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DISTRICT IV

August 19, 2013

To:

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

2012AP824-CRNM	State of Wisconsin v. Bernard Clark, Jr. (L.C. #2011CF1054)
2012AP825-CRNM	State of Wisconsin v. Bernard Clark, Jr. (L.C. #2011CF1120)

Before Lundsten, Sherman and Kloppenburg, JJ.

Attorney Eileen Hirsch, appointed counsel for Bernard Clark, Jr., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Clark's plea or sentencing. Clark was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Clark was charged with substantial battery, felony intimidation of a victim, strangulation, and battery, all as a repeater. Subsequently, Clark was charged with felony bail jumping, as a repeater, after he attempted to contact the victim contrary to the conditions of his release on bail. Pursuant to a plea agreement, Clark pled no-contest to amended charges of strangulation, misdemeanor intimidation of a victim, and misdemeanor bail jumping. The remaining charges were dismissed and read-in, and all the repeater allegations were dropped. The court sentenced Clark to a total of two years and four months of confinement and three years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Clark's plea. A postsentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Clark and determine that Clark understood the nature of the charges, the range of punishments he faced, and the direct consequences of the plea.² See *State v. Hoppe*,

² At the plea hearing, the circuit court failed to personally advise Clark of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). A circuit court's failure to give the deportation warning may support a postconviction motion for plea withdrawal if the plea is likely to result in the defendant's "deportation, exclusion from admission to this country or denial of naturalization." See § 971.08(2); see also *State v. Douangmala*, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. However, our review of the presentence investigation report indicates that Clark was born in Oklahoma, and thus it appears that Clark is a United States citizen. See 8 U.S.C.A. § 1401. Accordingly, we discern no arguable merit to this issue.

(continued)

2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The court also reviewed the plea questionnaire and waiver of rights form Clark had signed, ascertaining that Clark had reviewed the forms with his attorney, that his attorney had explained each item on the form to him, and that Clark understood the rights he was giving up as listed on the form. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Clark's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Clark's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including the need to protect the community, Clark's character and criminal history, and the seriousness of the offenses. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the applicable penalty range. *See* WIS. STAT. §§ 940.235(1); 939.50(3)(h); 973.01(2)(b)8.; 940.44(1); 946.49(1)(a); 939.51(3)(a). We agree with counsel's assessment that a claim that the sentence was unduly harsh would lack arguable merit. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Clark 130 days of sentence credit. We discern no erroneous exercise of the court's sentencing discretion.

Additionally, as counsel notes, the circuit court failed to personally ascertain Clark's ability to understand the proceedings or whether any threats or promises had been made to induce the plea. However, counsel informs us that Clark cannot allege that his understanding was impaired in any way or that he was threatened or forced to enter his plea. Clark has not responded to the no-merit report. Accordingly, our review of the entire record before us indicates that a challenge to Clark's plea would lack arguable merit.

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

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

IT IS FURTHER ORDERED that Attorney Hirsch is relieved of any further representation of Clark in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals