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April 5, 2016

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

2015AP768-CRNM State of Wisconsin v. Dean Tienter (L.C. # 2007CF157)

Before Lundsten, Higginbotham, and Blanchard, JJ.

Dean Tienter appeals a judgment convicting him, after entry of a no contest plea, of possession of a firearm by a felon, as well as an order denying his postconviction motion. *See* WIS. STAT. §§ 941.29(2) (2007-08).[1] Attorney Joshua Christianson has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. § 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d

[1] The date of the offense in this matter is March 28, 2007. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Tienter was sent a copy of the report and has filed a response. Attorney Christianson then filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplemental report, we conclude that there are no arguably meritorious appellate issues.

On March 12, 2009, Tienter pled no contest to possession of a firearm by a felon. He entered into a deferred judgment agreement under which the State agreed not to enter judgment for one year so long as Tienter agreed not to "engage in conduct giving rise to criminal charges which survive probable cause challenges" during the term of the agreement. Tienter was subsequently charged criminally in St. Croix County case No. 2009CM279, for conduct occurring on March 29, 2009. Tienter challenged probable cause. After a hearing, the court in case No. 2009CM279 found probable cause. The court in this case then entered a judgment of conviction as to one count of possession of a firearm by a felon. Tienter was sentenced to four years of initial confinement and five years of extended supervision.

As a background matter, we note that Tienter previously filed a petition for writ of habeas corpus with this court, alleging that Attorney Christianson abandoned him without filing a postconviction motion, notice of appeal, or no-merit report. Christianson then moved for an extension of time to file a no-merit report, asserting that, after discussion with his client, he had believed that Tienter would be pursuing his appeal without the assistance of counsel. The State filed a response agreeing to the reinstatement of Tienter's direct appeal rights. In an order dated February 13, 2015, the writ petition was granted and Tienter's direct appeal rights were reinstated. Tienter then filed a pro se motion to withdraw his plea. The circuit court denied the motion. This no-merit appeal follows.

The no-merit report concludes that there would be no arguable merit to arguing on appeal that the felon in possession of a firearm statute, WIS. STAT. § 941.29, does not apply to Tienter because his underlying felony conviction, attempted first-degree criminal sexual conduct, was entered in Minnesota for conduct that occurred in Minnesota. We agree with counsel's conclusion on this issue. WISCONSIN STAT. §§ 941.29(1) and (1)(b) provide that "[a] person is subject to the requirements and penalties of this section if he or she has been … [c]onvicted of a crime elsewhere that would be a felony if committed in this state." In applying the felon in possession of a firearm statute, a circuit court is entitled to look at the underlying conduct supporting the conviction. *See* ***State v. Campbell***, 2002 WI App 20, ¶7, 250 Wis. 2d 238, 642 N.W.2d 230.

In August 1990, Tienter was charged in Hennepin County, Minnesota with two counts of criminal sexual conduct in the first degree. The complaint alleged that Tienter grabbed a woman at a bus shelter, placed a knife at her throat, and forced her into his car, where he pulled her clothes off and engaged in vaginal penetration despite her screams and protests. The victim had bruises on her body and a split lip. Tienter pled guilty to attempted criminal sexual conduct in the first degree as to count I, which charged Tienter with engaging in "sexual penetration with a known adult female, and circumstances existing at the time of the act caused the adult female to have a reasonable fear of imminent great bodily harm to herself or another." The judgment indicates that the crime to which he pled was a lesser included offense of criminal sexual conduct in the first degree.

