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DISTRICT I

June 20, 2013

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

2012AP2742-CRNM State of Wisconsin v. Aaron D. Lee
(L.C. #2011CF4999)

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

Aaron D. Lee appeals from a judgment of conviction, entered on his guilty plea, for one count of armed robbery with threat of force, as a party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2011-12).[1] Lee's postconviction/appellate counsel, Michael J. Backes, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Lee has not responded. We have independently reviewed the

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

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.

According to the criminal complaint, which served as the factual basis for Lee's guilty plea, Lee was walking down the street when he saw a young man wearing "nice 'buds,'" or earrings. Lee continued walking and came upon a man he knew as "Rock," who was with two other men. Lee told them about the earrings he saw. Rock gave Lee a handgun and indicated he should rob the man with the earrings. According to the victim, Lee and the three men approached him. Lee, who was holding the gun, said, "Give me those earrings." The four men took the victim's earrings, cash, and phone. Lee pointed the gun at the victim throughout the robbery. The victim later identified Lee through a photo array. The police interviewed Lee and he confessed.

Lee and the State entered a plea bargain pursuant to which Lee agreed to plead guilty and the State agreed to recommend a prison sentence of unspecified length. The trial court accepted Lee's plea and found him guilty. At sentencing, trial counsel urged the trial court to impose and stay a prison sentence, noting that Lee had already spent 194 days in custody. The trial court, however, rejected the recommendation, finding that "[t]his is just too serious of an offense." It imposed a sentence of four years of initial confinement and four years of extended supervision, and it also ordered Lee to provide a DNA sample and pay the DNA surcharge.[2] The trial court

[2] The trial court stated: "[Y]ou shall … be required to give a DNA sample of your body … [a]nd you shall pay the surcharges and court costs associated with that sample." It specifically found that Lee had "the ability to pay" the surcharge, and it ordered that the surcharge be taken from Lee's prison wages. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (Factors to be considered when imposing DNA surcharge include "financial resources of the defendant" and "any other factors the trial court finds pertinent.").

further found Lee ineligible for the Challenge Incarceration Program "because of the violent nature of this particular offense" and ineligible for the Wisconsin Substance Abuse Program because it was not "appropriate in this case."

The no-merit report considered three issues: (1) whether there is a basis to seek to withdraw Lee's guilty plea based on the plea colloquy; (2) whether the trial court erroneously exercised its sentencing discretion; and (3) whether there would be any merit to a motion for sentence modification. 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 plea and sentence.

We begin with Lee's guilty plea. There is no arguable basis to allege that Lee's plea was 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 Lee'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, *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 Lee understood that it was not bound by the parties' recommendations.

The trial court specifically told Lee what the State would need to prove, incorporating the facts in the criminal complaint and referencing the jury instructions that were attached to the plea questionnaire, and both Lee and his counsel stipulated that the complaint provided a factual basis

for the plea. The plea questionnaire, waiver of rights form, Lee's discussion with his trial counsel, and the trial court's colloquy appropriately advised Lee of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the validity of the plea, and the record discloses no other basis to seek plea withdrawal.

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 sentence was 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. The trial court discussed the crime and the fact that Lee allowed himself to be persuaded by another man

to commit what the trial court termed an "outrageous" crime that involved Lee threatening the victim with a gun. The trial court also referred to the PSI (presentence investigation) report, which included information about Lee's experience in the juvenile justice system, and a COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) report that found Lee was at high risk to reoffend.[3] The trial court said that society needs protection from people like Lee who "just haphazardly, impulsively say, 'Oh, yeah, I think I'll go stick that guy up and threaten his life.'" The trial court expressed hope that Lee would be rehabilitated. 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 Lee could have been sentenced to twenty-five years of initial incarceration and fifteen years of extended supervision. *See* WIS. STAT. §§ 939.50(3)(c) & 973.01(2)(b)3. There would be no merit to asserting that Lee's eight-year total sentence was excessive. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Given Lee's prior juvenile record and the seriousness of this crime, there would be no merit to arguing that the sentence "shock[s] public sentiment and violate[s] the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185.

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

[3] This was Lee's first adult criminal conviction, but he was placed on probation three times as a juvenile, for criminal damage to property, battery as a party to a crime, and resisting or obstructing an officer.

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 Michael J. Backes is relieved of further representation of Lee in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals