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

2012AP2265-CRNM State of Wisconsin v. Fred Cotrez McBride
(L.C. #2011CF3260)

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

Fred Cotrez McBride appeals from a judgment of conviction, entered on his guilty pleas, for one count of first-degree sexual assault with use of a dangerous weapon and one count of armed robbery with use of force as a party to a crime, contrary to WIS. STAT. §§ 940.225(1)(b),

943.32(2) and 939.05 (2011-12).[1] McBride's postconviction/appellate counsel, Mark A. Schoenfeldt, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which McBride has not responded. We have independently reviewed the record and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

McBride was charged with three crimes in connection with the abduction and robbery of a woman.[2] The criminal complaint alleged that while his co-defendant drove the woman's car, McBride sat in the back seat with the woman, threatened her with a gun, and forced her to perform fellatio on him for several hours. Ultimately, McBride entered a plea agreement with the State pursuant to which he agreed to plead guilty to first-degree sexual assault and armed robbery and have a kidnapping charge dismissed and read in. In exchange, the State agreed to

[1] The first count in the judgment of conviction contains a scrivener's error. Specifically, in addition to identifying the proper statute for first-degree sexual assault, WIS. STAT. § 940.225(1)(b), it also references WIS. STAT. § 939.63(1)(a), which provides for an increased penalty where a person possesses, uses, or threatens to use a dangerous weapon while committing a misdemeanor. Section 939.63(1)(a) is not applicable in this case because first-degree sexual assault is a felony and because the increased penalty provided in § 939.63 "does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged," as was the case here. *See* §§ 939.63(2), 940.225(1)(b). Accordingly, the plea questionnaire stated and the trial court told McBride that he could be sentenced up to sixty years for count one—the maximum sentence for violating § 940.225(1)(b), *see* WIS. STAT. § 939.50(3)(b)—and did not reference any penalty enhancers. Upon remittitur, the trial court shall direct the clerk of circuit court to issue an amended judgment of conviction that removes the reference to § 939.63(1)(a) in count one.

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

[2] McBride was sixteen at the time he committed the crimes and, therefore, the case was originally filed in juvenile court. Although the record does not contain details of the juvenile court proceedings, it does indicate that McBride was waived to adult court. *See* WIS. STAT. § 938.18. Because McBride pled guilty to the criminal charges, he waived whatever right he might have had to challenge the juvenile court proceedings. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 765-66, 457 N.W.2d 562 (Ct. App. 1990).

recommend a total of twelve years of initial confinement and four years of extended supervision, to be served consecutive to any other sentence. The trial court accepted the guilty pleas and dismissed and read in the kidnapping charge.

At sentencing, the trial court imposed a sentence of fourteen years of initial confinement and six years of extended supervision on each count, to be served concurrent to each other and consecutive to any other sentence. The trial court also ordered McBride to pay the DNA surcharge; this surcharge is mandatory for defendants convicted of violating WIS. STAT. § 940.225. *See* WIS. STAT. § 973.046(1r).

The no-merit report considered four issues: (1) whether the pleas were knowingly and voluntarily entered; (2) whether there was sufficient evidence to support the pleas; (3) whether the trial court erroneously exercised its sentencing discretion; and (4) whether McBride was denied the effective assistance of counsel. This court agrees with appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with appellate counsel's description and analysis, we will briefly discuss the pleas and sentences.

We begin with McBride's guilty pleas. There is no arguable basis to allege that McBride's pleas were not knowingly, intelligently and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He 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), and the trial court conducted a thorough plea colloquy addressing McBride's understanding of the charges to which he was pleading guilty, the penalties he faced, and the

constitutional rights he was waiving by entering his pleas,[3] *see* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. The trial court confirmed that McBride understood that one charge would be dismissed and read in, and it told McBride that it was not bound by the parties' recommendations.

Trial counsel told the trial court that the allegations in the complaint were "substantially true" and McBride personally indicated that he had read through the criminal complaint with his trial counsel and that what the State alleged with respect to the armed robbery and sexual assault was true. The plea questionnaire, waiver of rights form, McBride's discussion with his trial counsel, and the trial court's colloquy appropriately advised McBride of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the validity of the pleas, and the record discloses no other basis to seek plea withdrawal.

[3] This court notes that the trial court neglected to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty 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 ***id.***; *see also* ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (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). To be entitled to plea withdrawal based on the trial court's failure to personally read the language of § 971.08(1)(c) during the plea, McBride 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 McBride can make such a showing.

Next, we conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial 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 it may consider several subfactors. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. At sentencing, the trial court heard directly from the victim, who discussed what occurred in the vehicle. The trial court later referenced the victim's statement when it discussed the gravity of the offense, stating that the way McBride treated the victim was "gross," "humiliating," and "despicable." It said the crimes were "much worse than average." The trial court also considered McBride's character when it referenced McBride's prior record in juvenile court, his "difficulty getting along with others," and other challenges that were documented in a report prepared for the juvenile court waiver hearing. The trial court gave McBride "a good deal of credit" for having accepted responsibility. It considered the likelihood that McBride would

commit another crime in the future and concluded that "the chances of [him] committing another crime are just about average." We discern no basis to challenge the trial court's exercise of sentencing discretion.

With respect to the severity of the sentences, we note that by entering the plea agreement, McBride benefitted from the dismissal of the kidnapping charge and from the imposition of concurrent sentences. Although the trial court imposed a period of initial confinement that was two years longer than that recommended by the State and five years longer than that recommended by McBride, there would be no merit to arguing that the trial court's sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Given the severity of the crimes, the dismissed charge, and McBride's juvenile history, the twenty-year concurrent sentences do not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***id.*** For these reasons, there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentences.

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 Mark A. Schoenfeldt is relieved of further representation of McBride in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals