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DISTRICT II

August 6, 2014

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

2014AP993-CRNM State of Wisconsin v. John W. Dunisch (L.C. #2013CF4)

Before Brown, C.J., Reilly and Gundrum, JJ.

John W. Dunisch appeals a judgment convicting him of burglary of a building or dwelling, contrary to WIS. STAT. § 943.10(1m)(a) (2011-12).[1] Dunisch's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S.

[1] Dunisch does not appeal the order denying his postconviction motion seeking to have the DNA surcharge vacated because the court did not explain the basis for imposing it. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. Appellate counsel represents that Dunisch has chosen to waive any further challenge to the surcharge and Dunisch has not filed a response to the no-merit report stating otherwise.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

738 (1967). Dunisch was advised of his right to file a response but he has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We therefore affirm the judgment, accept the no-merit report, and relieve Attorney Timothy T. O'Connell of further representing Dunisch in this matter.

Dunisch initially was charged with child enticement and attempted first-degree sexual assault of a child under thirteen. The State later amended count one, child enticement, to burglary of a building or dwelling. Pursuant to a plea agreement, Dunisch agreed to plead guilty or no-contest to the amended charge and that count two would be dismissed and read in for sentencing. The State agreed to recommend probation, sentence withheld, and a year of conditional jail time. The circuit court accepted the plea and sentenced Dunisch to three years' initial confinement plus five years' extended supervision.

Postconviction, the court granted Dunisch's motion to have the judgment of conviction corrected to reflect his eligibility for the Challenge Incarceration and Substance Abuse Programs (CIP, SAP) but denied his motion to vacate the DNA surcharge. This no-merit appeal followed.

The report first considers whether Dunisch could withdraw his plea as not knowingly and voluntarily entered. We agree with counsel's analysis and conclusion that no issue of merit could be raised in this regard.

A defendant seeking to withdraw a guilty or no-contest plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561

N.W.2d 707 (1997). Under WIS. STAT. § 971.08, the circuit court must ensure that a plea is knowingly, voluntarily, and intelligently entered by ascertaining that the defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being given up. ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12, 20-21 (1986), and ***State v. Hampton***, 2004 WI 107, ¶¶24, 33, 38, 274 Wis. 2d 379, 683 N.W.2d 14. The defendant must make a prima facie case that the court did not comply with the procedural requirements of § 971.08 and that he or she did not understand or know the information that should have been provided. *See* ***Bangert***, 131 Wis. 2d at 274.

The record confirms that the circuit court met each requirement. Besides a complete colloquy, the court properly looked to the plea questionnaire/waiver of rights form Dunisch signed reflecting his understanding of the elements of the crime, the potential penalties, and the rights he agreed to waive. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Dunisch also orally reiterated his understanding under questioning by the court. He indicated no hesitation, confusion, or lack of clarity, and confirmed his understanding that the court was not bound by any sentencing recommendation. Further, Dunisch received the concessions contemplated by the plea agreement.

The report also analyzes a potential claim that the court erroneously exercised its discretion at sentencing. We agree with counsel's conclusion that the sentence reflects a proper exercise of discretion and was not unduly harsh.

To properly exercise its discretion, a circuit court must provide a rational and explainable basis for the sentence. ***State v. Gallion***, 2004 WI 42, ¶39, 270 Wis. 2d 535, 678 N.W.2d 197. The court "must consider three primary factors in determining an appropriate sentence: the

gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409.

No basis exists to disturb the sentence imposed. The court weighed proper sentencing factors, applied them in a reasoned and reasonable manner, and provided a thorough and rational explanation for imposing the sentence it did. The court focused on Dunisch's character, specifically his pattern of impulsive, ill-considered decisions and, in this case, his attempt to blame the young victim for being the aggressor. The weight given to each factor is within the court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We also assess whether Dunisch's eight-year total sentence is unduly harsh. Presumptively it is not, as it is within the limits of the twelve years he faced. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. It also actually is not because the length is not so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Ocanas***, 70 Wis. 2d at 185. The court explained why community supervision was inadvisable and ultimately made him eligible for CIP and SAP. The court explained that the DNA surcharge was appropriate because the crime he committed—burglary with intent to commit a felony, a sexual assault—was of the type frequently investigated using DNA evidence. Dunisch had testified that he recently was employed in construction. There is no arguable merit to a claim that Dunisch could show that the surcharge makes his sentence unreasonable. *See* ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998).

Our independent review reveals no other meritorious issues.

For the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved of further representing Dunisch in this matter.

Diane M. Fremgen
Clerk of Court of Appeals