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DISTRICT II

September 11, 2013

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

2013AP663-CRNM State of Wisconsin v. Wayne E. Mohnsam, Jr. (L.C. # 2011CF133)

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

Wayne E. Mohnsam, Jr., appeals from a judgment convicting him of theft in a business setting. Mohnsam's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738 (1967). Mohnsam received a copy of the report, was advised of his right to file a response, and has elected not to do so. After

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

reviewing the record and counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses the following appellate issues: (1) whether Mohnsam's no contest plea was knowingly, intelligently, and voluntarily entered;² and (2) whether Mohnsam's counsel was ineffective at the restitution hearing for failing to present evidence of Mohnsam's financial situation and ability to pay.

With respect to the entry of the no contest plea, the record shows that the circuit court engaged in a colloquy with Mohnsam that satisfied the requirements of WIS. STAT. § 971.08(1)(a), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶¶33, 38, 274 Wis. 2d 379, 683 N.W.2d 14.³ In addition, a signed plea questionnaire and waiver of rights form was entered into the record. Accordingly, we agree with counsel that any challenge to the entry of Mohnsam's no contest plea would lack arguable merit.

With respect to whether Mohnsam was afforded effective assistance of counsel at his restitution hearing, we note that WIS. STAT. § 973.20(14)(b) places the burden upon the defendant to present evidence as to his financial resources and present and future ability to pay. The party who has the burden of proof cannot rely upon argument of counsel to fulfill this obligation. *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990).

² In particular, the report focuses on whether Mohnsam understood the constitutional rights he was waiving by entering his plea and whether a factual basis existed to support the plea.

³ To the extent that there were arguable deficiencies in the plea colloquy regarding either the constitutional rights Mohnsam was waiving or the factual basis supporting the plea, counsel concedes that (1) Mohnsam is unable to make an initial showing under *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); and (2) the criminal complaint, which Mohnsam acknowledged as accurate, contains sufficient facts to support the plea.

Consequently, we conclude that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.⁴

Our independent review of the record does not disclose any potentially meritorious issue for appeal.⁵ Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Ana L. Babcock of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Ana L. Babcock is relieved of further representation of Mohnsam in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Although counsel's report does not address the issue, we also conclude that a challenge to the circuit court's decision at sentencing would lack arguable merit. That is because the circuit court's decision to withhold Mohnsam's sentence and place him on probation for three years with sixty days of conditional jail time was consistent with the parties' joint recommendation. *See State v. Magnuson*, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998) (a defendant is judicially estopped from arguing that a sentence he or she agreed to was excessive).

⁵ Mohnsam did move to suppress certain inculpatory statements he provided to police. However, he elected not to litigate the motion prior to entering his plea. Thus, we deem the issue abandoned and will not consider it now. *See Herkert v. Stauber*, 106 Wis. 2d 545, 560-61, 317 N.W.2d 834 (1982) (generally, an issue is not properly before us on appeal when the circuit court was not given an opportunity to consider an argument and either correct itself or make a ruling that this court could then review).