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DISTRICT I

January 22, 2013

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

2012AP1952-CRNM State of Wisconsin v. Robert Louis Clark, Jr. (L.C. #2011CF3013)

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

Robert Louis Clark, Jr., appeals from a judgment of conviction, entered upon his guilty plea, on one count of burglary as party to a crime. Appellate counsel, Scott D. Obernberger, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2009-10).¹ Clark was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by *Anders*, and

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

counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Clark was originally charged with one count of burglary of a dwelling in which the person arms himself with a dangerous weapon, contrary to WIS. STAT. § 943.10(2)(b). The victim reported that he had left his home but returned a few minutes later and noticed certain things out of place. He armed himself with a cleaver or butcher knife and called out for his roommate. Clark then appeared on the staircase with an encased shotgun that he had obtained from somewhere in the home. The victim disarmed him and chased him from the home; while outside, the victim saw his television in the yard.

The victim's neighbor, who was outside because she was waiting for a tow truck to remove an unauthorized vehicle parked in her driveway, watched the victim chase Clark. Clark and a second man got into the parked vehicle which, as it sped away, struck a light pole. The neighbor had obtained the car's license plate number and reported it to police. The car was registered to Clark's mother. When they contacted her the day after the burglary, she confirmed her son had used the vehicle the previous day. Police found the vehicle parked outside her place of employment and noted that the vehicle had front end damage consistent with a collision with a light pole.

Clark, who has a prior record, ultimately agreed to a plea bargain in which he would plead guilty to a reduced charge of burglary as party to a crime. The State would recommend a concurrent prison term with no specified length, and Clark would be free to argue. The agreement came about because Clark's co-defendant, who had no prior record, insisted that he was the one inside the victim's home and Clark was the one outside by the car. The circuit court

accepted the plea and sentenced Clark to two years' initial confinement and two years' extended supervision.

Counsel identifies two potential issues: whether there is a “sufficient factual basis” for Clark’s guilty plea—which we take as an assessment of the plea’s general validity—and whether the circuit court appropriately exercised its sentencing discretion.² We agree with counsel’s conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Clark’s plea was knowing, intelligent, and voluntary. See *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Clark completed a plea questionnaire and waiver of rights form, see *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly acknowledged the maximum penalties Clark faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. See *Bangert*, 131 Wis. 2d at 262. The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, *Bangert*, and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Prior to accepting a guilty plea, the circuit court must, among other things, ensure that the defendant understands the nature of the charges against him. See *Bangert*, 131 Wis. 2d at 262. There are multiple ways in which a circuit court can ascertain a defendant’s understanding. See *id.* at 267-68. Here, the circuit court confirmed with Clark that he had read the criminal

² Counsel also notes that, at this time, there is no basis for a sentence modification motion based on new factors.

complaint, was aware of what he was charged with and why, and was aware of the elements of the offenses. *See id.* The circuit court additionally explained the nature of the party-to-a-crime element to Clark and confirmed his understanding thereof.

The plea questionnaire and waiver of rights form and addendum and the circuit court's colloquy appropriately advised Clark of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of *Bangert* and *Hampton* for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see Gallion*, 270 Wis. 2d 535, ¶41. 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, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See Ziegler*, 289 Wis. 2d 594, ¶23.

The circuit court noted the disputed versions of Clark's role—the victim was one-hundred percent certain that Clark had been in the home even though the co-actor was taking the blame—but noted that in either case, Clark was involved in the burglary. The circuit court

agreed with the victim that the situation could have been much worse but for the fact that the shotgun had a trigger lock. The circuit court commented that the burglary was very dangerous given that there was a confrontation with one of the residents. Further, Clark had a prior burglary conviction. The circuit court did consider that Clark had taken some responsibility by entering a plea, but noted that Clark should be mature enough to make better decisions. Thus, the circuit court concluded that punishment and deterrence were appropriate objectives.

The maximum possible sentence Clark could have received was twelve and one-half years' imprisonment. The sentence totaling four years' imprisonment is well within the range authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

We independently note that the circuit court, in imposing sentence, made a few references to the co-actor, whose own sentence was imposed and stayed in favor of probation. There is, however, no issue of arguable merit to a claim that Clark should have received the same sentence as the co-actor. Notably, the co-actor had no prior record while Clark did. Further, as the circuit court commented, Clark's prior sentence was apparently insufficient to deter him from further crime. The fact that co-actors may have received different sentences is consistent with the concept of individualized sentencing. *See Gallion*, 270 Wis. 2d 535, ¶48; *McCleary v. State*, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). There is no arguable merit to a challenge stemming from different sentences between co-actors in this case.

Our independent review of the record reveals no other issues of arguable merit.

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 Scott D. Obernberger is relieved of further representation of Clark in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals