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DISTRICT I

July 19, 2013

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

2013AP41-CRNM State of Wisconsin v. Ronnie Lemar Howard (L.C. # 2010CF6271)

Before Fine, J.

Ronnie Lamar Howard appeals a judgment of conviction, entered on his guilty plea to one count of possession of a non-narcotic controlled substance. Appellate counsel, J. Dennis Thornton, Esq., filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Thornton told Howard and his temporary guardian, Mary J.

Mountin, Esq., of Howard's right to file a response.[1] Howard, by Mountin, declined to respond. On this court's independent review of the Record as mandated by ***Anders*** and 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 November 18, 2010, police stopped Howard for suspected impaired driving because he was driving his car in the dark with his headlights off. The officer who stopped him noticed that Howard appeared sleepy and had glassy, watery, bloodshot eyes. The officer said that he did not conduct field sobriety tests because Howard was too unsteady to safely perform them.

During the stop, the officer discovered that there was an open warrant for Howard. The officer arrested Howard and conducted a search incident to arrest. Howard then mentioned that there were pills on him and in the car, but the officers should not worry because all the pills were Howard's. Officers recovered a prescription bottle bearing Howard's name and containing oxycodone from his pants pocket, and a small, unlabeled container attached to his key ring that also had oxycodone. From the glove box, officers recovered three more prescription bottles: one, with the name scratched off, contained Xanax and the other two, bearing the name Joe or Joseph Anderson, contained Xanax and morphine.

[1] After Howard's conviction, but before Thornton could determine an appropriate course of postconviction action, Howard suffered a stroke that left him largely uncommunicative. When Howard's rehabilitation specialist told Thornton that she did not believe Howard was capable of understanding counsel's letter detailing Howard's postconviction and appellate options, Thornton moved the circuit court for the appointment of a temporary guardian. *See* ***State v. Debra A.E.***, 188 Wis. 2d 111, 131–135, 523 N.W.2d 727, 734–736 (1994). The circuit court appointed Mountin for the limited purpose of determining whether Howard should respond to Thornton's no-merit report or invoke an alternate appellate option.

The criminal complaint and information originally charged Howard with one count of possession of a controlled narcotic substance based on the bottle of morphine. An amended information added a "second or subsequent" offense enhancer to that charge, and added a charge of possession of a non-narcotic controlled substance based on the bottle of Xanax that had the name scratched out.[2]

Howard agreed to plead guilty to the second count, an unclassified misdemeanor. The first count, a felony, was dismissed.[3] The circuit court accepted Howard's guilty plea, sentenced Howard to twenty days in jail, and granted him credit for twenty days already served.

Counsel first addresses whether the criminal complaint sufficiently stated probable cause, whether the complaint was "duly issued in a timely fashion," and whether the initial appearance was held within a reasonable time. We agree with counsel's determination that the complaint was sufficient and that, in any event, any challenge to the complaint's sufficiency was waived or forfeited by the guilty plea. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 73, 716 N.W.2d 886, 892. There is also no arguable merit to a claim the complaint was not timely issued: it was filed approximately six weeks after the offense, and within eight days of its subscription and approval by the district attorney.

Further, there is no arguable merit to a claim that the initial appearance was not timely. "[F]ollowing a warrantless arrest, there must be a probable cause determination within 48 hours[.]" ***State v. Golden***, 185 Wis. 2d 763, 768, 519 N.W.2d 659, 660 (Ct. App. 1994) (citing

[2] Howard was also later separately charged with operating while intoxicated, first offense.

[3] It appears that the State was satisfied that Joseph Anderson had left his bottles in the car by mistake.

County of Riverside v. McLaughlin, 500 U.S. 44, 55–58 (1991)). The Record appears to indicate that Howard was not arrested on the charges in this case when he was stopped. Rather, he was arrested on the outstanding warrant and then subject to a probation or supervision hold. *See* ***State v. Martinez***, 198 Wis. 2d 222, 233–234, 542 N.W.2d 215, 220 (Ct. App. 1995). The initial appearance was held on the same day that the criminal complaint in this matter was filed.[4] Further, any potential ***Riverside*** violation is not a jurisdictional defect, *see* ***Golden***, 185 Wis. 2d at 769, 519 N.W.2d at 661, and, thus, was waived or forfeited by the guilty plea, *see* ***Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d at 73, 716 N.W.2d at 892.

The next potential issue counsel identifies is whether the circuit court followed the appropriate procedures in accepting Howard's guilty plea. Our review of the Record—including the plea questionnaire, waiver of rights form, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261–262, 389 N.W.2d 12, 21 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 616–617, 716 N.W.2d 906, 917. There is no arguable merit to a claim that the circuit court did not fulfill its obligations or that Howard's plea was anything other than knowing, intelligent, and voluntary.

The final issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. At sentencing, a court must consider the principle objectives of sentencing, including

[4] Counsel indicates that the complaint was subscribed and filed on December 10, 2010, with the initial appearance held on December 29, 2010. However, the Record indicates that the criminal complaint was subscribed and sworn on December 21, 2010, and filed on December 29, 2010.

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, 606, 712 N.W.2d 76, 82, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the 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, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the circuit court's discretion. ***Ibid.***

Though its sentencing comments were brief, our review of the Record confirms that the court appropriately considered relevant sentencing objectives and factors. The circuit court acknowledged the primary objectives. It noted that though this was not the most serious of crimes, it was still a drug crime. It stated that Howard might have medicinal needs, but he should know that the way to fulfill those needs is through a valid prescription. The circuit court viewed Howard's lengthy record as aggravating, and commented that the public needs to be protected from anyone who will violate the law. The circuit court did, however, decline to impose any driver's license suspension, noting that such a penalty could be addressed in the operating-while-intoxicated case if warranted.

The twenty-day sentence is well within the thirty-day range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108–109, 622 N.W.2d 449, 456, 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, 461 (1975). There would be no arguable merit to a challenge to the court's sentencing discretion.

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 J. Dennis Thornton, Esq., is relieved of further representation of Howard in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals