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DISTRICT III

(Amended July 18, 2014 as to Panel)

July 15, 2014

To:

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

2014AP438-CRNM State of Wisconsin v. Robert J. Beyersdorf (L.C. # 2012CF413)

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

Counsel for Robert Beyersdorf has filed a no-merit report concluding there is no arguable basis for Beyersdorf to withdraw his no contest pleas or challenge the sentences imposed for substantial battery, misdemeanor battery and burglary, all as a repeater. Beyersdorf was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Beyersdorf with misdemeanor theft, substantial battery, misdemeanor battery, disorderly conduct and burglary, all as a repeater. The complaint alleged that James and Sandra Kropp returned to their home and found a car later identified as Beyersdorf's in their driveway. They noticed a strong odor of cigarette smoke in their garage and, because neither of them smoked, Sandra wrote down the vehicle's license plate number. James then entered the residence and heard a noise coming from a hallway. When he walked down the hallway, the intruder lunged at him and tackled him. The intruder punched James in the face and rib cage. When Sandra entered the house, the intruder grabbed her by the shoulders and pushed her out of the way. James then approached the intruder who again began punching James. The intruder picked up a wooden chair and threw it at them. Sandra locked herself in a bedroom and dialed 911. The intruder eventually fled in Beyersdorf's car. James suffered two broken ribs and facial injuries. Sandra suffered pain in her wrist, hip and lower back as a result of the altercation. Four rings were stolen in the burglary with an approximate value of \$920.

An officer responding to the call recovered Beyersdorf's library card and a cigarette butt. The cigarette butt was later tested, and the DNA on it matched Beyersdorf's.

In a photo line-up, Sandra identified Beyersdorf as the intruder. The police did not retain the other photographs that made up the photo array.

At a pretrial hearing, Beyersdorf's counsel informed the court that he might present a voluntary intoxication defense. The court noted the low success rate of that defense. The defense was never presented because, pursuant to a plea agreement, Beyersdorf entered no contest pleas to substantial battery, misdemeanor battery and burglary, and the remaining counts were dismissed. The State agreed to cap its sentence recommendation at ten years' initial

confinement and eight years' extended supervision. The defense was free to argue for any sentence. The court imposed consecutive sentences totaling thirteen and one-half years' initial confinement and five and one-half years' extended supervision.

Beyersdorf filed a postconviction motion contending he was suffering from acute mental health issues at the time he entered the pleas and his counsel refused to pursue the intoxication defense, which Beyersdorf believed would have been a viable strategy because a combination of medications and alcohol he consumed rendered him so intoxicated that he could not form the intent to steal or batter the victims. At the postconviction hearing, Beyersdorf's trial counsel testified he discussed the intoxication defense with Beyersdorf several times, researched the issue, requested an adjournment so he could attempt to find an expert who would support the defense and was unable to find such an expert. Counsel concluded he did not have sufficient evidence for the court to allow him to present that defense to a jury. Counsel also stated his belief that Beyersdorf was competent to stand trial and his pleas were not the result of mental health issues.

Beyersdorf testified at the hearing, admitting he and his counsel discussed the voluntary intoxication defense. He learned of the defense from another inmate in the correctional facility, who opined, "You could probably maybe try and pursue intoxication defense." Beyersdorf said he was up all night consuming alcohol and sleeping pills before the burglary. He abandoned the intoxication defense because he believed he had no choice due to his attorney's conclusion that the judge would not have allowed that defense and the jury would not accept it. The court denied the postconviction motion.

The record discloses no arguable basis for Beyersdorf to withdraw his no contest pleas. The court's colloquy, supplemented by a Plea Questionnaire/Waiver of Rights form, informed Beyersdorf of the constitutional rights he waived by pleading no contest, the elements of the offenses and the potential penalties. As required by *State v. Hampton*, 2004 WI 117, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Beyersdorf it was not bound by the parties' sentencing agreement. The record shows the pleas were knowingly, voluntarily and intelligently entered. See *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Entry of a valid no-contest plea constitutes a waiver of all nonjurisdictional defects and defenses, including the involuntary intoxication defense. *Id.* at 293. Abandonment of the intoxication defense in favor of the plea agreement constitutes a reasonable strategy in light of the difficulties of persuading the court and a jury that Beyersdorf was too intoxicated to form the intent to steal or the intent to batter the Kropps, particularly in light of his ability to drive from the scene.

Before entering the no contest pleas, Beyersdorf filed a pro se motion to dismiss based on the State's failure to preserve the photographs used in Sandra Kropp's photo identification of Beyersdorf. That motion was not pursued. The remedy for a suggestive photo array would not have been dismissal of the charges. Rather, Sandra Kropp's identification might have been suppressed. In light of the library card, license plate and DNA evidence, suppressing her identification of Beyersdorf would have been inconsequential.

Finally, the record discloses no arguable basis for challenging the sentencing court's discretion. The court could have imposed sentences totaling twenty-eight years and nine months. The court appropriately considered the seriousness of the offenses, the effect on the victims, Beyersdorf's character, including a substantial prior record, and the need to protect the public. See *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no

improper factors and the sentences totaling nineteen years' imprisonment are not arguably 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 issue for appeal. Therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Ralph Sczygelski is relieved of his obligation to further represent Beyersdorf in this matter. *See* WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals