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DISTRICT III/IV

September 19, 2014

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

2013AP1255-CRNM State of Wisconsin v. Devon D. Johnson (L.C. # 2012CF488)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Attorney Leonard D. Kachinsky, appointed counsel for appellant Devon Johnson, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Johnson's plea and sentencing. Johnson was provided a copy of the report, but has not filed a response. Upon independently reviewing the

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

entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Johnson was charged with two counts of arson of a building, two counts of arson of property other than a building, and one count of operating a motor vehicle without the owner's consent, all as a party to the crime. Pursuant to a plea agreement, Johnson pled no contest to two counts of arson of a building and one count of arson of property other than a building. In exchange for Johnson's plea, the State dropped the repeater allegations in the complaint, dismissed and read in the remaining charges, and read in two uncharged offenses. The court sentenced Johnson to a total of seven years of initial confinement and five years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Johnson's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Johnson and to determine information, such as Johnson's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Johnson's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Johnson's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *See* ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Johnson's character, and the need for punishment and to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was well within the maximum Johnson faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Johnson 110 days of sentence credit. We discern no erroneous exercise of the court's sentencing discretion.

Counsel notes, however, that the judgment of conviction imposes the DNA surcharge, while the circuit court did not impose the DNA surcharge at the sentencing hearing. Because this appears to be a clerical error, upon remittitur the court shall enter an amended judgment of conviction without the DNA surcharge.[2]

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

[2] Counsel also asserts that the judgment of conviction incorrectly lists Judge Mark Warpinski as the sentencing judge. Counsel requests that we direct the judgment be modified to reflect the correct sentencing judge. We determine that it is unnecessary to modify the judgment of conviction in that regard, as the only place a judge is named in the judgment of conviction is on the distribution list. We discern no practical effect to modifying the distribution list at this point.

IT IS ORDERED that the judgment of conviction be modified and, as modified, is affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard Kachinsky is relieved of any further representation of Devon Johnson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals