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June 11, 2014

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

2013AP1556-CRNM State of Wisconsin v. Jordan T. Kloetzke (L.C. #2012CF152)

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

Jordan Kloetzke appeals from a judgment convicting him of burglary contrary to WIS. STAT. § 943.10(1m)(a) (2011-12),[1] theft contrary to WIS. STAT. § 943.20(1)(a) and felony bail jumping contrary to WIS. STAT. § 946.49(1)(b). Kloetzke's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Kloetzke received a copy of the report and was advised of his right to file a response. He has not

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

done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Kloetzke's no contest pleas were knowingly, voluntarily and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether the circuit court erred when it denied both of Kloetzke's requests for new trial counsel. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest pleas, Kloetzke answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Kloetzke's no contest pleas were knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The court explained the significance of the dismissed and read-in offenses. Additionally, the plea questionnaire and waiver of rights form Kloetzke signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken.

Hoppe, 317 Wis. 2d 161, ¶¶30-32.[2] We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Kloetzke's no contest pleas.

We agree with appellate counsel that challenging the circuit court's denial of trial counsel's two motions to withdraw would lack arguable merit for appeal. In the first instance, Kloetzke could not articulate a specific reason for asking counsel to withdraw. In the second instance, Kloetzke complained that counsel had not visited him and had not provided him with documents. The court directed counsel to provide Kloetzke with the documents he sought, and Kloetzke conceded that he and counsel had met three times in the early stages of the case. The circuit court did not err when it denied counsel's motions to withdraw.

With regard to the sentences, 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 factors relevant to sentencing Kloetzke to three consecutive sentences totaling twenty-three years (twelve years of initial confinement and eleven years of extended supervision). In fashioning the sentences, the court considered the seriousness of the offenses, Kloetzke's character and history of other offenses, the impact on the victim, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentences complied with WIS. STAT.

[2] We note that the circuit court did not warn Kloetzke that his no contest pleas could lead to deportation. ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. No issue with arguable merit arises because the presentence investigation report confirms that Kloetzke is a citizen of the United States.

We also note that the circuit court's reference to the plea questionnaire to confirm the constitutional rights waived by the plea was not "so great that the [questionnaire] substituted for an in-court colloquy." ***Id.,***¶33.

§ 973.01 relating to the imposition of bifurcated sentences of confinement and extended supervision. The circuit court declared Kloetzke ineligible for the Challenge Incarceration Program due to the facts of his case but eligible for the Substance Abuse Program once he reaches the age of twenty-five. Sec. 973.01(3g) and (3m). The victim's restitution request was adequately documented, Kloetzke did not object to the restitution award, and the court did not err in imposing restitution of $4147.50. WIS. STAT. § 973.20(3) and (7). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

Although the circuit court did not state a reason for requiring Kloetzke to pay the $250 DNA surcharge under WIS. STAT. § 973.046, we conclude that any challenge to the imposition of the DNA surcharge would lack arguable merit for appeal.

The circuit court has discretion under WIS. STAT. § 973.046(1g) to impose the DNA surcharge. "[R]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). We have rejected the notion that the "circuit 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 may examine the court's entire sentencing rationale to determine if imposition of the DNA surcharge was a proper exercise of discretion. *See* ***id.***, ¶11-13. To establish arguable merit to a claim that the circuit court erroneously exercised its discretion in imposing the surcharge, the defendant would have to show that imposition of the surcharge was unreasonable. ***Id.***, ¶12.

We conclude that the circuit court's entire sentencing rationale supports the discretionary decision to impose the DNA surcharge. Moreover, Kloetzke cannot show that the surcharge was unreasonable. ***Id.***, ¶12. At sentencing, Kloetzke expressed remorse, took responsibility for his conduct, and did not object to restitution on any grounds, including inability to pay. ***Id.***, ¶11. The DNA surcharge was substantially less than the restitution to which Kloetzke did not object. In this sentencing environment, imposing the DNA surcharge was a proper exercise of discretion.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did 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, affirm the judgment of conviction, and relieve Attorney Andrew Morgan of further representation of Kloetzke 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 Andrew Morgan is relieved of further representation of Jordan Kloetzke in this matter.

Diane M. Fremgen
Clerk of Court of Appeals