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DISTRICT III

May 13, 2014

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

2013AP1763-CRNM State of Wisconsin v. David B. Lewis (L. C. #2011CF1243)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for David Lewis has filed a no-merit report concluding no grounds exist to challenge Lewis's convictions for delivering between one and five grams of cocaine; delivering less than one gram of cocaine; child neglect; possession with intent to deliver between three and ten grams of a designer drug; and third-degree sexual assault. Lewis was informed of his right to file a response to the no-merit report and did not respond.

The State charged Lewis with nine crimes: two counts of delivering between one and five grams of cocaine; delivering less than one gram of cocaine; child neglect; possession with intent to deliver greater than 200 grams of THC; possession with intent to deliver between one

and five grams of cocaine; possession with intent to deliver between three and ten grams of a designer drug, MDMA/ecstasy; and two counts of second-degree sexual assault of a child under the age of sixteen—all nine counts as a repeater. Lewis entered no contest pleas to delivering between one and five grams of cocaine, delivering less than one gram of cocaine, child neglect, possession with intent to deliver between three and ten grams of MDMA/ecstasy, and an amended charge of third-degree sexual assault, all without the repeater enhancer.[1] In exchange for his pleas, the State agreed to dismiss and read in the remaining charges and recommend an aggregate ten-year sentence, consisting of five years' initial confinement and five years' extended supervision. Out of a maximum possible forty-seven and one-half year sentence, the court imposed concurrent sentences consistent with the State's recommendation. This no-merit appeal follows.

Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we disagreed with counsel's conclusion in the no-merit report that there was no arguable basis for challenging the plea. At the time of the plea hearing, Lewis was mistakenly informed that he faced a maximum sentence of twelve and one-half years for possession with intent to deliver between three and ten grams of MDMA/ecstasy, when his maximum exposure for that crime was actually fifteen years. On this count, the court imposed a concurrent nine-year sentence consisting of five years' initial confinement and four years' extended supervision.

[1] Although the record shows Lewis was convicted upon his no contest plea of third-degree sexual assault without a repeater enhancer, the judgment of conviction adds the "repeater" designation to this count. Because this appears to be a clerical error, upon remittitur, the court shall enter an amended judgment of conviction removing the "repeater" designation.

We could not conclude from the record that Lewis was aware, despite the misinformation provided during the plea proceedings, that he faced a maximum fifteen-year sentence for the subject crime. *See* ***State v. Taylor***, 2013 WI 34, ¶54, 347 Wis. 2d 30, 829 N.W.2d 482 (not manifestly unjust to deny plea withdrawal motion where court imposed sentence equal to or less than erroneously understated maximum *and* record shows defendant was nonetheless aware of maximum possible penalty). We consequently ordered additional proceedings with respect to this possible issue. Counsel then submitted a written statement from Lewis indicating that after consideration of the potential benefits and risks inherent in plea withdrawal, he waives any challenge to the legitimacy of his plea based on the misinformation regarding the maximum possible sentence for the subject crime.

No issue of arguable merit otherwise exists from the taking of Lewis's no contest pleas. Our review of the record—including the plea questionnaire, its addendum, and the plea hearing transcript—confirms that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08 (2011-12), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Lewis committed the crimes charged.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Lewis's character, including his criminal history; the need to protect the public; and the mitigating factors Lewis raised. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Lewis's sentence is so

excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is modified and, as modified, affirmed pursuant to WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Donna L. Hintze[2] is relieved of further representing Lewis in this matter. *See* WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals

[2] Although the no-merit report was filed by attorney Paul G. LaZotte, attorney Donna L. Hintze subsequently filed a substitution of counsel.