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DISTRICT II

April 16, 2014

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

2013AP1990-CRNM State of Wisconsin v. Kurt A. Witak (L.C. # 2012CF677)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Kurt A. Witak appeals from a judgment convicting him of aggravated battery with intent to cause bodily harm with the use of a dangerous weapon. Witak'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). Witak received a copy of the report, was advised of his right to file a response, and has elected not to do so. Counsel then filed a supplemental no-merit report per this court's

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

order.² After reviewing the record and counsel's reports, 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 reports address the following appellate issues: (1) whether Witak's no contest plea was knowingly, voluntarily, and intelligently entered, (2) whether Witak has a basis to challenge his sentence, and (3) whether the circuit court erred in imposing restitution.

With respect to the entry of the no contest plea, the record shows that the circuit court engaged in a personal colloquy with Witak that satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.³ In addition, a signed plea questionnaire and waiver of rights form was entered into the record. This form, which the court referred to during its colloquy, is competent evidence of a valid plea. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). We conclude that there would be no arguable merit to a challenge to the entry of Witak's no contest plea.

With respect to the sentence imposed, the record reveals that the circuit court's decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing its sentence, the court considered the seriousness of the offense,

² The record did not include a transcript of the restitution hearing. Accordingly, we required counsel to obtain a transcript and submit a supplemental no-merit report addressing the issue.

³ There is one exception to this. The circuit court failed to establish Witak's understanding of the range of punishment to which he was subjecting himself by entering his plea. This failure does not present a potentially meritorious issue for appeal, however, as Witak was informed of the maximum sentence for his offense at his initial appearance. Moreover, counsel notes that the maximum sentence is contained in the plea questionnaire and waiver of rights form and appears to be in Witak's handwriting.

Witak's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by the impact of the crime on the victim,⁴ the sentence does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We conclude that there would be no arguable merit to a challenge to the sentence.⁵

Finally, with respect to the issue of restitution, we are satisfied that the circuit court did not err in imposing it. As noted by counsel, the court ordered restitution only in the amounts to which Witak agreed. The court also appropriately found that Witak had the ability to pay the amount ordered based upon his prior employment history and period of extended supervision. We conclude that there would be no arguable merit to a challenge to the restitution.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. 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 Brandon Kuhl of further representation in this matter.

Upon the foregoing reasons,

⁴ As a result of Witak's battery, the victim had six plates put in his face, twenty-two screws, and a new mesh eye socket.

⁵ The circuit court included in its original sentence five years of extended supervision, which is two more years than statutorily authorized for the offense at issue. *See* WIS. STAT. § 973.01(2)(d)5. The court subsequently remedied the error by filing an amended judgment of conviction, reducing the term of extended supervision to three years. Accordingly, we conclude that the court's initial error does not present a potentially meritorious issue for appeal.

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 Brandon Kuhl is relieved of further representation of Witak in this matter.

*Diane M. Fremgen
Clerk of Court of Appeals*