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DISTRICT I

November 12, 2018

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

2017AP669-CRNM State of Wisconsin v. Dominique D. Leflore (L.C. # 2016CF773)

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).

Dominque D. Leflore appeals from a judgment of conviction, entered upon his guilty pleas to four drug-related offenses. Appellate counsel, Jon A. LaMendola, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32

(2015-16).[1] Leflore was advised of his right to file a response, but he has not responded. Counsel also filed a supplemental no-merit report at this court's request. Upon our independent review of the record, as mandated by ***Anders***, and counsel's reports, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Leflore was arrested after a series of controlled drug buys made with confidential informants. A criminal complaint charged Leflore with seven offenses: counts one through four alleged manufacture or delivery of less than three grams of heroin; count five alleged manufacture or delivery of less than three grams of heroin as a party to a crime with use of a dangerous weapon; count six alleged possession with intent to deliver between one and five grams of heroin as a party to a crime with use of a dangerous weapon; and count seven alleged possession with intent to deliver between three and ten grams of heroin as a party to a crime with use of a dangerous weapon.

The case was resolved with a plea agreement. In exchange for guilty pleas to counts one, two, six, and seven, the State would dismiss and read in counts three, four, and five, and would dismiss the dangerous weapon enhancer from counts six and seven. Additionally, while the State would recommend a prison sentence, it would not recommend any specific length. The circuit court accepted Leflore's pleas and imposed concurrent and consecutive sentences totaling seven years of initial confinement and seven years of extended supervision. Leflore appeals; appellate counsel discusses five potential issues, which he concludes lack arguable merit.

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

The first potential issue appellate counsel discusses is whether there is any arguable merit to a claim that Leflore's pleas were not knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights form and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Leflore's pleas were anything other than knowing, intelligent, and voluntary.[2]

The second issue appellate counsel addresses is whether the circuit court erroneously 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, *see* ***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 court should consider primary factors including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. *See* ***State v. Odom***, 2006

[2] Four mandatory DNA surcharges were assessed on the judgment of conviction. Because of the multiple DNA surcharges, we put 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 he was not advised at the time of the plea that multiple mandatory DNA surcharges would be imposed. ***Odom*** was voluntarily dismissed before oral argument. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. ***Freiboth*** holds that a circuit court does not have a duty during a plea colloquy to inform a defendant about mandatory DNA surcharges because the surcharge is not a punishment or a direct consequence of the plea. *See* ***id.***, ¶12. Thus, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

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.

Our review of the record satisfies us that the circuit court properly exercised its sentencing discretion. It explained that probation was not appropriate because of the seriousness of the offenses. It observed that police were so concerned about how their "takedown" was going to go that they took the unusual step of using aerial surveillance. It noted that Leflore's offenses involved a substantial amount of drugs, a stolen vehicle, and a firearm. However, the circuit court also noted Leflore had experienced a difficult childhood and gave him credit for taking responsibility with his pleas.

On count one, manufacture or delivery of less than three grams of heroin, the circuit court imposed three years of initial confinement and three years of extended supervision. On count two, the same offense, it imposed three and one-half years of initial confinement and three and one-half years of extended supervision, increasing the sentence slightly for the repeat offense. On count six, possession with intent to deliver one to five grams of cocaine as party to a crime, the circuit court imposed two and one-half years of initial confinement and two and one-half years of extended supervision. On count seven, possession with intent to deliver three to ten grams of heroin as party to a crime, the circuit court imposed four and one-half years of initial confinement and four and one-half years of extended supervision. Counts one, two, and seven were made concurrent because they involved the same drug, though the time imposed in count seven was higher for the larger amount of drugs involved. These three concurrent sentences were made consecutive to count six; count six was separate because it involved a different drug and a different time.

The maximum possible sentence Leflore could have received was fifty-two and one-half years of imprisonment. The concurrent and consecutive sentences totaling fourteen years of imprisonment are well 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 are 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 in setting the terms of imprisonment.

In an order dated August 8, 2018, we asked for a supplemental no-merit report regarding restitution. As part of the plea agreement, the State requested and Leflore agreed to pay $640 in restitution to compensate the High Intensity Drug Trafficking Area Gang Task Force for the "buy money" used in the controlled buys. However, this court has previously held that buy money cannot be ordered as restitution. *See* ***State v. Evans***, 181 Wis. 2d 978, 979, 512 N.W.2d 259 (Ct. App. 1994). The legislative response to that holding was to authorize recovery of buy money as an item of costs. *See* WIS. STAT. § 973.06(1)(am).

After receiving our order, the parties stipulated to vacating the restitution amount. The circuit court approved the stipulation and entered an amended judgment that set restitution at zero. Appellate counsel has provided a copy of the amended judgment with the supplemental no-merit report. Thus, any issue of arguable merit with regard to the amount of restitution ordered has been eliminated by the amended judgment.

Appellate counsel additionally briefly discusses whether there are new factors to support a sentence modification motion, whether Leflore is entitled to additional sentence credit, and whether trial counsel was ineffective. Appellate counsel notes that Leflore has suggested no new

factors and counsel is aware of none. On the record before us, we agree that there are no new factors that would support an arguably meritorious sentence modification motion. Appellate counsel notes that Leflore was awarded 168 days of sentence credit, and additional credit would be "improper and unjustified." We agree that 168 days of credit appears to be the amount to which Leflore is entitled, so there is no arguable merit to a claim for additional credit.

Finally, appellate counsel notes that he "is not aware of any action or inaction by trial counsel which was deficient or prejudicial." We note that, depending on how the restitution matter was resolved, there might have been an ineffective assistance claim for allowing Leflore to agree to otherwise prohibited restitution as part of a plea agreement. However, because the restitution award has been vacated, Leflore has suffered no prejudice. We therefore agree with appellate counsel's conclusion that there is no arguably meritorious claim of ineffective assistance of trial counsel.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment appealed from, as subsequently modified to vacate restitution, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jon A. LaMendola is relieved of further representation of Leflore 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