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October 26, 2016

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

2015AP1895-CRNM State of Wisconsin v. Robert B. McBain (L.C. # 2014CF94)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Robert B. McBain appeals from a judgment of conviction for party to the crime second-degree intentional homicide. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). McBain has

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

filed a response to the no-merit report and counsel then filed a supplemental no-merit report.[2] RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

Ian Skjerly and Trista Raven-Hrabak decided to kill Raven-Hrabak's former husband, Daniel Raven. McBain was paid to drive Skjerly to Daniel's home. After several excursions to the home in the preceding months, Skjerly committed the murder just before midnight on March 9, 2014. Skjerly told police that McBain drove him to Daniel's home and parked at the end of the driveway and waited for him. Skjerly returned to the car after the rifle jammed and the pair drove to a spot where Skjerly cleared the jam. McBain drove Skjerly back to Daniel's home. Without entering the home, Skjerly observed Daniel asleep on the couch. He shot Daniel twice and killed him. Skjerly returned to McBain's car, the pair drove off, Daniel deposited the rifle along their route home, and McBain disposed of the clothes Skjerly had been wearing. In his statement to police, McBain admitted he drove Skjerly and that he had been out to Daniel's home several times before. On the night of the murder, he told Skjerly that it was the last night he would drive Skjerly to the home. McBain admitted to throwing Skjerly's clothes in a garbage can. He also told police that he never thought Skjerly would go through with committing the murder.

[2] The supplemental no-merit report points out that counsel did not receive pages three and four of McBain's response. Although the pages were inadvertently omitted from the copy of the McBain's response sent to counsel, the court received and considered those pages. Because McBain's response includes numerous claims, when discussing the response we give paragraph references to demonstrate that each of his claims have been considered.

McBain was charged with party to the crime first-degree intentional homicide. On September 11, 2014, he entered a guilty plea to the amended charge of party to the crime second-degree intentional homicide. Under the plea agreement, the prosecution agreed to recommend ten years' initial confinement and ten years' extended supervision. At sentencing, the prosecutor made the agreed-upon recommendation. McBain argued for a sentence of five years' initial confinement and fifteen to twenty years' extended supervision on the ground that his participation in the crime was out of character, driven by financial problems, and based on his belief that Skjerly would never go through with the murder. McBain was sentenced to fifteen years' initial confinement and ten years' extended supervision.

The first potential issue is whether McBain's plea was freely, voluntarily and knowingly entered. The no-merit report does not directly address the issue.[3] However, in response to McBain's complaints about trial counsel's pre-plea performance and claims that the trial court and trial counsel failed to inform him about certain things, the supplemental no-merit report discusses the plea colloquy and implicitly concludes that McBain's plea was freely, voluntarily and knowingly entered and that a factual basis existed for the plea. Except for the trial court's

[3] The no-merit report starts off by stating: "Mr. McBain has identified a number of issues, none of which have arguable merit. Counsel will herein address each of these issues." Counsel is reminded that the no-merit report must do more than address issues raised by the appellant. Counsel is obligated to review the entire record and the report should reflect that counsel has done so by raising and addressing every potential issue. A no-merit report which complies with Wisconsin's discussion requirement serves to assure us that appointed counsel has discharged counsel's obligation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1***, 137 Wis. 2d 90, 100-01, 403 N.W.2d 449 (1987).

failure to give the required deportation warning,[4] we conclude that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, to establish a valid plea.

We agree with the conclusion in the supplemental no-merit report that because McBain's plea was freely, voluntarily, and knowingly entered, McBain's claims that trial counsel was ineffective in several respects prior to entry of McBain's plea lack arguable merit.[5] First, during the plea colloquy and in a signed plea agreement, McBain confirmed that he was satisfied with the representation provided by his trial counsel. Second, the trial court specifically addressed many of the things about which McBain claims to have lacked knowledge about, particularly as to the elements of the crime and that the trial court was not bound by the plea agreement. Third,

[4] The failure to give the deportation warning does not create an issue of arguable merit because the presentence investigation report (PSI) reflects that McBain was born in Illinois. Thus, McBain could not show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

[5] In his response to the no-merit report McBain claims that his no-merit counsel has failed to raise claims that trial counsel was ineffective (¶A1). McBain claims trial counsel failed to explain the elements of first-degree intentional homicide and how a lesser type offense could have been more appropriate (¶A2) and the meaning of intent and what the prosecution would have to prove beyond a reasonable doubt for first-degree intentional homicide (¶A3), to file a motion to suppress McBain's statements to police (¶A4), to research and properly advise McBain of the law and facts for participation as a party to the crime (¶A5), to explore a defense of non-participation or that McBain was an unwilling participant due to threat of bodily harm (¶A6), to inform McBain of the right to challenge co-defendants' testimony under oath (¶A9), to explain hearsay rules of evidence to McBain and that McBain "could have challenged the relevance of testimony used to charge him" (¶A11), to consider whether McBain was competent to understand the charged offense and consequences of entering a plea "to a charge that could not be sustained" (¶A12), to inform McBain of the difference between a "plea 'recommendation' and a plea 'stipulation' which is related to a binding agreement for a plea, if accepted by both parties and the judge's determination" (¶A13), to investigate cell phone records to show that McBain was not present at or during the criminal act nor that McBain was informed "what had taken place or what was planned before or after the ride he gave to the other co-defendant" (¶A14), to keep McBain informed "properly for his own defense" regarding discovery and investigation before the plea negotiations (¶A15), and to seek a "minimal or minor role defense" (¶A16).

