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**DISTRICT I**

May 21, 2013

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

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2012AP1496-CRNM State of Wisconsin v. Andrew James Becker (L.C. #2010CF5587)

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

Andrew James Becker appeals from a judgment of conviction, entered upon his guilty plea, on one count of burglary to a building or dwelling. 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] Becker was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by

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

***Anders***, and counsel's reports,[2] we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Police were dispatched to an address in West Allis in response to a report of a man, later determined to be Becker, being held by employees. The owner of the building at the address told police that the building was being prepared for demolition and employees had detained Becker—who had no business being there—when he entered the building. Becker initially told police he was homeless and looking for a place to stay, but officers noticed that Becker had a duffel bag filled with tools that were consistent with burglarious tools.

Simultaneously, a woman nearby having a cigarette break observed a man park a beat-up blue pick-up truck on the street. She watched him remove a duffel bag from the truck and walk toward the building. She thought this was suspicious and called police. When they ran the vehicle identification number, the truck came back registered to Becker. Becker later told police that his tools—which included a pair of gloves, a pick-axe, a hacksaw, pliers, a folding knife, and a pry bar—were for scrapping but that he had not taken anything before the building employees detained him. Becker was charged with one count of burglary.

Becker resolved his case through a deferred prosecution agreement. He would plead guilty to the burglary, but entry of judgment would be withheld so that Becker, who had an addiction to prescription pain medication—could participate in the Milwaukee County Drug

[2] By order dated October 8, 2012, we directed counsel to address an issue regarding restitution. Counsel filed a supplemental report explaining why there was no issue of arguable merit but suggested that remand might also be appropriate. Thus, by order dated January 15, 2013, we temporarily remanded this matter to the circuit court. On March 11, 2013, counsel submitted an additional supplement, describing the remand proceedings.

Treatment Court program. Upon successful completion of the program, the burglary case would be dismissed. As part of his participation in the program, Becker—who had five prior operating-while-intoxicated convictions that might otherwise bar his participation—would have to wear a secure continuous remote alcohol monitoring (SCRAM) bracelet around his ankle. When Becker failed to appear at a May 2011 status date, a bench warrant was issued. When Becker was apprehended, he was not wearing the SCRAM bracelet.

The deferred prosecution agreement was subsequently revoked and Becker was returned to the circuit court for sentencing. The State recommended fifteen months' initial confinement and twenty-four months' extended supervision, as it had agreed to do. The circuit court imposed fifteen months' initial confinement and twenty-four months' extended supervision. The circuit court additionally ordered $1400 in restitution for failure to return the SCRAM bracelet, although, as we will explain below, the restitution order was later vacated.

Counsel identifies four potential issues: whether there is any basis for a challenge to the validity of Becker's guilty plea, whether the circuit court erred in revoking the deferred prosecution agreement, whether the circuit court appropriately exercised its sentencing discretion, and whether there is any basis for a sentence modification motion. We ultimately agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Becker's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Becker 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 Becker 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. Counsel notes that the circuit court did not expressly caution that, as a convicted felon, Becker would lose the right to vote. However, as counsel points out, this information was provided on the plea questionnaire form, which Becker confirmed that he had read and that counsel had read to him. Becker further confirmed he understood the form. *See* ***Moederndorfer***, 141 Wis. 2d at 827-28. The circuit court also carefully reviewed the deferred prosecution agreement "participant contract" with Becker, ensuring that he had discussed it with counsel and both understood what was required of him and what the consequences for failure to follow those requirements would be.

Thus, the plea questionnaire and waiver of rights form and addendum, along with the circuit court's colloquy, appropriately advised Becker 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.

There is no arguable merit to a challenge to the revocation of the deferred prosecution agreement. By signing the participant contract, Becker agreed that "[i]f, at any time during the deferral period, the defendant has not complied with the conditions of this agreement, the State may at its discretion revoke this Agreement, and, upon notice to the defendant, move the court to enter the judgment of conviction and the parties shall proceed to sentencing." Further, Becker

had agreed that he would "be required to wear a SCRAM bracelet that detects alcohol consumption.… [A]ttempts to tamper with the SCRAM bracelet may result in termination of this agreement. The SCRAM bracelet may not be removed without the court's permission." By removing his SCRAM bracelet, Becker violated the agreement. There is no arguable merit to a challenge to the State's or the circuit court's revocation of the agreement.

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 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 appears to have considered punishment and rehabilitation to be its objectives. It noted that while this burglary was not the worst, Becker's explanations were unsatisfying.[3] It commented that the judge who had authorized the deferred prosecution

[3] During his allocution, Becker had explained, among other things, that though he entered the building hoping to find scrap to take to earn money, he did not actually have a chance to take anything; he did not attend his pretrial monitoring because he was still sick from his drug addiction issues; and a positive marijuana test was merely an anomaly and he had not tested positive since.

agreement had taken a chance on Becker, and Becker was smart enough to know that he should have stayed with the program. The circuit court also noted Becker's noncompliance with the Justice 2000 pretrial monitoring that had been put in place; that his case worker had to fight "tooth and nail" to get Becker to agree to inpatient treatment; and that Becker had absconded either just before or on the day of discharge, resulting in the bench warrant. The circuit court also noted that Becker had an "addictive personality" and should know to stay away from addictive substances.

The maximum possible sentence Becker could have received was twelve and one-half years' imprisonment. The sentence totaling three years and three months' 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 in setting a term of confinement.

The final issue counsel raised in the original no-merit report was whether there was any basis for a postconviction motion for sentence modification. Counsel had concluded there was not but, upon our original review of the record, we noted a potential issue regarding restitution. Specifically, the circuit court had ordered Becker to pay $1400 for the cost of the SCRAM bracelet he had failed to return. WISCONSIN STAT. § 973.20 authorizes a circuit court to order a defendant to pay restitution to victims of a "'[c]rime considered at sentencing,'" which includes "any crime for which the defendant was convicted and any read-in crime." *See* WIS. STAT. § 973.20(1g)(a) and (1r). However, the owner of the SCRAM bracelet was not a victim of Becker's burglary. In addition, § 973.20(13)(a) sets forth multiple factors that a circuit court must consider before it orders restitution, including a defendant's ability to pay. *See* ***State v.***

***Fernandez***, 2009 WI 29, ¶22-23, 316 Wis. 2d 598, 764 N.W.2d 509. It did not appear that the circuit court had considered those factors. We directed counsel to file a supplemental report addressing the issue.

Counsel reported that Becker had, in fact, returned the SCRAM bracelet. The bracelet owner wrote a letter to the circuit court, a copy of which counsel provided to this court, advising that the bracelet was returned to inventory and Becker should not have to pay for it. Counsel opined that this should settle the matter but, "should the Trial Court require a more formal motion," he requested remand to the circuit court to obtain a formal order. We granted the remand request because the circuit court had stated, "Somebody brings it in [intact], then I'd consider a motion to adjust restitution," suggesting that the circuit court did, indeed, require a more formal motion. On remand, the circuit court vacated the restitution obligation.[4] Accordingly, we can now agree with counsel that there is no arguable merit to a challenge to the restitution order and, thus, no arguable merit in bringing a motion for sentence modification.

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

[4] A no-merit report is only appropriate if counsel is convinced that an appeal would be wholly frivolous. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 437 (1988). Thus, we ordinarily do not remand a matter to allow pursuit of postconviction motions. Here, though, once Becker returned the SCRAM bracelet, forgiveness of the restitution award appeared to be a *fait accompli* given the circuit court's prior comment. Thus, the issue was less about whether there was any arguable merit to a challenge to the circuit court's restitution order and more about obtaining the circuit court's confirmation that, in fact, the successful return of the bracelet was sufficient to relieve Becker of the $1400 obligation.

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 Becker in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*