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DISTRICT II

December 17, 2014

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

2014AP1802-CRNM State of Wisconsin v. Alfred R. Johnson (L.C. #2013CF106)

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

Alfred R. Johnson appeals a judgment, entered upon his guilty plea, convicting him of possession with intent to deliver cocaine (>5-15 grams). Johnson'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). Johnson has exercised his right to file a response[2] to which counsel filed a

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

[2] Johnson filed two similar responses, the second because he "never got a response back" from this court after filing the first.

supplemental no-merit report. Upon consideration of the no-merit reports, Johnson's responses, 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 Daniel Goggin II of further representing Johnson in this matter.

A search warrant was executed at a residence after recorded telephone calls between Johnson and a confidential informant indicated Johnson had crack cocaine for sale. The search of the premises and of Johnson yielded marijuana and a duffel bag containing items associated with the sale of cocaine. Johnson conceded ownership. Believing Johnson was in possession of crack cocaine and knowing in their experience that suspects hide contraband on or in their person, police sought to do a strip search. Johnson denied having any contraband on him and refused to allow the search. Upon transporting Johnson to the county jail, an officer informed jail personnel that Johnson was being detained for manufacture/delivery of crack cocaine. The required permission to perform a strip search was obtained. Johnson had in his rectum a plastic bag containing thirty-seven individual packages of crack cocaine.

Johnson was charged with possession of cocaine with intent to deliver (>40 grams) and possession of THC. The parties negotiated a plea by which Johnson would plead guilty or no contest to a reduced charge of possession with intent to deliver cocaine (>5-15 grams) and the THC charge as well as two drug charges in another case would be dismissed but read in for sentencing. Johnson pled guilty. The court rejected the defense's and the PSI author's recommendation of a stayed sentence and four years' community supervision plus a year

conditional jail time. Instead, the court ordered Johnson to serve ten years' initial confinement plus five years' extended supervision. This no-merit appeal followed.

Appellate counsel indicates that Johnson challenges the strip search, regrets entering a plea, and believes he was too harshly sentenced. We agree with counsel that none of these issues has arguable appellate merit.

Johnson contends the strip search was statutorily and constitutionally improper so that the cocaine evidence should have been suppressed. He argues that he had been arrested only for misdemeanor possession of THC prior to the strip search, was not a detained person under WIS. STAT. § 968.255, and further, he did not consent to the warrantless search. Johnson is mistaken. The record indicates that he was arrested for possession of THC and crack cocaine, a felony. A detained person is one "[a]rrested for any felony." Sec. 968.255(1)(a)1. In addition, consent is but one exception to the warrant requirement. The search here was done incident to an arrest supported by probable cause. *See* ***State v. Sykes***, 2005 WI 48, ¶¶14-18, 279 Wis. 2d 742, 695 N.W.2d 277 (a search incident to arrest is valid if arrest supported by probable cause—that is, if the totality of the circumstances supports a reasonable belief that the defendant probably committed a crime—and the search is contemporaneous to the arrest).

The no-merit report also considers whether an arguable basis exists for Johnson to withdraw his guilty plea. None does. He executed a plea questionnaire and waiver-of-rights form that, along with the court's thorough colloquy, informed him of the constitutional rights he waived by pleading guilty, the elements of the offense, and the potential sentence. The court made clear it was not bound by the plea negotiations or the PSI recommendation. Our independent review of the record satisfies us that the plea was knowingly, voluntarily, and

intelligently entered under WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and that no arguable issue could be raised that would satisfy Johnson's "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). A manifest injustice is a serious flaw in the fundamental integrity of the plea, not simply disappointment in the sentence. *See* ***State v. Nawrocke***, 193 Wis. 2d 373, 379-80, 534 N.W.2d 624 (Ct. App. 1995).

The no-merit report also addresses whether the sentence imposed constitutes an erroneous exercise of the court's discretion. Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Here, the court carefully examined the gravity of Johnson's offense, his character, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). It acknowledged Johnson's minimal criminal background but was troubled by the magnitude of this offense, given Johnson's level of education, past employability, strong family, and claimed concern for his children. Although the fifteen-year sentence imposed is the maximum for his offense, it is significantly lower than the crime with which he initially was charged. It is not so excessive, unusual, or disproportionate to the offense committed as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court's "rational and explainable basis" for the sentence satisfies this court that discretion in fact was exercised, ***Gallion***, 270 Wis. 2d 535, ¶39 (citation omitted), and that no issue of merit could arise from this point.

Johnson complains that he expected a sentence more in line with what the PSI author recommended. The court was not bound to adopt that sentencing recommendation, however,

see ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41, a fact the court made clear to Johnson.

Johnson also asserts that the sentencing court improperly commented that he enjoyed being a drug dealer based on year-old pictures on his cell phone showing him smoking marijuana and holding large amounts of money. The year-old pictures cut both ways. The court reasonably could have inferred that, while this was his first drug charge, he has been involved in selling drugs for a longer time, especially since he has been unemployed since 2011.

Johnson also challenges the length of his sentence compared to "plenty [of] people" he has encountered in jail with "way more serious drug cases … [who] get a way lesser sentence." A court sentences within a framework that the legislature determines is proper. The court here fully explained why it imposed the sentence it did. Other offenders' sentences are not before this court.

Finally, Johnson asks this court to alter his sentence so that he might be eligible for the Challenge Incarceration Program in five years, as the court ordered, rather than in seven as Johnson claims the Department of Corrections since has determined. The court authorized his participation in the program but the DOC maintains final control over whether an inmate is even allowed in the program. *See* WIS. STAT. § 302.045(2) (if an inmate meets all program eligibility criteria, DOC "may" place that inmate in the Challenge Incarceration program); *see also* ***State v. Schladweiler***, 2009 WI App 177, ¶10, 322 Wis. 2d 642, 777 N.W.2d 114, *overruled on other grounds by* ***State v. Harbor***, 2011 WI 28, ¶¶47-48 & n.11, 333 Wis. 2d 53, 797 N.W.2d 828. The authority to classify an inmate to a particular institutional program lies solely with the DOC. *See* ***State v. Lynch***, 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981).

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel Goggin II is relieved of further representing Johnson in this matter.

Diane M. Fremgen
Clerk of Court of Appeals