the no-merit report addresses whether trial counsel was ineffective for failing to obtain and review relevant evidence, particularly cell phone records. The report explains that trial counsel in fact obtained the cell phone records and that they did not negate McBain's involvement in the crime. Also, the supplemental no-merit report explains why a suppression motion would have lacked arguable merit and therefore, trial counsel was not ineffective for not filing one. Fourth, the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights, is forfeited by a valid guilty plea. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (observing the general rule that a guilty plea waives all nonjurisdictional defects, including constitutional claims, but noting that "forfeiture" more accurately conveys the effect of a plea because "waiver" means an intentional relinquishment of a known right); ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53 (Ct. App. 2002).

Finally, in light of McBain's admitted involvement, the record does not permit any suggestion that trial counsel was ineffective. McBain's belief that his limited involvement was a complete defense to the charge is without a basis. His involvement, whether unknowing or coerced by threat of bodily injury, would only have served to permit a conviction for second-degree intentional homicide, the crime to which he pled.[6] There is nothing to suggest that trial counsel's performance fell below the objective standard of reasonableness. *See* ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985) (determining whether a defendant who has entered a plea has been denied

[6] As the prosecutor explained at the plea hearing, the charge was amended to second-degree intentional homicide because coercion was a mitigating factor a jury could consider and then convict of second-degree intentional homicide. *See* WIS JI—CRIMINAL 1015. There was nothing to negate Skjerly's intent and McBain's party to the crime liability.

effective assistance of counsel first requires inquiry into whether counsel's performance fell below the objective standard of reasonableness). Further, in his response McBain does not indicate that he would not have entered a guilty plea had trial counsel performed as he now claims counsel should have. *See* ***id.*** at 59 ("to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

The no-merit report addresses whether McBain should be entitled to plea withdrawal based on the fact that the sentence exceeded the prosecution's recommendation. As the report observes, McBain was advised by the trial court that it was not bound by plea agreement. We agree with the conclusion that the fact that the sentence exceeded the prosecution's recommendation does not create a manifest injustice that supports plea withdrawal. In sum, there is no arguable merit to a claim for plea withdrawal.

The no-merit report next address whether there any evidence of judicial bias. McBain makes two related claims—that his trial counsel should have filed a motion for substitution of judge upon learning that the judge had also heard McBain's divorce case (¶A7), and trial counsel failed to inform McBain that he could request judicial substitution (¶A8). We agree with the no-merit report's conclusion that in applying the objective and subject test for bias no issue of arguable merit exists. Simply put, the record does not suggest one speck of bias by the judge. Further, as the no-merit report observes, nothing prohibits a judge from hearing a divorce case and then presiding over one of the divorcing party's criminal case. The supplemental no-merit includes information from trial counsel that substitution of judge was discussed with McBain and McBain was satisfied with the assigned judge. No issue of arguable merit exists as to judicial substitution or judicial bias.

We next consider whether the sentence was the result of an erroneous exercise of discretion. The no-merit report also addresses two additional potential sentencing issues: whether the sentencing court improperly considered false statements made by McBain's ex-wife included in the presentence investigation report and whether the sentence was disproportionate to the sentences imposed on Raven-Hrabak and Skjerly. We are satisfied that the no-merit report properly analyzes the sentencing issues it raises as without merit, and this court will not discuss them further.[7] Further, the twenty-five year sentence was well within the sixty-year maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

McBain's response also includes eleven paragraphs claiming that his no-merit counsel was ineffective (¶¶B1-11). Some of the claims piggyback on McBain's asserted ineffective assistance of trial counsel claims (¶¶B1, 3, 6, 7, 8, 9).[8] Others attempt to impose requirements on appointed counsel that have no basis in the statutory no-merit procedure, *i.e.* that no-merit counsel had to allow McBain to review "court documentation" before filing the no-merit report (¶B2), had to counsel McBain that acceptance of the no-merit report would "waive" other

[7] The no-merit report's discussion of false information claim puts to rest McBain's claim in his response that trial counsel failed to object to his ex-wife's statements in the PSI (¶A10). The statements were flagged as false and the sentencing court accepted that correction to the PSI. The court made no mention of the ex-wife's statements.

[8] McBain claims that the no-merit report "eliminates a competency issue that can effect McBain's understanding of the crime charged and the direct consequences of his signature on any form used in the court system process" (¶B5). To the extent that this suggests that McBain lacked competency to enter his plea, nothing in the record suggests any reason to question McBain's competency during the entire criminal case.

possible meritorious claims (¶B4), had to explain to McBain that "actual innocence or a claim of that, would aid in the filing of a Federal Habeas Corpus, if trying to seek Federal intervention and review of claims" (¶B10), and had to inform McBain of "the mandated obligations of the Supremacy Clause" which demands compliance with federal court rulings in matters raised in state courts (¶B11). A no merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's acceptance of the no-merit report and discharge of appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent McBain further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Daniel P. Ryan is relieved from further representing Robert B. McBain in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals