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June 19, 2013

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

2012AP2050-CRNM State of Wisconsin v. Christopher D. McCall (L.C. #2010CF1015)

Before Brown, C.J., Reilly and Gundrum, JJ.

Christopher D. McCall appeals from a judgment convicting him of possession with intent to deliver cocaine, in an amount more than five grams but not more than fifteen grams, as party

to a crime, and from the part of an order denying his postconviction motion for plea withdrawal.[1] McCall's appellate counsel has filed a thorough no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). McCall received a copy of the report and has exercised his right to file a response.[2] Upon consideration of the report, the response and our independent review of the record as mandated by ***Anders***, we conclude that the judgment and order may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Pursuant to a plea agreement, McCall entered a no-contest plea to the cocaine-possession charge; a count of possessing marijuana was ordered dismissed and read in for purposes of sentencing. McCall's efforts to withdraw his plea before sentencing were unsuccessful. The circuit court followed the parties' joint recommendation and imposed a sentence of three years' initial confinement plus five years' extended supervision. McCall then moved for postconviction relief, alleging that trial counsel's ineffectiveness in fully explaining a no-contest plea led him to enter an uninformed plea and seeking sentence modification. After a ***Machner***[3] hearing, the

[1] Although the notice of appeal does not state that the appeal is from the August 8, 2012 order denying McCall's postconviction motion, we construe the September 14, 2012 notice of appeal to encompass the August 8 order. *See* WIS. STAT. RULE 809.10(1)(f) (2011-12) ("An inconsequential error in the content of the notice of appeal is not a jurisdictional defect."); *see also* ***East Winds Props., LLC v. Jahnke***, 2009 WI App 125, ¶1, 320 Wis. 2d 797, 772 N.W.2d 738 (where the notice of appeal post-dated the order following the judgment, jurisdiction extended to the order even though the notice mentioned only the judgment). All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

[2] While this appeal was pending, McCall filed a pro se notice of voluntary dismissal. Appellate counsel moved for leave to consult with McCall before this court took action on his notice. Counsel now has advised this court that she has consulted with McCall and that he hereby withdraws his notice of voluntary dismissal and wishes to continue with the no-merit procedure.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

motion was denied to the extent that McCall sought plea withdrawal but granted to the extent that the circuit court agreed to make McCall eligible for the Earned Release and Challenge Incarceration Programs (ERP, CIP). This no-merit appeal followed.

The no-merit report addresses the potential issues of whether (1) McCall's plea was freely, voluntarily, and knowingly entered; (2) he should have been permitted to withdraw it before being sentenced or postconviction; and (3) McCall should be resentenced because the sentence could be challenged either as the result of an erroneous exercise of discretion or as unduly harsh. Upon review of the record, we are satisfied that the no-merit report properly analyzes these issues and that they have no arguable merit. Accordingly, we will discuss them no further, except to the extent that McCall's pro se response raises them.

McCall first contends he should have been permitted to withdraw his plea before sentencing. Presentencing plea withdrawal is a matter within the circuit court's discretion**.** ***State v. Jenkins***, 2007 WI 96, ¶6, 303 Wis. 2d 157, 736 N.W.2d 24. The defendant must show by a preponderance of the evidence a "fair and just reason" for the court to allow him or her to withdraw the plea. ***Id.***, ¶2. "The reason must be something other than the desire to have a trial, or belated misgivings about the plea." ***Id.***, ¶32 (citations omitted). The proffered reason must be one the circuit court finds "actually exists" and is credible. ***Id.***, ¶43. An appellate court must uphold the circuit court's findings of fact and credibility determinations unless they are clearly erroneous, ***id.***, ¶33, and affirm the court's decision if it was demonstrably made on the facts of record and in reliance on the applicable law, ***id.***, ¶6.

When McCall first sought to withdraw his no-contest plea before sentencing, he explained that he was dissatisfied with his counsel for not filing motions or interviewing persons

McCall wanted. The circuit court concluded that was not a fair and just reason because it already had addressed that issue before McCall entered his plea and saw no basis to revisit it. The implicit finding that a credible fair and just reason did not actually exist is not clearly erroneous. Still, McCall once again contends that trial counsel should have taken the actions he requested. We agree with appointed appellate counsel that there exists no arguable issue as to the validity of McCall's plea. A knowing and voluntary no-contest plea waives all nonjurisdictional pre-plea defects. *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986).

McCall also complains that "[n]o contest is like pleading guilty and that's not a plea that I wanted to enter because I'm not guilty of anything … because the facts haven't been proven yet." The plea hearing transcript belies that claim. When the court asked McCall whether he "underst[oo]d I'm going to treat this no[-]contest plea just like a plea of guilty," McCall answered that he understood, and confirmed that knowing that did not change his desire to enter a plea. A challenge to the court's finding no fair and just reason would have no arguable merit.

McCall also asserts that he should have been permitted to withdraw his plea after sentencing. He asserted that he did not understand that by pleading he was waiving his constitutional rights to not testify and to have his attorney cross-examine witnesses at trial because counsel did not explain it to him. He also asserted that the circuit court did not personally inform him during the plea colloquy that he was waiving those rights but instead improperly relied solely on the plea questionnaire to satisfy itself that he understood. *See* ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794.

When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201

Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A circuit court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988).

If a defendant makes a prima facie showing that the plea colloquy was not adequate, the burden then switches to the State to show by clear and convincing evidence that the plea was entered knowingly, intelligently, and voluntarily. ***Bangert***, 131 Wis. 2d at 274. The State may use any evidence to show that the defendant "in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him." ***Id.*** at 275 (citation omitted).

Although the circuit court concluded that McCall met his initial burden under ***Bangert***, McCall's argument supplies no basis for further proceedings. Both McCall and trial counsel testified at the ***Machner*** hearing. Counsel testified that he and McCall had "detailed discussions" about McCall's rights to not testify at trial and to have his attorney cross-examine witnesses and that McCall appeared to understand those rights. The circuit court found counsel to be the more credible and concluded that the State met its burden to show that McCall's plea was knowing, voluntary, and intelligent. A challenge to the circuit court's factual findings and credibility assessments and its conclusion that plea withdrawal is not necessary to remedy a manifest injustice lacks arguable merit.

Finally, McCall asserts that a factual basis was not established for his no-contest plea because police lacked probable cause to arrest him. Police used a confidential informant (CI) in

the drug deal that netted McCall. McCall asserts that he has an idea who the CI is and, if he is correct, that CI "has no credibility" and cooperated only to get a lighter sentence on charges that person faces. McCall's no-contest plea waived any deficient probable cause determination. *See* ***Bangert***, 131 Wis. 2d at 293. Like McCall's other pro se contentions, this one also is without arguable merit.

Based on an independent review of the record, we find no grounds for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32. Accordingly, we accept the no-merit report, affirm McCall's conviction, and discharge appellate counsel of her obligation to further represent him in this appeal.[4]

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved from further representing McCall in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[4] This court appreciates the care and thoroughness that Judge Hammer took in making the record in the proceedings before him and that Attorney Schieber took in preparing the no-merit report and carrying through with her responsibilities. We commend them both.