At the time Tienter engaged in the acts that led to his Minnesota conviction, the Wisconsin sexual assault statute provided, in relevant part, that a defendant could be convicted of first-degree sexual assault, a Class B felony, if he had sexual intercourse or sexual contact with

another person, without that person's consent, and if he either (a) caused great bodily harm to that person or (b) used or threatened to use a dangerous weapon. WIS. STAT. § 940.225(1)(a) and (1)(b) (1989-90). Attempt of either first- or second-degree sexual assault remained a felony. *See* WIS. STAT. §§ 939.50(1), 939.50(3)(b) and (c), and 939.60 (1989-90). A defendant could be convicted of second-degree sexual assault, a Class C felony, if he had sexual intercourse or sexual contact with another person, without that person's consent, by use or threat of force or violence. WIS. STAT. § 940.225(2)(a) (1989-90). Based on the facts in the record regarding Tienter's Minnesota conviction, we are satisfied that the conduct underlying the Minnesota conviction would have been considered either attempted first- or second-degree sexual assault in Wisconsin at the time, both felonies, such that any argument that Tienter was not subject to Wisconsin's felon in possession of a firearm statute would be without merit.

We also see no arguably meritorious basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Tienter entered a no contest plea pursuant to a negotiated plea agreement, the terms of which were presented in open court. In exchange for Tienter's pleading no contest to the felon in possession charge in this case and a disorderly conduct charge in another case, the State agreed to dismiss charges against him in two other cases. As discussed above, the parties also entered into a deferred judgment agreement that was filed with the court.

The circuit court conducted a standard plea colloquy, inquiring into the defendant's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring the defendant's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Tienter understood that it would not be bound by any sentencing recommendations. Our review of the record, along with the no-merit reports and responses, reveals no basis for arguing that the State breached the terms of the plea or the deferred judgment agreement.

In his no-merit response, Tienter argues that the plea colloquy was defective in that the court failed to ascertain that he knew the object he possessed, a black powder muzzleloader, was a firearm. Tienter further asserts that he believed the possession of a black powder muzzleloader was legal in Minnesota and that he did not intend to break any law. We agree with counsel's assessment that Tienter's assertions do not give rise to any arguably meritorious appellate issue.

The crime of possession of a firearm by a felon, WIS. STAT. § 941.29, requires that the State prove two elements: (1) the defendant possessed a firearm and, (2) the defendant previously had been convicted of a felony. *See* WIS JI—CRIMINAL 1343. A "firearm" is considered to mean a weapon that acts by the force of gunpowder. ***Id.*** "Possess" means that the defendant knowingly had actual physical control of a firearm. ***Id.*** Notably, the State is *not* required to prove that the defendant had an intent to break the law.

The transcript of the plea colloquy demonstrates that the court reviewed the elements of WIS. STAT. § 941.29 with Tienter. Specifically, the court stated, "[T]hey would have to have

proven that you did … intentionally, meaning you had the mental purpose, made a conscious decision, to possess a firearm after having been convicted of a crime that would be a felony if committed in Wisconsin. Do you understand that?" Tienter responded, "Yes." He fails to allege any specific facts that would suggest otherwise, relying instead on the conclusory assertion that he did not intend to break the law. In light of all of the above, we are satisfied that the court ascertained on the record that Tienter understood the elements of the crime, including the element of knowledge.

Our review of the plea colloquy reveals no other arguably meritorious issues. The parties stipulated that the complaint and the preliminary hearing testimony established a factual basis for the plea. There is nothing in the record or in the no-merit report, response, or supplemental response to suggest that trial counsel's performance was in any way deficient, and Tienter has not alleged any other facts that would give rise to a manifest injustice. Therefore, his plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

A challenge to Tienter's sentence would also lack arguable merit. The court considered the seriousness of the offense, Tienter's character, his history of deviant sexual behavior and substance abuse, his failed attempts at treatment, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶40 & n.10, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed—four years of initial confinement and five years of extended supervision—was within the applicable penalty range. *See* WIS. STAT. § 941.29(2) (classifying possession of a firearm by a felon as a Class G felony); WIS. STAT. § 939.50 (3)(g) (providing ten years as the maximum term of imprisonment for a Class G felony). Under these circumstances, it cannot reasonably be

argued that Tienter's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Our independent review of the record discloses no other potential issues for appeal.

In addition to his response to the no-merit report, Tienter also has filed a motion requesting that we suspend the execution of the remainder of his sentence. The motion is denied.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the motion for suspension of Tienter's sentence is denied.

IT IS FURTHER ORDERED that Joshua Christianson is relieved of any further representation of Dean Tienter in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals