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May 10, 2019

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

2018AP1912-CRNM State of Wisconsin v. Edward V. Allen, Jr. (L.C. # 2014CF3398)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Edward V. Allen, Jr. appeals from a judgment of conviction for two counts of armed robbery, as a party to the crime, and from an order denying his postconviction motion. His

appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Allen has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, the judgment and order are summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Allen was charged with participating in two armed robberies within an hour of each other on July 29, 2014. Each victim reported that when he got out to check the damage to his car after his car was rear-ended by a minivan, persons exited the minivan, threatened him with a single barreled shotgun, and robbed him. In one instance, one of the robbers drove off in the victim's car. Both victims identified Allen as one of the robbers. When questioned by police, Allen admitted he drove the minivan. Allen was seventeen years old when the crimes were committed.

Allen entered guilty pleas to both charges. Under a plea agreement, the prosecution's sentencing recommendation would be for "substantial prison." Allen moved to withdraw his pleas before sentencing alleging that he was confused and scared when his trial attorney presented the plea agreement to him and that he did not fully understand the nature of the plea agreement. After the circuit court heard testimony from Allen and his former trial attorney, the motion for plea withdrawal was denied. Allen was subsequently sentenced to concurrent terms of nine years of initial confinement and six years of extended supervision. Allen filed a postconviction motion to withdraw his pleas on the ground that the circuit court failed to advise

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

him that he would be subjected to mandatory DNA surcharges as a result of his guilty plea. The postconviction motion was denied.[2]

We first address a potential issue not addressed by the no-merit report—whether the circuit court properly exercised its discretion in denying Allen's presentence motion to withdraw his pleas. *See* ***State v. Bollig***, 2000 WI 6, ¶14, 232 Wis. 2d 561, 605 N.W.2d 199 ("A circuit court's discretion to allow a plea withdrawal prior to sentencing will be sustained unless the court erroneously exercised its discretion."). When seeking to withdraw a plea before sentencing, a defendant has the burden to show by a preponderance of the evidence that there is a "fair and just reason" for withdrawal of the plea. *See* ***State v. Canedy***, 161 Wis. 2d 565, 583-84, 469 N.W.2d 163 (1991). In meeting this burden of proof, it is enough that the defendant present plausible "fair and just reasons" that are supported by evidence in the record. *See* ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). Where the defendant has met this burden, the motion should be granted unless the State has shown that it will be "substantially prejudiced by reliance upon the defendant's plea." ***Id.*** at 288-89.

In his motion to withdraw his plea, Allen asserted that he misunderstood the plea's consequences, particularly the meaning of the prosecutor's agreement to recommend only "substantial prison," that he felt rushed and pressured into entering the plea as counsel discussed the matter and the plea questionnaire while he was in the "bullpen" before the final pretrial conference, and that he was scared because it was his first time in the adult system. The circuit

[2] The circuit court held the postconviction motion in abeyance pending a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. The deadline for the circuit court to decide the postconviction motion under WIS. STAT. RULE 809.30(2)(i) was extended to July 19, 2018.

court found Allen's testimony that he did not understand the plea agreement and the prosecutor's promise lacked credibility. The court noted that Allen's trial counsel was aware of his young age, that counsel spent extra time with Allen to explain it all, and that Allen had a half hour to think about his pleas before giving his answer to counsel. The court also recognized Allen was in no different position than other defendants because nearly every defendant is scared at the prospect of admitting guilt and being sentenced, possibly to prison. The court concluded that no fair and just reason was presented based on emotions that nearly every defendant similarly feels when in Allen's position. Denial of the presentence motion to withdraw Allen's pleas was based on a proper exercise of discretion. No issue of arguable merit exists from the denial of the motion.

The no-merit report addresses the potential issues of whether Allen's pleas were knowingly, voluntarily, and intelligently entered, whether there was compliance with the plea agreement, whether the failure to inform Allen of mandatory DNA surcharges was a ground for plea withdrawal,[3] and whether the sentence was the result of an erroneous exercise of discretion or unduly harsh or excessive. We are satisfied that the no-merit report properly analyzes the plea proceeding and sets forth why there is no arguable merit to a motion for plea withdrawal.

With respect to sentencing, the no-merit report simply sets forth the standard of review and the conclusion that the sentencing court "considered all the appropriate factors in sentencing

[3] In his response, Allen expresses his disagreement with the holding of ***Frieboth***, 383 Wis. 2d 733, which renders meritless his claim that during the plea colloquy the circuit court should have informed him of the mandatory DNA surcharges that would be imposed. The Wisconsin Supreme Court denied a petition for review in ***Frieboth***, thus signaling that the issue has no merit. *See* ***id.***, *pet. for rev. denied*, 2018 WI 111, 384 Wis. 2d 465, 922 N.W.2d 293 (Nov. 13, 2018). Further, we are bound by the published decisions of our court. *See* ***Ranft v. Lyons***, 163 Wis. 2d 282, 299-300 n.7, 471 N.W.2d 254 (Ct. App. 1991).

Mr. Allen and explained on the record the reasons for the sentences [it] imposed." Without more, we are not able to simply adopt the discussion in the no-merit report as demonstrating that a challenge to the sentence lacks arguable merit.[4] In fashioning the sentence, the court considered Allen's lengthy juvenile court record and that Allen continued to commit crimes despite the services offered by the juvenile court system. What drove the sentence was that only sixteen days after the expiration of his juvenile order, Allen committed the "incredibly serious offenses" for which he was being sentenced. Based on the violent and aggravated nature of the crimes, Allen's culpability, and Allen's history, the court rejected probation as unduly depreciating the nature of the offenses. Despite Allen's youth, the court determined that the need to protect the public from further criminal activity by Allen required concurrent terms of fifteen years. The court properly exercised its discretion and had a reasoned explanation for the sentences imposed. There is no arguably meritorious basis to challenge the sentences.

In his response, Allen asserts that in taking his pleas, the circuit court failed to comply with the second and fourth duties as outlined in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906—to ascertain whether any agreements were made in connection with the pleas and to ensure that the defendant understands that an attorney can be provided at no expense.[5] Conceding, as he must, that he answered "no" when the court asked him if any threats

[4] The no-merit report lacks any analysis of the factors considered by the sentencing court and the court's remarks. Appointed counsel is reminded that a no-merit report must satisfy the discussion rule which requires a statement of reasons why the appeal lacks merit. ***State ex rel. McCoy v. Wisconsin Ct. of Appeals***, 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987). The discussion might include "a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result." ***Id.*** More than a conclusory statement of the frivolity of the appeal is required. *See* ***id.*** at 100-01.

[5] ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, summarizes the judge's duties during the plea colloquy. In relevant part it states that the court must:

(continued)

or promises were made to induce his guilty pleas, Allen contends he was not asked about any agreements and that he was unaware that "'agreements' were prohibited in respect[ ] to his plea." However, the court was made aware of the plea agreement that Allen had accepted—it was recited on the record at the start of the plea hearing. Contrary to Allen's contention, plea agreements are allowed. *See* ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 21, 203 N.W.2d 638 (1973). Having been informed of the agreement and made aware that there were no threats or promises, the court fulfilled the second duty outlined in ***Brown***. With respect to the fourth duty stated in ***Brown***, ascertaining that a defendant understands he or she is entitled to appointed counsel is only relevant when the defendant is not represented by counsel at the time the plea is entered. *See* ***State ex rel. Burnett v. Burke***, 22 Wis. 2d 486, 494, 126 N.W.2d 91 (1964) (stating that in accepting a guilty plea from an unrepresented defendant the court must ascertain that the defendant has freely and intelligently waived the right to counsel). Allen appeared by appointed counsel throughout the criminal prosecution, thus demonstrating his knowledge that a lawyer would be provided to him. There is no arguable merit to a claim that the circuit court failed to fulfill the duties as outlined in ***Brown***.

There being no infirmity in the plea proceeding, Allen's additional assertion that his trial counsel was ineffective during the plea hearing for not assuring that the second and fourth duties

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> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> ….
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him[.]

were fulfilled also lacks arguable merit. For the same reason, trial counsel who handled Allen's presentence plea withdrawal motion was not ineffective for not asserting the non-existent shortfalls in the plea colloquy.

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 Allen further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved from further representing Edward V. Allen, Jr., in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals