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December 14, 2016

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

2016AP210-CRNM State of Wisconsin v. Dion D. Hall (L.C. # 2014CF5098)

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

Dion Hall appeals from a judgment of conviction for one count of attempted theft from person, contrary to WIS. STAT. §§ 943.20(1)(a) and 939.32 (2013-14).[1] Hall's postconviction/appellate counsel, Susan M. Roth, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Hall has not filed a

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

response.[2] We have independently reviewed the 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 complaint alleged that on November 5, 2014, Hall tried to take the cell phone of a woman who was standing in a Burger King restaurant. The two struggled over the phone and Hall eventually ran from the restaurant, got into a minivan that was registered to him, and drove away. The victim gave the police the minivan's license plate number and a description of Hall. They later found Hall in the van, wearing clothing that matched the description given by the victim. The complaint said that Hall admitted trying to take the victim's phone. He told police that he thought the victim was the cousin of a woman who had refused to return Hall's phone and wallet to him after he left them at her house. Hall tried to take the victim's phone so "he could use it to get his property back." The victim denied knowing Hall or the woman Hall says refused to return his property.

Hall was charged with attempted theft from person. While the case was pending, his trial counsel questioned his competency, which led to a competency evaluation by the Mendota Mental Health Institute. The doctor's report stated that Hall was competent to proceed. Hall, trial counsel, and the State did not contest the doctor's opinion and the trial court found Hall

[2] On March 30, 2016, Hall filed a motion to extend the time to file a response, noting that he wanted to retain counsel. In his motion, Hall identified one legal issue he hoped to pursue: "violations produced extreme prejudice to my ability to prepare defense 'Riverside' case [sic]." We interpret this to be a reference to a potential ***Riverside*** violation, which postconviction/appellate counsel discusses in her no-merit report. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). We granted Hall's request for an extension of time and set a new deadline of May 2, 2016. No response or additional extension requests were ever filed.

competent to proceed.[3] Hall then entered into a plea agreement with the State pursuant to which he agreed to plead guilty and the State agreed to recommend twelve months in the House of Correction.

The trial court conducted a plea colloquy with Hall, accepted Hall's guilty plea, and found him guilty. At sentencing, the State urged the trial court to follow its sentencing recommendation. Trial counsel asked for a time-served disposition, noting that Hall had served eighty-two days in jail awaiting resolution of the case. The trial court sentenced Hall to six months in the House of Correction and also ordered Hall, a first-time felon, to provide a DNA sample and pay the mandatory DNA surcharge.

After sentencing, Hall filed two *pro se* motions seeking additional sentence credit. The trial court denied those motions. Postconviction/appellate counsel was subsequently appointed and she filed a no-merit appeal.

The no-merit report analyzes four issues: (1) whether there would be any basis for Hall to challenge his guilty plea; (2) whether Hall's "time in custody prior to the issuance of charges and appearance before the court" waived the court's jurisdiction or created grounds for dismissal; (3) whether there is a basis to challenge Hall's sentence; and (4) whether there is a basis to challenge the trial court's denial of Hall's *pro se* motions for sentence credit. This court agrees with postconviction/appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues.

[3] Nothing in the record suggests a basis to challenge the competency determination.

We begin with Hall's plea. There is no arguable basis to allege that Hall's guilty plea was not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the applicable jury instructions and an addendum signed by Hall and his attorney that outlined additional understandings, such as the fact that Hall was giving up certain defenses. The trial court conducted a thorough plea colloquy that addressed Hall's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* § 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.

As part of the plea colloquy, the trial court, trial counsel, and Hall specifically discussed the fact that Hall's conviction could affect his immigration status. The trial court informed Hall that if he is not a United States citizen, under federal law he could be deported, denied admission to the country, or denied naturalization. *See* WIS. STAT. § 971.08(1)(c).[4] Trial counsel later told

[4] WISCONSIN STAT. § 971.08(1)(c), requires the trial court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Section 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter.'" *See* ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (citation omitted). Nonetheless, we have recognized that slight differences in the reading of

(continued)

the trial court additional information about Hall's understanding of his conviction's potential impact on his immigration status, stating:

> I was aware that my client is a native of the Bahamas, that there is an [Immigration and Customs Enforcement] hold on him and that there are potential consequences to a conviction and sentencing in this particular matter. I discussed those with him prior to his entering a plea today. I think he also has an appreciation not only [based] on what I have said but his previous knowledge of some of the consequences of being involved in the criminal justice system. So I do believe that he is making a knowing, voluntary and understanding plea not only with regard to his constitutional rights but has a good understanding of possible consequences due to his immigration status.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Hall's conversations with his trial counsel, and the trial court's colloquy appropriately advised Hall of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** to ensure that his plea was knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Hall's plea.

