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DISTRICT II

September 4, 2013

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

2013AP1484-CRNM State of Wisconsin v. Michael Moulster (L.C. #2012CF169)

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

Michael Moulster appeals from a judgment convicting him of burglary. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Moulster received a copy of the report and was advised of his right to file a response but did not exercise it. Upon consideration of the no-merit report and our independent review of the record as mandated by ***Anders***, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on

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

appeal. *See* WIS. STAT. RULE 809.21. We accept the no-merit report, affirm the judgment and relieve Attorney Michael S. Holzman of further representing Moulster in this matter.

Over a nine-month period, Moulster broke into the homes and a business of several acquaintances and stole, among other things, weapons, ammunition, and a laptop computer. Moulster was arrested when he attempted to sell one of the stolen guns. Pursuant to a plea agreement, he entered no-contest pleas to four counts of burglary, one of them while armed; a separate misdemeanor case charging Moulster with receiving stolen property was dismissed and read in for sentencing. The circuit court sentenced Moulster to nine years' initial confinement plus eight years' extended supervision. This no-merit appeal followed.

The no-merit report addresses two possible appellate issues: whether Moulster knowingly, voluntarily and intelligently entered his no-contest plea and whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues have no arguable merit.

The record discloses that Moulster's no-contest plea was knowingly, voluntarily and intelligently entered, *see* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986), and had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Moulster signed, coupled with the substantive colloquy, is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987); ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Recognizing Moulster's intellectual limitations, the court made certain that he understood the rights he was waiving, and the meaning of particular terms, *e.g.*, "confrontation" and "read in." Any other possible appellate issues are

waived because a no-contest plea waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53 (Ct. App. 2002).

As to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion,*** 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and sentencing factors relevant to Moulster. It considered the seriousness of the home invasions, the reflection on his character of his decision to have his children at his sentencing, and the need to protect the public from the stolen firearms ending up in the community. The court also noted Moulster's efforts since his incarceration to address his learning and reading deficits. We cannot say that the sentence imposed—well below the fifty-plus years he faced—is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The circuit court also ordered Moulster to pay the $250 DNA surcharge, a discretionary call upon his felony conviction. *See* WIS. STAT. § 973.046(1g). When the decision to impose the surcharge is discretionary, the circuit court must explain its decision. ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 ("[I]n exercising discretion, the trial court must do something more than … impos[e] the DNA surcharge simply because it can."). The trial court "should consider any and all factors pertinent to the case before it, and … should set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge." ***Id.***, ¶9. The circuit court here did not state its rationale.

A circuit court erroneously exercises discretion when it fails to recite the factors that influenced its determination. ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d

832. Still, regardless of the extent of the court's stated reasoning, we will uphold a discretionary decision if there are facts in the record that "would support the [circuit] court's decision had it fully exercised its discretion." ***Id.*** (citation omitted). This court, too, has rejected the notion that the trial court must explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. We look to the court's entire sentencing rationale to determine whether imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

The court may consider a defendant's financial resources. ***Cherry***, 312 Wis. 2d 203, ¶10. The presentence investigation report indicates a long history of full-time employment. Moulster also told the PSI writer that he intended to eventually return the items, as he took one from a former roommate "as a joke" and others "to get back at" acquaintances because he was angry at them over perceived slights. The court found that restitution of over $15,000 was appropriate. Given that Moulster is demonstrably employable and that restitution of over $15,000 was deemed appropriate, ordering him to pay the $250 surcharge was within the court's discretion. Furthermore, appellate counsel recognized this as a potential issue for appeal and discussed the matter with his client. Moulster affirmatively stated that he did not want to challenge the surcharge on appeal. We therefore agree with appellate counsel that there would be no arguable merit to this issue.

Our independent review of the record does not disclose any other potentially meritorious issue for appeal. Therefore, we accept the no-merit report, affirm the judgment of conviction and relieve appellate counsel of further representation of Moulster in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved from further representing Moulster in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals