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DISTRICT II

August 31, 2016

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

2015AP2517-CRNM State of Wisconsin v. Hycel D. Buford (L.C. #2014CF606)

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

Hycel D. Buford appeals from a judgment convicting him of attempting to flee or elude a traffic officer and misdemeanor bail jumping and from an order denying his motion to withdraw his guilty pleas. Buford's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding that there

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

exist no issues of arguable merit. Buford was notified of his right to file a response but has elected not to do so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Buford, on a motorcycle, led police on a high-speed chase, running red lights and reaching speeds in excess of 130 mph, forcing police to abandon the chase. Buford crashed and fled on foot. He was found hiding in a nearby subdivision.

He pled guilty to attempting to flee or elude a traffic officer and misdemeanor bail jumping; an operating-while-revoked charge and a second bail-jumping charge were dismissed and read in. On the eluding conviction, the court sentenced him to the maximum three and a half years' imprisonment. On the bail jumping, the court ordered one year probation, imposed, and six months' jail, stayed, consecutive to the prison term. The sentence exceeded the parties' and PSI recommendations. Postconviction, he sought to withdraw his pleas on grounds that, based on assurances from defense counsel, he did not understand that he could receive a sentence above the PSI recommendation. The court denied his motion without a ***Machner***[2] hearing. This no-merit appeal followed.

The no-merit report first considers whether Buford's pleas were knowingly, intelligently, and voluntarily entered. A defendant seeking to withdraw a guilty plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). There is no manifest injustice upon which Buford could withdraw his pleas. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's thorough colloquy, augmented by the plea questionnaire and waiver of rights forms, informed Buford of the constitutional rights he waived by pleading, the elements of the offenses, and the potential penalties. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30-32, 317 Wis. 2d 161, 765 N.W.2d 794. An adequate factual basis supported the convictions. The court gave him extra time to meet with counsel and expressly advised him that it was not bound by the parties' or PSI recommendations and could impose the maximum penalties. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. Buford repeatedly assured the court that he had sufficient time to discuss his plea with counsel and affirmatively acknowledged that he understood it. The record shows the pleas were knowingly, voluntarily and intelligently entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The report also examines whether there exists any basis on which to challenge the sentence imposed. The record reveals that the court considered the proper factors, including the seriousness of the offenses, Buford's character and rehabilitation needs, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). It fully explained why it rejected the PSI's recommendation of probation in lieu of an imposed-and-stayed prison term and explained that read-ins can enhance the penalty. It specifically noted his "medium" criminal history and past supervision failures, and emphasized the "highly dangerous, highly aggravated set of circumstances" that endangered his own life and the lives of the police officers and the public.

Although the court imposed the maximum sentence, it examined the particular circumstances within a framework the legislature determined is proper. The sentence is not so excessive, unusual, or disproportionate to the offense committed as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A challenge to it being excessive or overly harsh thus would be meritless.

Our independent review of the record prompts us to address two other matters. First, the court commissioner did not inform Buford at the initial appearance of the penalties he faced for the felony. *See* WIS. STAT. § 970.02(1)(a). But entry of a valid guilty plea constitutes a waiver of non-jurisdictional defects and defenses. ***Bangert***, 131 Wis. 2d at 265-66, 293.

Second, we consider whether the postconviction court should have granted Buford a ***Machner*** hearing on his claim that he pled guilty based on counsel's "statements or lack thereof" that the sentencing court would follow the PSI's and parties' recommendations. He also claimed he did not understand the plea consequences because he had no contact with his counsel between the initial and adjourned plea hearings as counsel was on vacation out of state.

When a defendant challenges the effectiveness of trial counsel in a postconviction motion, the circuit court must hold an evidentiary hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. That presents a question of law we review de novo. ***Id.*** The court has the discretion to grant or deny a hearing, however, if "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***

The court here found that Buford's claims that he did not have enough time to confer with counsel and did not understand the plea were conclusory and contradicted by the record. We agree. After Buford advised the court at the initial plea hearing that he had not read the complaint defense counsel told the court:

> I met with [Buford] at the jail recently. We have discussed on multiple occasions the facts of the case, the state's recommendation, potentially how this case will go once the PSI is requested. He's aware of the maximum penalties, that you're under no obligation to follow the recommendations of either party.

The court declined to proceed until Buford received a copy and adjourned the matter a week.

At the adjourned hearing, Buford confirmed that he reviewed the complaint, information, and plea questionnaire with counsel and discussed with him the status of the case. The court made clear to Buford that it was not bound to adopt any sentencing recommendation. *See* ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41.

> THE COURT: At [the] sentencing hearing, the court imposes an independent sentence. I don't have to follow what any of the recommendations are in this case. I impose an independent sentence which can be up to the maximum [that] we will talk about in a few minutes for each of the charges consecutive to each other. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> ….
>
> THE COURT: At sentencing then I can impose a sentence up to the maximum of three and a half years plus the $10,000 fine and six months revocation of your driver's license. I can impose a maximum sentence on the bail jumping, nine months in the county jail, $10,000 fine or both and I can run them consecutive to each other. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: That is one after another. So then the total time in prison or jail would be 3 and a half years, 3 years 6 months

> plus 9 months, that would come out to 4 years and 3 months. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

Buford acknowledged being told he could receive the maximum sentence but that he opted to "trust" counsel's out-of-court assurances that the plea deal "would minimize or eliminate jail time." This allegation is conclusively refuted by the record. The court properly exercised its discretion in denying his request for a ***Machner*** hearing.

Our review of the record discloses no further potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney William Thomas Croke is relieved of further representing Buford in this matter.

Diane M. Fremgen
Clerk of Court of Appeals