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February 27, 2013

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

2012AP1088-CRNM State of Wisconsin v. Jonathon R. Edwards (L.C. #2010CF254)
2012AP2429-CRNM State of Wisconsin v. Jonathon R. Edwards (L.C. #2011CF53)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated cases, Jonathon R. Edwards appeals from judgments convicting him of being party to the crimes (PTAC) of armed robbery with use of force and felony intimidation of a victim, and of armed robbery with use of force, all as a repeater. Edwards' appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Edwards received a copy of the report and has exercised his

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

right to file a response. Upon consideration of the report, Edwards' response, and our independent review of the record as mandated by ***Anders***, we conclude that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgments of conviction and relieve Attorney Elizabeth Ewald-Herrick of further representing Edwards in this matter.

Brandishing knives, Edwards and an accomplice robbed a gas station/convenience store, threatening the two employees. A few nights later, Edwards robbed another gas station at knife point, telling the lone employee as he fled that he was going to "come back for [her]." The accomplice confessed to the first robbery and implicated Edwards. Edwards confessed to the second robbery. At defense counsel's request, a psychologist evaluated Edwards for an NGI defense because he claimed he had not been taking his medications for his diagnosed bipolar and schizoaffective disorders at the time of the crimes. The psychologist opined that Edwards did not meet the criteria to support an NGI defense.

Edwards pled no contest to PTAC armed robbery with use of force and felony intimidation of a victim and to armed robbery with use of force, all as a repeater. A second victim-intimidation count was dismissed and read in at sentencing. The court imposed the following sentences: thirty years on each of the armed robberies, each bifurcated as twenty-four years' initial confinement and six years' extended supervision, and nine years on the intimidating a witness, bifurcated as six years' initial confinement and three years' extended supervision. All sentences were ordered to run concurrently. Edwards did not object to the restitution amounts ordered. This no-merit appeal followed.

The no-merit report first addresses whether there would be any merit to a claim that Edwards should be allowed to withdraw his no-contest pleas. The court engaged in a thorough

colloquy satisfying the requirements of WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The court ascertained that Edwards understood the elements of the crime, *see* ***Bangert***, 131 Wis. 2d at 268, properly used his signed plea questionnaire in conjunction with the substantive colloquy, *see* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794, and verified a prior conviction to support the repeater allegation.

Edwards' response suggests that his no-contest pleas were less than voluntary. He first claims he "didn't know what [he] was doing" at the time of the offenses, as he was under the influence of hallucinogens and was not taking his psychiatric medication. "[A] defendant who suffers from a mental disease or a mental defect is not automatically excused from the legal consequences of his or her conduct." ***State v. Duychak***, 133 Wis. 2d 307, 316, 395 N.W.2d 795 (Ct. App. 1986). The psychologist concluded that Edwards' dysfunction was not sufficient to support an NGI defense. Edwards' voluntary decision to consume illicit drugs instead of taking his prescribed medications does not relieve him of liability.

Edwards also complains that, had he known the sentencing court did not have to go along with an agreed-upon "cap deal," he would not have pled but would have opted to go to trial. As to the "cap deal," the prosecutor stated at the plea hearing:

> There are some caps that the State has given in a written offer to the defense as well. As far as that cap, a recommended total bifurcated of 25 years with 12 years initial confinement, 13 years Extended Supervision, and then on the second count; bifurcated sentence, 20 years with five to eight years initial confinement, five to 15 years of Extended Supervision and that would be consecutive to the other file. Defendant is obviously free to argue.

The sentencing court then plainly advised Edwards that the final decision on his penalty was up to the court and it did not have to follow anyone's recommendations. Edwards answered, "Yes, I understand that." "[D]isappointment in the eventual punishment imposed is no ground for withdrawal of a guilty plea." ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987). Moreover, without a plea agreement, Edwards would have faced another count of felony victim intimidation, adding another twelve years' exposure. Having confessed to or been implicated in the crimes, faring better at trial is highly unlikely. We conclude that no issue of merit could arise from the plea taking.

The no-merit report also considers whether the sentence was excessive. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must address sentencing objectives that include the protection of the public, punishment and rehabilitation of the defendant, and deterrence, ***id.***, ¶40, and the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). The weight to be given the various factors is within the court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The court must provide a "rational and explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76. Unless the defendant can demonstrate otherwise from the record, we presume a sentence is reasonable. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996).

We agree with appellate counsel that no basis exists to disturb the sentence. The court considered each of the factors and objectives. It took into account Edwards' mental health

issues, his lengthy criminal history, his failures on probation and parole, his illicit drug habit coupled with the failure to take his psychiatric medication, the abdication of his responsibility to his children, and the "very serious" crimes he undertook simply to get drug money.

With the penalty enhancers, Edwards faced ninety-six years' imprisonment and/or a $225,000 fine. A sentence less than the maximum presumptively is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. We cannot say that the sentence imposed is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Nonetheless, Edwards argues that his sentence was too harsh because it is lengthier than his accomplice's. Mere discrepancy between sentences does not establish a basis for challenging a sentence based on proper considerations. *See* ***Drinkwater v. State***, 73 Wis. 2d 674, 679, 245 N.W.2d 664 (1976). The court fully explained its rationale for the sentence.

Finally, Edwards asserts that trial counsel "was not performing … 100%" because she did not pursue a second psychological evaluation, allow him to see the "DVDs and other recordings of the people who wrote statements against [him]," get a different judge as the presiding judge "sent [him] to prison more than once," or try to change the venue out of Shawano. He contends that if she had explained things better and if he were not having auditory hallucinations, he "would've had a better outcome [in] court."

One claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Edwards confirmed to the court at the plea hearing that he was having no trouble understanding what was transpiring. Beyond that, our review here

is limited because claims of ineffective assistance of trial counsel must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Edwards' conclusory allegations are not a sufficient basis for challenging counsel's performance. *See* ***State v. Washington***, 176 Wis. 2d 205, 215-16, 500 N.W.2d 331 (Ct. App. 1993).

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Elizabeth Ewald-Herrick is relieved from further representing Edwards in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals