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May 24, 2013

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

2012AP2779-CRNM State of Wisconsin v. Demareon L. Green (L.C. #2011CF4917)

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

Demareon L. Green appeals from a judgment of conviction, entered upon his guilty plea, on one count of robbery with the threat of force. 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] Green was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and

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

counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On October 5, 2011, an individual approached a pharmacy technician at a Walgreens and handed her a note demanding the pharmacy's oxycodone pills. The note stated, in part, "No phone, No Poliece [sic], No problems Stay where I can see you." According to the police report, the technician observed that the individual "had both hands in his front pocket of his hooded sweatshirt. He removed his left hand from his pocket, keeping his right hand in the pocket. She then observed a 'bulge' in the pocket and she believed that he was holding a handgun inside of this pocket." The pharmacy surrendered nearly 1600 pills—sixteen bottles—with a street value of more than $14,000.

When news of the robbery broke and surveillance photos were shown on television, Green's stepmother called police, believing he was involved. Two of the pharmacy technicians subsequently identified Green through a photo array, both commenting on distinctive facial features they recognized.

Later, the State filed an amended information charging a second count of robbery. Another Walgreens pharmacy had been robbed of its oxycodone on September 30, 2011. Surveillance photos evidently showing Green were also available from that robbery.

Green ultimately entered a plea agreement. In exchange for his guilty plea to the October robbery, the State would dismiss and read in the second count. The sentence would be left to the circuit court with both sides free to argue. The circuit court imposed a sentence of five years' initial confinement and five years' extended supervision.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Green's guilty plea 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 Green's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Green 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 robbery with the threat of force, appropriately modified to fit the facts, were attached, signed by Green. The plea form correctly acknowledged the maximum penalties Green 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. It specifically reviewed the constitutional rights Green was waiving. The circuit court also explained the nature of read-in offenses, as suggested by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. When the circuit court asked Green if he was pleading guilty because he was guilty, Green originally answered, "There's no win, Your Honor." The circuit court explained that it did not want to accept Green's plea if he was innocent, and that a guilty

plea was not an ***Alford*** plea.[2] After further consultation with counsel, Green acknowledged he was pleading guilty to accept responsibility. That admission allowed the circuit court to complete the colloquy.

The plea questionnaire and waiver of rights form and addendum, the supplemental documents counsel discussed with Green, and the circuit court's colloquy appropriately advised Green 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 other 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.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

The circuit court acknowledged each of the primary objectives, though it appears to have focused on protecting the community and Green's rehabilitation. It observed that Green was on probation at the time of the offenses—an aggravating factor—and that the robbery might be viewed as an escalation of the prior crime on Green's record, a burglary. The circuit court also observed that time in the House of Correction evidently had not imparted a lesson to Green. The circuit court further explained to Green that this robbery was serious because although he may not have actually had a gun, he behaved in a way that made the victims believe that he did.

The circuit court considered various mitigating factors, like the fact that Green had obtained a GED while incarcerated, and that he had accepted responsibility through the plea. However, Green by his own admission had a drug problem, and the circuit court determined that treatment would be a good idea. Thus, the circuit court imposed five years' initial confinement and five years' extended supervision. It further determined that Green would not be eligible for the Challenge Incarceration Program, but that he would be eligible for the Wisconsin Substance Abuse Program[3] after serving two-thirds, or forty months, of his initial confinement.

The maximum possible sentence Green could have received was fifteen years' imprisonment. The sentence totaling ten 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,

[3] This was formerly the Earned Release Program.

233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[4]

Though counsel does not identify this as a potential issue, we have considered whether there is any arguable merit to a claim of ineffective assistance of trial counsel for what might be characterized as goading the State into filing the second robbery charge after a pretrial status conference. At the conference, the circuit court inquired what the State's final plea offer was. Defense counsel responded that in exchange for a plea to the October robbery, the State would not pursue the second charge and would recommend prison, leaving the term length up to the circuit court. As the parties estimated how long a trial would take, defense counsel asked the circuit court to discuss "a very big issue" ahead of time. Counsel stated that he wanted to explore details of the September robbery and investigation at trial. He explained, "I think it's only fair to the defense to know how likely is it there would be two people who would try to commit the exact same type of offense within five days of each other … and be different people."

The State responded that such a line of inquiry would make the trial longer because there were different witnesses to call. The State also commented that defense counsel was "asking me to file another count against his client, which I'm willing to do[.]" The State noted that it thought the October robbery was the stronger case, because there were two photo array identifications, but noted that it had a still photo of the defendant from the September robbery.

[4] The circuit court also imposed the $250 DNA analysis surcharge, explaining why it should be a part of Green's punishment. There is no arguable merit to a challenge of the imposition of the surcharge. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶10-13, 338 Wis. 2d 151, 807 N.W.2d 241.

The circuit court observed that the defense approach was unusual, but that "it's just a strategic decision obviously by counsel…. So it's high risk in this case. I guess high reward." Defense counsel responded that he was not asking the State to charge the second offense, just that he wanted to be able to ask the detective who investigated both robberies about "show[ing] this purported photograph … to two citizen witnesses in that September 30 incident, both of whom said no, it was not my client." After confirming that Green had been put on notice about the possible filing of the second charge, the circuit court noted that he had a right to his strategy and theory of the defense.

Defense counsel then insisted that the circuit court confirm whether, if the trial was only on the October robbery, defense counsel could explore the facts surrounding the September robbery. Then, knowing that ruling, the State could decide whether it would file the second charge. The circuit court said that it did not think it could stop defense counsel from exploring the other incident. The State responded by filing the amended information and noting that if the September robbery would be discussed, "I'm not going to let him go into that to use that as a defense when he in fact did commit that offense."

The circuit court noted, more than once, that trial counsel was making a strategic decision, and counsel's reasonable strategic choices are virtually unassailable. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. Given what appears to be strong photographic evidence of Green's role in both robberies, it appears that counsel was pursuing the best defense he could ethically muster under the circumstances. Moreover, the State had put Green on notice of a possible second charge, so its filing was not a surprise, nor could it have been unanticipated once the "final" plea offer was rejected. Accordingly, there is

no arguable merit to a claim of ineffective assistance of trial counsel for comments that appear to have induced the State to file a second robbery charge.

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

Diane M. Fremgen
Clerk of Court of Appeals