The second issue we consider is the ***Riverside*** issue identified by postconviction/appellate counsel and also mentioned by Hall in his motion to extend the time to file a response to the no-merit report. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). The no-merit report

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this warning are tolerable. *See* ***State v. Mursal***, 2013 WI App 125, ¶16, 351 Wis. 2d 180, 839 N.W.2d 173 (warning was sufficient where "the trial court's warning complied perfectly with the statute, and linguistically, the differences were so slight that they did not alter the meaning of the warning in any way"). In this case, the trial court's warning varied slightly from § 971.08(1)(c). The trial court stated: "Do you also understand that if you are not a citizen of this country and upon a finding of guilt by this Court for this offense that you could be deported, denied admission or denied naturalization to this country should Federal law be applicable in your particular circumstances[?]" Because the trial court's wording varied only slightly from § 971.08(1)(c) and "did not alter the meaning of the warning in any way," *see* ***Mursal***, 351 Wis. 2d 180, ¶16, there would be no arguable merit to seek plea withdrawal based on the reading of the warning.

states that Hall was arrested on November 5, 2014, a complaint and arrest warrant were issued on November 18, 2014, and Hall made his initial appearance on November 19, 2014. The no-merit report explains that ***Riverside*** and its progeny require that a probable cause determination be made within forty-eight hours of a warrantless arrest. *See* ***id.***, 500 U.S. at 56-58. Postconviction/appellate counsel acknowledges that Hall "may have been subjected to a ***Riverside*** violation, as his total time in custody prior to an appearance before a court or charges being issued was 15 days." (Underlining omitted; bolding and italics added.) However, postconviction/appellate counsel concludes:

> [T]here is absolutely no evidence that [] this delay prejudiced Mr. Hall's ability to prepare a defense or that any crucial evidence against Mr. Hall was collected after the violation occurred. Mr. Hall was arrested and gave a statement to law enforcement on the 5th of November, 2014. It is the opinion of undersigned counsel that Mr. Hall's statement was not even necessary to the [S]tate's case, as the victim gave a detailed description of her assailant that matched Mr. Hall at the time of his arrest mere hours after the incident. As no prejudice to Mr. Hall's defense can be shown because of the potential ***Riverside*** violation, and the violation itself is not a jurisdictional defect, any claim that the court lacked jurisdiction over Mr. Hall's case, that the case should be dismissed with prejudice, or that the conviction should be vacated would be without merit.

(Record citations and underlining omitted; bolding and italics added.)

We agree with postconviction/appellate counsel's conclusion. We have previously recognized that "[t]he appropriate remedy for a ***Riverside*** violation may be suppression of evidence that is obtained as a result of the violation—*i.e.*, after the point at which the delay became unreasonable." ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). ***Golden*** continued:

> A ***Riverside*** violation, however, is not a jurisdictional defect causing a trial court to lose competency over the case. Therefore,

> we conclude that dismissal with prejudice or the voiding of a subsequent conviction is not required as the remedy for a ***Riverside*** violation unless the delay resulted from a deliberate ***Riverside*** violation producing prejudice to the defendant's ability to prepare a defense.

Golden, 185 Wis. 2d at 769. In this case, no additional evidence was gathered after Hall gave his statement on November 5, 2014, during which he admitted trying to take the victim's phone. Moreover, Hall ultimately admitted the allegations in the complaint when he pled guilty, and the record does not suggest he would have had a viable defense to the charge. We agree with postconviction/appellate counsel that there would be no arguable merit to allege that Hall is entitled to challenge his conviction based on a potential ***Riverside*** violation.

Next, we turn to the sentencing. 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 sentences were 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. It commented on Hall's character, noting that he had only a "limited" criminal record, but it also recognized that the crime was serious. It stated: "I've got to consider certainly the need to deter you and others from doing this kind of thing while protecting the public." Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***.

Further, there would be no arguable merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed two and one-half years of initial confinement and two and one-half years of extended supervision, but it imposed only six months in the House of Correction, which was less than the State recommended and well within the maximum sentence. We discern no erroneous exercise of discretion. *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.").

Finally, the no-merit report discusses the trial court's denial of Hall's *pro se* motions for sentence credit for "addition[al] good days credit" and "additional sentence credit." We agree with postconviction/appellate counsel's analysis and conclusion that Hall was not entitled to additional sentence credit based on "earned good time credit." (Emphasis omitted.) In addition, postconviction/appellate counsel explains that although she believes that at sentencing Hall should have been granted eighty-four days of sentence credit rather than eighty-two days, there would be no merit to raise the issue because it is now moot, given that Hall was released to the custody of another jurisdiction on March 25, 2015. We agree.

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 Attorney Susan M. Roth is relieved of further representation of Hall in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals