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DISTRICT II

September 23, 2020

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

2019AP76-CRNM State of Wisconsin v. Monttrail L. Tillman (L.C. #2016CF1349)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Attorney Vicki Zick has filed a no-merit report seeking to withdraw as appellate counsel for Monttrail Tillman. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a

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

challenge to Tillman's plea or sentencing. Tillman was sent a copy of the report, but has not filed a response. We issued an order questioning whether there would be arguable merit to a postconviction motion challenging Tillman's plea or sentence credit, and counsel has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit report and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Tillman was charged with three counts of attempted first-degree intentional homicide and one count of possession of a firearm by a felon as a repeater based on an August 20, 2016 shooting, and one count of attempted first-degree intentional homicide and one count of possession of a firearm by a felon as a repeater based on an August 29, 2016 shooting. Pursuant to a plea agreement, Tillman pled guilty to two amended counts of second-degree recklessly endangering safety and one count of felon in possession of a firearm as a repeater, and the remaining counts were dismissed and read-in for sentencing. At sentencing, the court imposed nine years of initial confinement and five years of extended supervision on count six. The court imposed five years of initial confinement and two years of extended supervision on counts one and five, concurrent to each other but consecutive to count six, but stayed those sentences and imposed five years of probation.

First, the no-merit report concludes that there would be no arguable merit to a challenge to Tillman's plea. We issued an order questioning whether there would be arguable merit to a postconviction motion challenging Tillman's plea based on a discrepancy between the stated plea agreement, Tillman's pleas, and the judgment of conviction. We noted that, at the plea hearing, the State offered an amended information with counts one and five amended from attempted first-degree intentional homicide to second-degree recklessly endangering safety. The parties

agreed that, pursuant to the plea agreement, Tillman would plead guilty to amended counts one and five, and also to count six, the felon in possession count based on the August 29, 2016 shooting, and the remaining counts would be dismissed and read in. However, the court then took guilty pleas from Tillman on amended counts one and five and count four, the felon in possession count from the August 20, 2016 shooting. We also noted that, while the plea hearing reflects that Tillman pled guilty to counts one, four, and five, the judgment of conviction reflects convictions for counts one, five, and six. We directed counsel to review whether there would be arguable merit to a postconviction motion for plea withdrawal on that basis and to consult with Tillman, and to provide this court with further input.

In response to our order, counsel informed us that Tillman does not wish to withdraw his plea. Because Tillman does not wish to pursue a motion for plea withdrawal, whether or not such a motion would have arguable merit, we will not further address the validity of Tillman's plea. A valid guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Tillman's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offenses, Tillman's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Tillman faced and, given the facts of

this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (citation omitted)). We discern no other basis to challenge the sentence imposed by the circuit court.[2]

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

[2] Our prior order questioned whether there would be arguable merit to a postconviction motion challenging the award of sentence credit. We noted that the judgment of conviction for the imposed and stayed sentences for counts one and five awarded Tillman 594 days of sentence credit, while the judgment of conviction for the imposed sentence for count six awarded Tillman zero days of sentence credit. Accordingly, we noted, it appeared that the sentence credit was improperly awarded on the imposed and stayed sentences, rather than the imposed sentence. *See* ***State v. Wolfe***, 2001 WI App 66, ¶1, 242 Wis. 2d 426, 625 N.W.2d 655 (sentence credit must be applied to term of incarceration, not consecutive stayed sentence). Counsel filed a supplemental no-merit report explaining that Tillman was not in custody in connection with these offenses for that time, but rather was serving a revocation sentence in another case. Counsel explains that Tillman received the sentence credit on his revocation sentence, and that because these sentences are consecutive to the revocation sentence, Tillman is not entitled to any additional sentence credit for that time in custody. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988). Counsel informs us that the circuit court has entered an amended judgment of conviction awarding no sentence credit in these cases. Based on the information provided by counsel, we conclude that there would be no arguable merit to further proceedings based on sentence credit.

IT IS ORDERED that the judgments of conviction are affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of any further representation of Monttrail Tillman 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