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September 20, 2018

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

2016AP1805-CRNM State of Wisconsin v. Matthew D. Seger (L.C. # 2014CF807)

Before Brennan, 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).

Matthew D. Seger appeals from a judgment of conviction for two counts of robbery of a financial institution. *See* WIS. STAT. § 943.87 (2013-14).[1] Seger's appellate counsel, Angela C. Kachelski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v.***

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

California, 386 U.S. 738 (1967). Seger filed a response and Kachelski filed a supplemental no-merit report. We have independently reviewed the record, the no-merit report, the response, and the supplemental 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 summarily affirm the judgment.

Seger was charged with two counts of robbery of a financial institution and one count of operating a motor vehicle without the owner's consent. According to the criminal complaint, a man—later identified as Seger—entered a bank and approached a bank teller. The complaint continues:

> [T]his individual slid a note with all capital block lettering in red to [the teller], which stated[,] "You're being robbed. Put money in bag. No dye packs." [The teller] indicated that this individual then stated[,] "I have bad news for you, you're being robbed, put all of your money in the bag, no dye packs. If you do, I'll come back for you."
>
> [The teller] indicated that this individual had brought a tan[-]colored plastic grocery bag into the bank and that he opened it and she placed a handful of money in the bag, which was an unknown amount of 10's, 20's and 5's. [The teller] indicated this male then left the bank through the west entrance with the bag in his hand.

The complaint alleges that two weeks later, Seger robbed the same bank again. The complaint states that Seger approached the counter of a different teller and handed her a note stating, "$10,000.00, No dye packs, No cops." The complaint continues:

> [The teller] went to get the bait money from the top drawer and the individual then stated[,] "[N]o, second drawer, hurry up." [The teller] stated that this individual had a regular size brown paper bag that [she] then placed money into. [The teller] described this individual as a male white, who was soft spoken.… [She] further indicated she was working in the bank at the time when the robbery had occurred on May 30, 2014 … and that the person who

> robbed her and presented her the note on June 13, 2014 was the same person who had robbed the bank on May 30, 2014.

The complaint alleged that when Seger drove away from the bank, he was driving a vehicle he had taken, without permission, from the car dealership where he worked. Thus, he was charged with operating a motor vehicle without the owner's consent.

In April 2015, while the case was pending, Seger personally wrote the trial court a letter raising numerous concerns about his case. Seger did not dispute that he was the man who took money from the bank on both occasions, but he asserted that he was not guilty of the robberies with which he was charged. He explained:

> In order for a robbery to have occurred per [WIS. STAT. §§] 943.87 [and] 939.50(3)(c) … there must be "use of force or threat of imminent force." Your Honor I threatened not a soul and certainly used no force nor had any weapon. In both counts … the face to face victims/witnesses described me as "soft spoken" and "hushed." Neither ever said that they w[]ere scared or threatened.

(Some capitalization omitted.) Seger's handwritten letter proposed a plea agreement pursuant to which he would plead guilty to two counts of theft from a financial institution, contrary to WIS. STAT. § 943.81, and one count of operating a motor vehicle without the owner's consent.

Less than two months after Seger wrote to the trial court, his attorney was allowed to withdraw based on a breakdown in the attorney-client relationship. New trial counsel was appointed for Seger. Trial counsel and Seger appeared at one status conference and then, one month later, Seger entered a plea agreement with the State. Pursuant to the plea agreement, Seger pled guilty as charged to two counts of robbery of a financial institution, and the motor

vehicle charge was dismissed.[2] In exchange, the State agreed to recommend a prison sentence of unspecified length. The trial court conducted a plea colloquy with Seger, accepted Seger's guilty pleas, and found him guilty. Seger was later sentenced to two consecutive terms of eight years of initial confinement and five years of extended supervision. Seger was ordered to pay two mandatory $250 DNA surcharges.[3] The trial court also declared Seger eligible for the Wisconsin Substance Abuse Program.

The no-merit report analyzes two issues: (1) whether Seger's guilty pleas were intelligently, knowingly, and voluntarily entered; and (2) whether the trial court properly exercised its sentencing discretion. This court agrees with appellate counsel's 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. We will also address the issues Seger raised in his response to the no-merit report and counsel's supplemental no-merit report.

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[2] One section of the guilty plea questionnaire indicated that Count 3 would be dismissed, while another section indicated Count 3 would be dismissed and read in. At the plea hearing, the State told the trial court that Count 3 was being dismissed, and it did not mention reading in Count 3 for sentencing purposes. The sentencing transcript does not reflect any discussion of Count 3, and the trial court signed a judgment of dismissal for Count 3.

[3] Because Seger was ordered to pay two mandatory DNA surcharges, we placed this appeal on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __. ***Freiboth*** held that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. *See **id.***, ¶12. Consequently, there would be no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges in Seger's case.

We begin with Seger's pleas. There is no arguable basis to allege that Seger's guilty pleas were 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). The trial court reviewed the nature of the crime of robbery of a financial institution, asking Seger: "Do you understand that the elements of that offense [are] that you did by use of force or threat of imminent force take from the individual or the presence of the individual money that was in the custody or control of a financial institution?" Seger responded: "I do." In addition, Seger, trial counsel, and the State stipulated to the facts in the criminal complaint for purposes of providing a factual basis for the crimes.

The transcript and the plea hearing documents demonstrate that the trial court conducted a plea colloquy that addressed the charges to which Seger was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶¶20-24, 38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. We conclude that the plea questionnaire, waiver of rights form, Seger's conversations with his trial counsel, and the trial court's plea colloquy appropriately advised Seger of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were

knowing, intelligent, and voluntary.[4] The record does not suggest there would be an arguable basis to challenge Seger's pleas.

In his response to the no-merit report, Seger raises an issue concerning advice he received from trial counsel prior to pleading guilty. He asserts that his trial counsel provided ineffective assistance "when describing [Seger's] options during the plea process." He explains:

> Simply put, had I known about "lesser included offenses" I would have chosen to go to trial and based my defense on the prosecution not being able to meet the elements of the charged offense and the jury having an option to find me guilty of Theft of a Financial Institution, a lesser included offense of Robbery of a Financial Institution…. [H]ad I known I could argue for a jury to reconcile their findings of fact with the prosecution's evidence which demonstrated the perpetrator was not armed, I would have unequivocally done so.

(Underlining omitted.) Seger asserts that but for trial counsel's error in advising him, he would have insisted on proceeding with a trial. Thus, he argues that he should be able to withdraw his guilty pleas and have a trial.

To be entitled to withdraw a guilty plea after sentencing, a defendant "must prove by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. Villegas***, 2018 WI App 9, ¶18, 380 Wis. 2d 246, 908 N.W.2d 198. Ineffective assistance of counsel can be a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829

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[4] We recognize that the trial court did not warn Seger that if he is not a citizen of the United States, his guilty pleas may lead to deportation or exclusion from this country. *See* WIS. STAT. § 971.08(1)(c). However, there would be no arguable merit to pursue postconviction proceedings based on that omission because the record indicates that Seger was born in Illinois and is, therefore, an American citizen. Accordingly, Seger could not demonstrate that his guilty pleas are likely to result in his deportation and that he was harmed by the lack of the statutory warning. *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶19, 378 Wis. 2d 504, 904 N.W.2d 773 (Harmless error analysis should be applied when the trial court fails to read the statutory warning concerning deportation.).

N.W.2d 482. To prevail on an ineffective assistance of counsel claim, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

The supplemental no-merit report concludes that there would be no arguable merit to seek plea withdrawal based on alleged ineffective assistance of counsel, and appellate counsel further indicates that she previously reviewed this issue with Seger. Appellate counsel disputes Seger's suggestion that theft from a financial institution, *see* WIS. STAT. § 943.81, is a lesser-included offense of robbery of a financial institution, *see* WIS. STAT. § 943.87. She also notes that Seger was fully aware of the potential for challenging whether his actions demonstrated use or threat of use of force, as he raised the issue in his correspondence with the trial court, but he still chose to plead guilty. Finally, appellate counsel asserts: "If Mr. Seger had gone to trial, it is most likely that there would not have been a basis for an instruction regarding theft of a financial institution."

We conclude there would be no arguable merit to seek plea withdrawal based on ineffective assistance of trial counsel because it would have been inaccurate for trial counsel to advise Seger that theft from a financial institution, *see* WIS. STAT. § 943.81, is a lesser-included offense of robbery of a financial institution, *see* WIS. STAT. § 943.87. Wisconsin uses an "elements only" test to determine if a crime is a lesser-included offense of another crime. ***State v. Carrington***, 134 Wis. 2d 260, 264, 397 N.W.2d 484 (1986). ***Carrington*** explained:

> Under the elements only test, the lesser offense must be statutorily included in the greater offense and contain no element in addition to the elements constituting the greater offense. An offense is a lesser included one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense.

Id. at 265 (citation, bracketing, and quotation marks omitted).

Applying those standards here, it is clear that theft from a financial institution, *see* WIS. STAT. § 943.81, is not a lesser-included offense of robbery of a financial institution, *see* WIS. STAT. § 943.87. Robbery of a financial institution is committed when a person "by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution." *See* § 943.87. Theft from a financial institution is committed by a person who:

> knowingly uses, transfers, conceals, or takes possession of money, funds, credits, securities, assets, or property owned by or under the custody or control of a financial institution without authorization from the financial institution and with intent to convert it to his or her own use or to the use of any person other than the owner or financial institution.

See § 943.81. Theft from a financial institution contains at least two elements that are not required to prove robbery of a financial institution: that the individual acted "without authorization from the financial institution" and "with intent to convert [the money, funds, credits, securities, assets, or property] to his or her own use or to the use of any person other than the owner or financial institution." *See* ***id.*** Because theft from a financial institution contains one or more elements "in addition to the elements constituting the greater offense" of robbery of a financial institution, it is not a lesser-included offense. *See* ***Carrington***, 134 Wis. 2d at 265. Therefore, there would be no arguable merit to filing a motion asserting that trial counsel provided ineffective assistance by failing to advise Seger that theft from a financial institution was a lesser-included offense of robbery of a financial institution.

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. The trial court considered Seger's criminal history, which included a 1992 conviction for bank robbery, additional convictions, and participation in drug treatment court. The trial court stated:

> You had been a bank robber, you were punished for that robbery, and then you returned to identical behavior years later, and not only identical behavior, but two times robbing the same institution in an identical manner with two weeks between [the crimes]. That shows a very blatant disregard for the law regarding bank robbing, regarding scaring people that work in those kinds of places, and so it's very serious behavior.

The trial court said that Seger was "a significant danger."

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 merit to assert

that the sentences were excessive. *See **Ocanas***, 70 Wis. 2d at 185. Seger was facing up to eighty years of imprisonment, including fifty years of initial confinement. His two consecutive sentences of eight years of initial confinement and five years of extended supervision were well within the maximum total sentences, 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.").

In his response to the no-merit report, Seger asserts that the trial court relied on "inaccurate and prejudicial statements" at the sentencing hearing. First, he contends that the State erroneously stated that he had "eight felony offenses." In response, the supplemental no-merit notes that the presentence investigation report identified nine convictions, although counsel points out that "it is unclear if all nine are felonies." Having reviewed the presentence investigation report and the sentencing transcript, we agree with appellate counsel's analysis and conclusion: "The prosecutor's statement was not inaccurate, but even if it was, the court did not focus on the number of convictions." Therefore, there would be no merit to seeking resentencing based on this issue.

Next, Seger's response asserts that the State should not have been allowed to tell the trial court that although Seger did not use a weapon during the robberies, the prosecutor "personally interviewed the witnesses who dealt with this defendant directly and who witnessed the incidents in both cases and they certainly believed there was a weapon." Seger further complains about the following statement from the prosecutor: "When I talked to the tellers and people involved in this case, some of them won't even work at some of these same facilities anymore. So, I mean, they have changed their ability to go to the work they've gone to for a dozen years." Seger argues this was false because "[t]he witnesses in question are still employed" at the bank.

As the no-merit report explains, trial counsel at the sentencing hearing disputed the State's representation that the victims believed Seger had a weapon, noting that the police reports did not support that representation. As for the State's representation that some of the employees "won't even work" at the bank as a result of being victims, the no-merit report indicates that appellate counsel hired an investigator to attempt to contact the tellers, but the tellers did not respond to cards or calls left by the investigator. Appellate counsel asserts that because she could not disprove the prosecutor's statements, there is no issue of arguable merit to pursue.

In order to bring "a motion for resentencing based on a [trial] court's alleged reliance on inaccurate information, a defendant must establish that there was information before the sentencing court that was inaccurate, and that the [trial] court actually relied on the inaccurate information." *See* ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the [trial] court 'actually relied' on the incorrect information at sentencing was based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" *See* ***id.***, ¶14 (citation omitted).

We conclude that there would be no arguable merit to bring a motion for resentencing based on allegedly inaccurate information. First, appellate counsel has indicated that she was unable to develop evidence that the State's representations were false. Based on the lack of available evidence that the State's representations were inaccurate, there would be no arguable merit to bringing a postconviction motion. *See* ***id.*** Moreover, even if it could be shown that the State's representations were inaccurate, there would still be no arguable merit to bringing a motion because there is no indication that the trial court relied on the State's representations. *See* ***id.*** Specifically, the transcript does not indicate that the trial court relied on the two facts Seger disputes—that the victims believed he had a weapon and that some of the victims no longer work

at the bank—when it imposed the sentences. Instead, the trial court focused on the fear the victims felt, which was undisputed.[5] Accordingly, we are not persuaded that Seger has identified an issue of arguable merit concerning the State's representations.

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 Angela C. Kachelski is relieved of further representation of Seger in this matter. *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

[5] During her sentencing argument, trial counsel told the trial court: "I'm not saying that they didn't experience any fear." When Seger directly addressed the trial court, he also acknowledged that the victims experienced fear, stating: "I've spent many nights and I know that they had to be scared. I'm a 6 foot 2 inch man standing across the counter from them and telling them to give me money. I make no bones about that and I'm sorry for that and I'm sorry to [the b]ank."