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DISTRICT II

September 17, 2014

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

2014AP1262-CRNM State of Wisconsin v. Kevin McMullen (L.C. #2012CF194)

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

Kevin McMullen appeals a judgment convicting him of possession with intent to deliver heroin (>3 - 10 grams) as party to a crime (PTAC) and with a second and subsequent penalty enhancer. He also appeals an order denying his motion for postconviction relief. McMullen's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). McMullen was advised of his right to file a response

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

but, although granted the extension of time he requested, 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 and order 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 McMullen in this matter.

Police executed a search warrant at a Fond du Lac motel where McMullen and Rakim Bloomingburg were staying. They seized baggies of heroin, methamphetamine, empty baggies, a digital scale, a razor, and a large amount of cash. During the search, McMullen vomited up three knotted baggies of heroin he had swallowed when he saw police approaching. The total heroin seized was 11.55 grams. A .357 Magnum and ammunition was found in the trunk of Bloomingburg's car. Bloomingburg told police this was the fourth time he and McMullen had traveled from Chicago to Fond du Lac to sell heroin and that they made between $1300 and $1500 on this trip. Both men were arrested. They were prosecuted separately.

McMullen was charged with carrying a concealed weapon; possession with intent to deliver heroin (> 10 - 50 grams), second and subsequent; possession with intent to distribute amphetamine;[2] possession of drug paraphernalia; and maintaining a drug-trafficking place. All were charged as PTAC, counts 2 through 5 had a use-of-a-dangerous-weapon enhancer, and the concealed-weapon and drug-paraphernalia charges carried a repeater enhancer.

[2] The Information amended Count 3 to read "methamphetamine."

The court accepted the parties' proposed plea agreement. McMullen entered a no-contest plea to a reduced Count 2. The remaining charges were dismissed and read in. Because Bloomingburg admitted that the gun and ammunition were his, the dangerous-weapon enhancer was dismissed outright. The court sentenced McMullen in line with the State's recommendation of ten years' initial confinement followed by five years' extended supervision.

McMullen later moved to withdraw his plea, alleging that the court and his counsel failed to explain the elements of PTAC and that he did not understand the concept. Postconviction counsel sought to withdraw the motion the day before the hearing, as his research convinced him that the motion was without merit. The court opted to conduct the hearing anyway to put its analysis and decision on the record to forestall a possible claim of ineffective assistance of counsel. The motion was denied. This no-merit appeal followed.

Appellate counsel concludes, and our review of the record leads us to agree, that there is no arguable basis for withdrawing McMullen's no-contest plea. A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, for example, that the plea was coerced, uninformed, or unsupported by a factual basis, that counsel provided ineffective assistance, or that the prosecutor failed to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 249-51& n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The court's thorough plea colloquy was supplemented by the plea questionnaire and waiver of rights form that McMullen completed, signed, and confirmed that he understood. The court informed McMullen of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no-contest plea. The questionnaire

McMullen signed indicated that counsel orally explained the elements to him. McMullen confirmed that he understood the immigration consequences of his plea, *see* WIS. STAT. § 971.08(1)(c), and the court made certain that McMullen understood it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The court also found that a sufficient factual basis existed to support McMullen's plea. We are satisfied that the plea was knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

A challenge to McMullen's sentence also would lack arguable merit. Our review of a sentence determination "start[s] with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The trial court considered the standard sentencing factors and explained their application to this case. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It considered on the record the gravity of the offense, noting that McMullen sold heroin to someone who provided it to two people who then overdosed; McMullen's character, including letters from several family members; his criminal record, which included a prior conviction for dealing heroin and then selling it less than three months after his release; and the safety needs of the community.

McMullen faced a potential fifteen-year sentence, and/or a $50,000 fine, for the Class E felony, plus up to four more years for the second and subsequent enhancer. *See* WIS. STAT. §§ 961.41(1m)(d)2., 939.50(3)(e), and 961.48(1)(b). The prison sentence the court imposed was within the applicable penalty range. The court expressed its awareness and perplexity that Bloomingburg had gotten only probation. The sentence imposed here, supported by the court's thorough rationale, was 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 it right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, no meritorious argument could be made that the postconviction motion was wrongly denied. At the motion hearing, the court read portions of the transcript from the plea colloquy where it informed McMullen that being party to a crime "means you committed the offense yourself or you helped somebody else commit it or you were a co-conspirator in committing it," trial counsel stated that she had explained the elements to him and that McMullen assured the court that he had no questions about the charges, the plea, the court's explanations, or the proceedings. Noting that McMullen's 2010 conviction for selling heroin also was charged as PTAC, the court concluded he was "no stranger to … the charge and the concept."

Our independent review reveals no other meritorious issues.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals