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**DISTRICT III**

November 18, 2014

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

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2014AP283-CRNM      State of Wisconsin v. Gary Lee Rietz (L. C. #2012CF139)

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

Counsel for Gary Lee Rietz has filed a no-merit report concluding there is no arguable basis for Rietz to withdraw his no-contest plea or challenge the sentence imposed for possession of less than three grams of heroin with intent to deliver as a party to a crime, or for challenging an order denying his motion for resentencing. Rietz filed a response challenging his sentence, arguing: (1) the court impermissibly used the sentencing hearing to deliver a campaign speech; (2) the court erroneously believed Rietz had committed second-degree murder; (3) the court erroneously believed Rietz was the center of Peshtigo's drug ring; (4) the court accused Rietz of

being responsible for all recent drug overdoses in Marinette County; and (5) Rietz's sentence was longer than the sentence imposed for co-defendants. 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 Rietz with possession of between ten and fifty grams of heroin with intent to deliver and one count of maintaining a drug trafficking place, both as a repeat offender. After receiving information from a confidential informant, police raided Rietz's home and discovered Reitz, two young men from Milwaukee, a large amount of heroin, and evidence of the sale of heroin. In exchange for the State's agreement to jointly recommend an eight-year sentence, Rietz entered a no-contest plea to one count of possession of less than three grams of heroin with intent to deliver, and the count of maintaining a drug trafficking place was dismissed and read in for sentencing purposes. The court rejected the parties' joint recommendation and imposed the maximum sentence of seven and one-half years' initial confinement and five years' extended supervision.

The record discloses no arguable manifest injustice upon which Rietz could withdraw his no contest plea. See *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, supplemented by a Plea Questionnaire and Waiver of Rights form, explained the constitutional rights Rietz waived by pleading no contest, the elements of the offense and the potential penalties. As required by *State v. Hampton*, 2004 WI 107, ¶¶24, 33, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Rietz that it was not bound by the parties' sentence recommendations. The court followed the requirements for accepting a no contest plea set out in *State v. Bangert*, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the sentence. The court appropriately considered the seriousness of the offense, Rietz's character and the need to protect the public. See *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Rietz was forty-seven years old at the time of sentencing, had four prior convictions including two drug offenses, and admitted using cocaine and heroin since he was nineteen years old.

In his response to the no-merit report, Rietz alleges the judge impermissibly used his sentencing as a campaign speech. The court made no overt reference to a then-upcoming election at the sentencing hearing. The court's focus on the seriousness of the crime and the harm heroin has caused in the community are legitimate factors for the court to consider regardless of whether it would also appeal to voters.

Rietz's argument that the court thought he had committed second-degree murder is based on the court's following sentencing remarks:

As far as the gravity of the offense, short of first-degree intentional homicide, there is nothing as serious as selling heroin to kids in this community. In my mind it is absolutely, positively the most serious public health problem in this community, bar none, and short of actually taking out a gun and shooting someone in front of you, I can't think of anything that's more serious than that. I find heroin sales, the retail sales of heroin, like you were involved in, to be catastrophically serious.

At the postconviction hearing, the court indicated it was "well aware of the statutory scheme for categorizing offenses." It indicated that its comments were made in the context of evaluating the seriousness of the crime and the importance of deterrence. The record does not show any confusion by the court about the potential penalties for various offenses.

Rietz next contends the court erroneously thought he was the center of Peshtigo's drug ring. To establish grounds for resentencing, Rietz must show that the court relied on inaccurate information. See *State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. The court's statement was supported by its observation that Rietz's home was a "storefront for the sale of heroin in this community." Rietz's co-defendants came from Milwaukee to sell heroin out of Rietz's home. Thus, it is not inaccurate to label Rietz as "at the center of this drug ring."

Rietz next complains the court erroneously found him responsible for all recent drug overdose incidents in the community. In fact, the court merely stated that Rietz was "implicated" in the heroin-related death of those who purchased heroin through his house. Rietz may reasonably be considered implicated in the deaths of any individuals who fed their addiction through him, even if the immediate cause of death was heroin purchased elsewhere.

Finally, Rietz argues his sentence was unduly harsh because his co-defendants received a lighter sentence. While sentencing disparity may be a factor, there is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences. *State v. Lechner*, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). Rather, the court must assess the crime, the criminal and the community, and no two cases will present identical factors. *Id.* Rietz was substantially older than his co-defendants. The read-in offense of maintaining a drug trafficking place would render his involvement more serious than theirs. His co-defendants may well have been unable to operate in Peshtigo had Rietz not opened his home to them to use as a storefront or base of operations for selling heroin. These factors support the sentencing court's determination that Rietz was more culpable than his co-defendants. The record does not support Rietz's assertion that the court considered any improper factors, and imposition of the maximum

sentence does not shock public sentiment in this case. *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 judgment and order are summarily affirmed. WIS. STAT. RULE 809.21. (2011-12)

IT IS FURTHER ORDERED that attorney Timothy O'Connell is relieved of his obligation to further represent Rietz in this matter. *See* WIS. STAT. RULE 809.32(3). (2011-12).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*