, we have no reason to believe that if he had, the outcome would have been different. Our analysis of these issues remains the same.

In what amounts to a second addendum to his original response, Diehl argues that he is entitled to withdraw his plea because his trial lawyer was ineffective for failing to pursue a suppression challenge. According to Diehl, his trial lawyer should have challenged the probable cause determination for the issuance of the search warrant on the basis that it was not made by a detached and neutral judge and based on the lack of a sworn affidavit supporting the application for a search warrant.

First, there is nothing in the Record before us that supports Diehl's blanket assertion that the judge was not neutral and detached. Second, a sworn affidavit is not the only way to support an application for a search warrant. *See* ***State v. Sveum***, 2010 WI 92, ¶23, 328 Wis. 2d 369, 390, 787 N.W.2d 317, 327 ("A search warrant may be based either 'upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter,' WIS. STAT. § 968.12(2), or 'upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication,' WIS. STAT. § 968.12(3)(a)."). If "sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication," *see* ***id.***, can form an adequate basis for a search warrant, it stands to reason that Diehl's trial testimony while under oath would likewise be sufficient. *See* ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24, 29 (1991) ("We accord great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause."). There would be no arguable merit to a challenge to Diehl's trial lawyer's performance on this basis.

SENTENCING

The second issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606–607, 712 N.W.2d 76, 82, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 850–851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

As noted, the plea agreement left the parties free to argue regarding the length of Diehl's sentence. The State recommended that the circuit court sentence Diehl to four years of imprisonment comprised of three years of initial confinement and one year of extended supervision. Diehl requested an eight-month jail sentence concurrent to any other sentence he was then serving.

In its remarks, the circuit court commented on Diehl's poor character, as evidenced by his criminal record. The circuit court accounted for the fact that Diehl pled no contest and agreed to be held accountable for his perjury. Still, the circuit court emphasized the problems that Diehl's perjured testimony created in the courtroom.

The maximum possible sentence Diehl could have received was six years' imprisonment. WIS. STAT. § 939.50(3)(h) (2003-04). Diehl's sentence totaling three years, comprised of one year of initial confinement and two years of extended supervision, was within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108–109, 622 N.W.2d 449, 456–457, 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, 461 (1975).

There would be no arguable merit to a challenge to the court's sentencing discretion.

POSTCONVICTION MOTIONS

Following remand, Diehl, *pro se*, filed a number of postconviction motions. He sought sentence credit, release on bail pending appeal, and to amend the judgment. The circuit court subsequently entered orders denying Diehl's motions for sentence credit and for release on bond pending appeal; however, it granted Diehl's *pro se* motion for reconsideration of its earlier determination that his waiver of counsel was knowing, intelligent, and voluntary. After counsel was appointed to represent Diehl, he nevertheless continued to represent himself *pro se* in litigating his motion to amend his judgment of conviction, which the circuit court viewed as a motion for sentence modification. After listening to the arguments presented, the circuit court took the matter under advisement and subsequently issued a written decision denying Diehl's motion seeking to modify his sentence to a withheld sentence in favor of one year probation or a concurrent sentence.

In counsel's no-merit report, she offered the following two-paragraph discussion of Diehl's *pro se* postconviction filings related to sentence credit and sentence modification:

> Mr. Diehl filed several motions requesting sentence credit and sentence modification because he was still in custody on this case even though 03-CF-299 [i.e., the underlying theft-by-contractor case] had been vacated. He wanted his sentence modified to make it clear it was consecutive to 96-CF-1352 [i.e., an earlier case where Diehl's probation was revoked]. Put simply, Mr. Diehl had three sentences when he was originally sentenced on this case, this being the third. He was given an 8[-]year sentence on 96-CF-1352 and [a] 5[-]year sentence, consisting of 18 months of initial incarceration and 42 months of extended supervision in case number 03-CF-299. All the sentences were consecutive.
>
> After Mr. Diehl's conviction was vacated in 03-CF-299 the Department of Corrections was improperly calculating his release date. He was subsequently released and the Department of Corrections has properly concluded that Mr. Diehl completed his 1 year of initial confinement in this case. He now has 2 years of extended supervision which is consecutive to his continued parole in 96-CF-1352. Therefore, any errors involving this issue have been cured.

(One Record citation omitted.)

Against this perfunctory backdrop, it was unclear to this court whether Diehl should have had the benefit of appointed counsel's representation during the sentence modification proceedings that took place *after* her appointment. Consequently, we issued an order directing Diehl's appellate counsel to file a supplemental no-merit report. This court also asked counsel to more thoroughly explain her position that Diehl's postconviction motions relative to sentence credit and sentence modification do not raise any arguably meritorious issues.

In her supplemental report, counsel states that on April 26, 2011, Diehl waived his right to counsel for purposes of his motions for sentence modification, sentence credit, and to amend

the judgment of conviction, and the circuit court found him competent to represent himself.[5] Counsel further advises—without providing a supporting affidavit—that she spoke with Diehl after her appointment but before his sentence modification hearing. *See* WIS. STAT. RULE 809.32(1)(f) (Lawyers may file a supplemental no-merit report and an affidavit or affidavits, including matters outside the Record.). She claims to have told him that if he wanted legal representation for the sentence modification motion he would have to wait until she received the Record and transcripts. Counsel relays that Diehl chose to represent himself, and in any event, counsel reiterates that he previously waived counsel. Diehl—while not disputing that he waived counsel at the April 26, 2011, hearing—asserts that does not recall being informed that he had a

[5] After initially concluding on remand that Diehl's waiver of counsel on direct appeal was knowing, voluntary, and intelligent, the circuit court held a hearing—with Diehl appearing *pro se* by telephone—and explained that the numerous filings in Diehl's case were causing confusion. The circuit court expressly asked Diehl whether he wanted a lawyer to represent him after which the following exchange occurred:

> MR. DIEHL: Uhm, do I want an attorney? Well, if it requires continued imprisonment, no, I do not.
>
> THE COURT: You still haven't answered my question.
>
> MR. DIEHL: Not for—I do not want an attorney to further this. If we can have this Motion for Reconsideration today and possibly the Motion for Release Pending Bail, I do not want an attorney then. Should this get continued, should you decide to continue it—then I would request counsel. Am I allowed to—Am I allowed to do that?
>
> THE COURT: Well, the problem with, you know, hedging your bets like that is then we end up with another hearing about whether you ha[ve] waived your right to counsel and we should start all over again…. As you know and I want to remind you: that you have a right to counsel and you have the right to indigent counsel; and that there are certain disadvantages in self[-]representation, I can't foresee all of them. But you know this has been fairly complicated. And you have to make a decision, and I can't make it for you. And I'm not going to let you have a foot in both camps.

Diehl ultimately expressed his desire to proceed *pro se*.

right to counsel *at the sentence modification hearing* and if he did have such a right, he did not waive it in accord with ***Klessig***.

The circuit court, at the April 26, 2011 hearing, stated during the ***Klessig*** colloquy that Diehl was giving up his right to counsel at the hearing on the three issues he raised: sentence credit, reconsideration, and release on bail pending appeal. Although Diehl's motion for sentence modification came later, this court is not aware of any requirement that ***Klessig*** colloquy needed to be renewed with each additional filing. Moreover, the circuit court had previously warned Diehl that it was not going to let him "have a foot in both camps," i.e., proceed both with counsel and *pro se*. *See supra* n.5. There would be no arguable merit to a challenge to the court's failure to conduct another ***Klessig*** colloquy in connection with the sentence modification motion.

In a supplemental reply, Diehl advises this court that he otherwise agrees with counsel's analysis regarding his postconviction filings. We likewise agree that there would be no arguable merit to a challenge based on the issues presented in those filings.

EFFECT OF VOIDED THEFT-BY-CONTRACTOR CONVICTION

Diehl also argues that because the proceedings in the theft-by-contractor case against him were void, no factual basis exists for the perjury charge. As a result, he claims he should be allowed to withdraw his no-contest plea based on the manifest injustice that would result if the perjury conviction is allowed to stand. He submits that the elements stated in the information in the theft-by-contractor case failed to allege any known crime and that if he had known this when the perjury proceedings were underway, "it would have prevented judgment against [him]" in this case. He also claims that his perjured testimony was not material. *See* WIS. STAT. § 946.31

(2003-04) ("Whoever under oath or affirmation orally makes a false *material* statement which the person does not believe to be true, in any matter, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class H felony.") (emphasis added).

The criminal complaint against Diehl alleged that a defense to the charge of theft-by-contractor for which Diehl stood trial was that Diehl had a *bona fide* dispute with a subcontractor and further that he had not converted to his own use money he received for the services of the subcontractor, but instead had held onto that portion the subcontractor was entitled to. The complaint alleged that while under oath, Diehl testified that he received a check from Amwood Homes for $3400. He further testified that he cashed the check and placed that amount, which was what he believed the subcontractor was owed, in a lockbox in his home. The complaint relayed that after Diehl's testimony, the circuit court granted a recess and a search warrant for the lockbox was issued. The officers did not find any money there.

Although a new trial in the underlying theft-by-contractor case was subsequently ordered, the fact remains that at the time of the initial trial, there was a factual basis for the perjury charge and the testimony at issue was material. We agree with the State that a change in circumstances in the theft-by-contractor case does not negate the elements of perjury for which Diehl entered a no-contest plea.

We have carefully reviewed Diehl's filings. This order addresses many of his assertions, but to the extent we do not address a particular assertion, we have concluded that it does not raise an issue of arguable merit that would require the no-merit report to be rejected. Moreover, our independent review of the Record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that we deny Diehl's request that we order his appellate counsel to file an additional supplemental response.

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

IT IS FURTHER ORDERED that Assistant State Public Defender Katie R. York is relieved of further representation of Diehl in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals