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January 15, 2020

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

2018AP2377-CRNM State of Wisconsin v. James Clinton Atterberry, Jr.
(L.C. # 2016CF4685)

Before Kessler, Dugan and Donald, 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).

James Clinton Atterberry, Jr., appeals from a judgment of conviction for one count of second-degree reckless homicide, contrary to WIS. STAT. § 940.06(1) (2015-16).¹ Atterberry also appeals from an order denying his postconviction motion. Atterberry's postconviction/appellate

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

counsel, Christopher D. Sobic, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Atterberry has not filed a response. We have independently reviewed the record and the no-merit report as mandated by *Anders*. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment and order.

It is undisputed that Atterberry and his friend, R.M., got into an altercation and that Atterberry, who had a license to carry a concealed weapon, shot R.M. multiple times, causing his death. Atterberry claimed that he fired his gun because R.M., who was very intoxicated, had threatened him. Atterberry was charged with first-degree reckless homicide and the case proceeded to a trial before a jury, where Atterberry asserted that he had acted in self-defense. The jury was unable to reach a unanimous verdict, and the trial court declared a mistrial.

Before any retrial of the case, Atterberry and the State reached a plea agreement pursuant to which Atterberry pled guilty to the lesser charge of second-degree reckless homicide. The State agreed to recommend incarceration and leave the length of incarceration to the trial court's discretion.

Atterberry completed a plea questionnaire and waiver of rights form. He also signed a written addendum that stated he understood that he was giving up various rights and defenses, including the defenses of intoxication and self-defense. The trial court conducted a plea colloquy with Atterberry and accepted his guilty plea. At sentencing, the trial court imposed a sentence of twelve years of initial confinement and seven years of extended supervision.

With the assistance of postconviction/appellate counsel, Atterberry filed a postconviction motion seeking resentencing. The motion alleged that the trial court "improperly relied on the

fact that Mr. Atterberry legally possessed the gun in this case in accordance with a carrying a concealed weapon license and also relied on inaccurate information regarding Mr. Atterberry's intoxication level in sentencing him." The trial court denied the motion in a written order. This appeal follows.

The no-merit report addresses three issues: (1) whether Atterberry's plea was intelligently, knowingly, and voluntarily entered; (2) whether the trial court erroneously exercised its sentencing discretion; and (3) whether there would be arguable merit to appeal the denial of Atterberry's motion for resentencing. The no-merit report thoroughly discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court is satisfied that the no-merit report properly analyzes the issues it raises.

With respect to Atterberry's guilty plea, the no-merit report analyzes the trial court's compliance with WIS. STAT. § 971.08; *State v. Hampton*, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14; and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Postconviction/appellate counsel concludes that there would be no arguable merit to asserting that Atterberry's plea was not intelligently, knowingly, and voluntarily entered. Having reviewed the record, including the plea hearing transcript, we agree with postconviction/appellate counsel's conclusion. We note that postconviction/appellate counsel acknowledges that during the plea colloquy, the trial court did not specifically repeat all of the constitutional rights that Atterberry was giving up, referring instead to the written plea questionnaire and waiver of rights form that listed those rights. There would be no arguable merit to challenge the trial court's reference to, and use of, that form during the plea colloquy. See *State v. Pegeese*, 2019 WI 60, ¶39, 387 Wis. 2d 119, 928 N.W.2d 590 (holding that a trial

court may utilize a waiver of rights form during a plea colloquy and that “a formalistic recitation of the constitutional rights being waived is not required”).

The no-merit report addresses the sentence that was imposed, providing citations to the sentencing transcript and analyzing the trial court’s compliance with *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Postconviction/appellate counsel concludes that there would be no arguable merit to assert that the trial court erroneously exercised its sentencing discretion, *see id.*, ¶17, or that the sentence was excessive, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with these assessments. The trial court considered the requisite sentencing factors and explained its sentencing decision. Further, the trial court could have imposed fifteen years of initial confinement and ten years of extended supervision. The sentence of twelve years of initial confinement and seven years of extended supervision was well within the maximum sentence, and 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 order denying Atterberry’s postconviction motion for resentencing. Postconviction/appellate counsel notes that, in the order denying the postconviction motion, the trial court explained its sentencing hearing comments on Atterberry’s use of a gun while under the influence of alcohol and “clarified that it did not actually rely on Mr. Atterberry legally possessing a gun in accordance with a concealed carry permit or his level of intoxication in sentencing him.” *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (recognizing that the trial court has an additional opportunity to explain its sentence when challenged by postconviction motion). We agree with

postconviction/appellate counsel's analysis of this issue and his conclusion that an appeal of the trial court's order would lack arguable merit.

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 postconviction/appellate counsel of the obligation to represent Atterberry 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 Christopher D. Sobic is relieved from further representing James Clinton Atterberry, 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