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DISTRICT I

January 25, 2013

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

2012AP2097-CRNM State of Wisconsin v. Martinez Burdett Vance (L.C. #2011CF4653

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

Martinez Burdett Vance appeals from a judgment of conviction, entered upon his guilty plea, on one count of possession of a firearm by a felon. Appellate counsel, Alexander D. Cossi, 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] Vance was advised of his right to file a response, but has

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

not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Police officers responded to a complaint about drug-dealing at a particular residence. When they arrived at the address, they found Vance and another individual on the front porch. Observing a clear sandwich bag with a missing corner on the steps, officers asked Vance whether he had anything illegal. Vance reportedly responded, "No, you can search me." Officers found a gun and marijuana on Vance's person.

Vance was charged with possession of a firearm by a felon as a repeat offender and possession of THC as a second or subsequent offense. Pursuant to a plea agreement, Vance agreed to plead guilty to the felon-in-possession count. In exchange, the repeater enhancer would be dropped and the THC charge would be dismissed entirely. The State would recommend incarceration, though it would leave the length up to the circuit court's discretion, and Vance would be free to argue for any sentence. The circuit court accepted the plea and imposed a sentence of four years' initial confinement and three and one-half years' extended supervision, with eligibility for both the earned release and challenge incarceration programs.

Counsel identifies three potential issues: whether there is any basis for a challenge to the validity of Vance's guilty plea, whether trial counsel was ineffective in failing to pursue a suppression motion of some sort, and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Vance's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

Vance 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. Attached to the form was a copy of the applicable jury instructions, signed by Vance in apparent acknowledgement that he had reviewed them with counsel. The plea form correctly acknowledged the maximum penalties Vance 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.

The plea questionnaire and waiver of rights form and addendum and the court's colloquy appropriately advised Vance 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.[2] There is no arguable merit to a challenge to the plea's validity.

Ordinarily, a valid guilty plea waives or forfeits all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, counsel discusses whether there is any arguable merit to a claim of ineffective assistance of trial

[2] The circuit court did not provide the required warning related to immigration consequences. *See* WIS. STAT. § 971.08(1)(c). To withdraw his plea because of the omission, Vance would have to allege that the circuit court failed to advise him of the potential deportation consequences of his plea *and* that his plea was likely to result in his deportation, exclusion from admission to this country, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶23, 343 Wis. 2d 1, 819 N.W.2d 749. The pretrial AIM report indicates that Vance has lived in Milwaukee County "his whole life." Thus, the record does not support the pleadings necessary to seek plea withdrawal, and there is no issue of arguable merit stemming from this error.

counsel for failure to pursue a suppression motion based on the circumstances of the police encounter with Vance. We agree with counsel's assertion that the record does not supply any basis on which trial counsel could have pursued a suppression motion. Thus, there is no arguable merit to a claim of ineffective assistance of trial counsel. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

The final 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 necessary amount of explanation "'will vary from case to case.'" ***State v. Brown***, 2006 WI 131, ¶39, 298 Wis. 2d 37, 725 N.W.2d 262 (citation omitted). We will sustain a circuit court's proper exercise of discretion, even if this court might have imposed a different sentence. *See* ***id.***, ¶19.

The circuit court considered that Vance had a likeable personality and did not want to hurt people and that he was struggling to overcome difficulties and disadvantages from earlier in his life. However, the circuit court also considered that Vance had five prior felonies on his

record and had been on probation at the time of the underlying offense. The circuit court explained that the community simply does not want people with felony records walking around with guns, because that leads to violence and is how people get shot. As the circuit court described, "It's just really frightening." Thus, the circuit court determined the goal of sentencing in this case was to protect the public and to send a message of deterrence. It also appears that the circuit court had Vance's rehabilitation in mind, noting that it was up to Vance how he chose to proceed while in prison—to either fall in with bad influences or take the steps necessary to better himself—and explaining that his early-release opportunities would be determined in part by his behavior while confined.

The maximum possible sentence Vance could have received was ten years' imprisonment. The sentence totaling seven and one-half 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 sentencing court's discretion.

Our independent review of the record reveals no other potential 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 Alexander D. Cossi is relieved of further representation of Vance in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals