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DISTRICT I

April 23, 2013

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

2012AP2484-CRNM State of Wisconsin v. Jeffrey Marquis Moore (L.C. #2011CF5265)

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

Jeffrey Marquis Moore appeals from a judgment of conviction, entered upon his guilty plea, on one count of armed robbery with the threat of force 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 (2011-12).[1] Moore was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as

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

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.

As the victim in his case was taking out his trash, a man approached him, pointed a shotgun at him, and demanded of the the victim, "[G]ive me all your shit[.]" The victim handed over his wallet, which contained six dollars, and a backpack. The robber fled and the victim called police. The victim provided a description of a vehicle that had been waiting nearby, and the police stopped a vehicle matching that description a short while later. Moore and two passengers were in the vehicle. Officers observed a shotgun between the driver and passenger seats, as well as a backpack matching the one taken from the victim. Moore was arrested.

After Moore was informed of his rights, he provided a confession. He explained that he had planned to sell some compact discs but they had been stolen, and he was looking to get some money. He got his shotgun and began driving around with his passengers. When he saw the victim, he decided to rob him. Moore was charged with the armed robbery offense and possession of a firearm by a felon.[2]

At the first preliminary hearing date, trial counsel requested a competency evaluation for Moore. The outpatient examiner wrote that Moore was "unproductive" during her assessment and recommended an inpatient assessment. Moore was sent to Winnebago Mental Health Institute, where he received a primary diagnosis of malingering. Though Moore apparently does have some mental health needs, the inpatient examiner determined that Moore was competent to

[2] Either the passengers played no role in the robbery at all or there was insufficient evidence linking them to the robbery, as neither was charged with any offense stemming from this incident.

proceed to trial. Upon return to the circuit court, Moore allowed the circuit court to rely on the report. The circuit court thus found Moore competent.

Moore agreed to resolve the case through a guilty plea to armed robbery. In exchange, the State would recommend prison but leave the length up to the circuit court; Moore would be free to argue. Also, the felon-in-possession charge would be dismissed and read in at sentencing. Ultimately, the circuit court sentenced Moore to three years' initial confinement and four years' extended supervision. The victim did not appear at sentencing or otherwise submit a restitution request to the circuit court, so restitution was set at zero.

Counsel identifies three potential issues: whether there is any basis for a challenge to the validity of Moore's guilty plea, whether the circuit court appropriately exercised its sentencing discretion, and whether there is any basis for a postconviction motion for sentence modification. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Moore's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Moore 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 jury instructions for armed robbery were attached and signed by Moore. The plea questionnaire form correctly acknowledged the maximum penalties Moore 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. In particular, Moore initialed next to each of the rights listed on the plea questionnaire, suggesting each was specifically reviewed with him.

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 colloquy was generally compliant with the prescribed duties, and the circuit court also informed Moore about the nature of read-in offenses. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. Omitted from the plea colloquy was a discussion of the elements of party-to-a-crime liability. The circuit court did not discuss the elements with Moore directly, but asked trial counsel whether she had. Counsel responded that she had not, because Moore was charged as a direct actor, not an aider-and-abettor or co-conspirator. The record bears out the contention that Moore was charged as, and admitted to being, a direct actor, so any discussion of the party-to-a-crime elements was superfluous in this case and unnecessary for a knowing, intelligent, and voluntary plea. *See* ***State v. Brown***, 2012 WI App 139, ¶¶13-15, 345 Wis. 2d 333, 824 N.W.2d 916.

The plea questionnaire and waiver of rights form and addendum, the jury instructions that trial counsel discussed with Moore, and the circuit court's colloquy appropriately advised Moore 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 next 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.

Our review of the record reveals a proper exercise of sentencing discretion. The circuit court commented that armed robbery is one of the more serious crimes, and Moore committed his while on crack cocaine and marijuana. It also noted that although Moore's criminal history was not violent, it was lengthy and apparently related to drug and alcohol use. Further, Moore's case was exacerbated by his lack of cooperation with the outpatient examiner and his subsequent malingering. However, the circuit court placed primary emphasis on Moore's rehabilitation as an objective, noting that he had acquired some skills, including cooking, drawing, landscaping, plumbing, and hanging dry wall. It told Moore that there were many opportunities waiting for him if he could kick his bad habits. For that reason, the circuit court explained, it would give him a little more time on extended supervision, because that would present the best opportunity for Moore's rehabilitation.

The maximum possible sentence Moore could have received was forty years' imprisonment. The sentence totaling seven 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.

Finally, counsel addresses whether there was any basis for a postconviction motion for sentence modification. We do agree with counsel that there appears to be no arguably meritorious basis for any such motion. However, we take a moment to address two issues raised in *pro se* letters that Moore sent to the circuit court. At sentencing, the circuit court had required Moore to pay the DNA surcharge if it had not been previously paid. The judgment of conviction did not properly reflect this contingency, and the Department of Corrections subsequently began collecting the surcharge in this case. Moore, however, had paid the surcharge previously, so he wrote to the circuit court. The circuit court entered an order vacating the surcharge entirely, and an amended judgment of conviction was then entered.

Moore's letter also complained about the victim-witness surcharge. The complaint was not addressed the first time, so he wrote a second letter.[3] He asserted that the circuit court told him he did not have to pay the surcharge because the victim had not appeared. First, as circuit court staff explained to Moore in a response letter, the victim-witness surcharge is a mandatory assessment. *See* WIS. STAT. § 973.045(1). Second, it appears that Moore may have confused the victim-witness surcharge with restitution: the circuit court told Moore he would not have to pay *restitution* because the victim neither appeared nor submitted a written request. Thus, there is no

[3] The second letter also appears to have requested a refund of amounts collected by the Department of Corrections for the DNA surcharge before it was vacated. However, to the extent that Moore believes he is entitled to a refund of those amounts, he must direct any such request to the Department.

issue of arguable merit related to the DNA or victim-witness surcharges to be raised by postconviction motion.

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

Diane M. Fremgen
Clerk of Court of Appeals