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December 14, 2015

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

2014AP2842-CRNM State of Wisconsin v. Jerome Bernard White (L.C. #2014CF494)

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

Jerome Bernard White appeals from a judgment of conviction, entered upon his guilty pleas, on two counts of substantial battery as a domestic violence incident. Appellate counsel[1]

[1] White's original appointed attorney was Adam Schleis, who prepared the no-merit report and a supplement. We were subsequently notified that Attorney Andrew Rider had been appointed as successor to Schleis. By order dated August 4, 2015, we directed Rider to advise whether he planned to rely on Schleis's filings or whether he planned to take some other action. Rider indicated he would rely on Schleis's reports.

has filed a no-merit report, pursuant to WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738 (1967). White was advised of his right to file a response, but he has not responded. Appellate counsel additionally submitted a supplemental no-merit report pursuant to this court's order. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's reports, we conclude there is no issue of arguable merit that could be pursued on appeal.

According to the criminal complaint, citizen G.H. reported that on February 1, 2014, he was walking with his girlfriend, R.F., when he observed her former live-in boyfriend, White, running towards them with a tire iron in his hand. White struck G.H. in the head, knocking him to the ground. R.F. told police she tried to intervene, but White then struck her in the head multiple times. R.F. lost consciousness at least twice and had an injury to her face requiring ten stitches, an injury to the back of her scalp requiring eight staples, and two nasal fractures. White was charged with substantial battery as a domestic abuse incident, misdemeanor battery, and misdemeanor disorderly conduct as a domestic violence incident, all with a dangerous-weapon enhancer.

White agreed to resolve this matter through a plea agreement. In exchange for his guilty pleas to the original substantial battery charge and a new, second substantial battery charge, both as a domestic abuse incident involving R.F., the State would dismiss and read in the other two offenses and drop the dangerous-weapon enhancer from all charges, the net result of which was to reduce White's overall prison exposure. The circuit court accepted the pleas and sentenced

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

White to one year of initial confinement and two years' extended supervision on each charge, to be served consecutively.

Counsel identifies three potential issues: whether there is any basis for a challenge to the validity of White's guilty pleas, whether the circuit court imposed a harsh and excessive sentence, and whether White received effective assistance from trial counsel during the sentencing hearing. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether White's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). White completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. White further acknowledged reviewing and understanding the complaint, which was later used to establish the factual basis for his pleas. The form correctly acknowledged the maximum penalties White faced, and the form, along with an addendum, also specified the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Among other things, the circuit court took care to document the intended scope of the amended charges, as the amendments were made only orally. The circuit court further took care to explain the effect of read-in charges. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. It also expressly confirmed that White understood he was surrendering the opportunity to raise affirmative defenses, such as self-defense.

In ordering the supplemental no-merit report, we directed counsel to address whether there might be an arguable challenge to the pleas because, although the circuit court did point out that White would be subject to the domestic abuse surcharge, it did not discuss with White what constitutes "domestic abuse." Further, neither the elements of domestic abuse nor its definition appeared to have been reviewed with White by his trial attorney.

Prior to accepting a guilty plea, the court must, among other things, ensure the defendant understands the nature of the charges against him. *See* ***Bangert***, 131 Wis. 2d at 262. A defendant who seeks to withdraw a guilty plea is entitled to an evidentiary hearing on the motion if he: (1) makes a *prima facie* showing that the circuit court's plea colloquy did not conform to WIS. STAT. § 971.08 or ***Bangert***; and (2) alleges that he did not know or understand the information that should have been provided during the plea hearing. *See* ***State v. Brown***, 2006 WI 100, ¶¶1-2, 293 Wis. 2d 594, 716 N.W.2d 906. Counsel's supplemental report indicates that White was well aware of the domestic abuse modifier's implications, including the fact that it would result in an additional assessment on each count. Thus, to the extent the circuit court was required by ***Bangert*** to review the domestic abuse modifier with White in more detail, there would be no basis for pursuing relief because White could not allege he did not understand the omitted information.

The plea questionnaire and waiver of rights form and addendum, the complaint, and the circuit court's colloquy appropriately advised White of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.

The second issue counsel raises is whether the circuit court's sentence was harsh and excessive, which is essentially a question of whether the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit 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. *See* ***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 circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that White had an extensive history of both violent and nonviolent offenses, which should have taught him that the criminal lifestyle was not the way to go. At sixty-one years of age, he was old enough to realize his behavior was inappropriate and he needed to understand how serious his offenses were. The circuit court noted that White could have killed R.F. or caused other serious injuries like a stroke. While White attempted to explain his actions by claiming that he had just run into R.F. and G.H. on the street where G.H. pulled a knife on him, the circuit court discounted that story, stating that it did not make much sense considering R.F. was the one who received the worst injuries, not G.H. The circuit court did, however, credit White for accepting responsibility with his pleas.

The maximum possible sentence White could have received was seven years' imprisonment. The sentence totaling six years' imprisonment is within the range authorized by

law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

The final issue counsel addresses is whether White received ineffective assistance of trial counsel at sentencing. During its initial sentencing comments, the State described a witness to the incident—a security manager for the building where G.H. lived. According to the State, the manager "was able to really confirm the version of events that both" victims gave. Later, the circuit court asked the State to remind it of what the manager would have testified to at a trial. Trial counsel did not object to the State providing this information.

It is not entirely clear why counsel believes this information presents a potential issue to address in the no-merit report, although it may be because the manager's statement made no mention of R.F., so it was possible the manager was not describing the same incident for which White was charged. Nevertheless, we agree with appellate counsel's conclusion that there is no arguable basis for a claim of ineffective trial counsel. Even if the manager witnessed a separate incident, circuit courts may consider uncharged and even unproven offenses at sentencing. *See* ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. Further, there is no indication that the manager's confirmation played any role in the circuit court's fashioning of the sentence—White already confirmed his culpability with his pleas, and the circuit court discounted White's explanation of events for its own internal lack of logic, not because there was a witness who contradicted it.

Our independent review of the record reveals no other potential issues of arguable merit.[3]

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 Andrew Rider is relieved of further representation of White in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] In ordering the supplement, we also asked counsel to address whether there is any arguable merit to a challenge to the imposition of the domestic abuse surcharges because WIS. STAT. § 973.055(1)(a)2. appears to require the circuit court to make an express, particular finding regarding the conduct in question before it imposes the surcharge. However, the record supports imposition of the surcharge even in the absence of the express finding; White was R.F.'s former live-in boyfriend, so the applicable statutory definition is fulfilled. *See* ***id.***; *see also* WIS. STAT. § 968.075(1)(a).