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DISTRICT II

January 7, 2015

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

2014AP1035-CRNM State of Wisconsin v. Brian J. Kienast (L.C. #2012CF480)

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

Brian Kienast appeals from a judgment, entered upon his guilty plea, convicting him of armed burglary. He also appeals from the order denying his postconviction motion seeking to have his sentence reduced and a restitution order modified. Kienast'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). Kienast was advised of his right to file a response but, despite an extension of

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

time, 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 affirm the judgment and order, accept the no-merit report, and relieve Attorney Scott A. Szabrowicz of further representing Kienast in this matter.

Kienast was charged with two counts of burglary and one count of armed burglary after burglarizing the same apartment on three separate occasions. He pled guilty to the armed burglary. The two burglary counts and pending counts in other case files were dismissed as read-ins at sentencing. The trial court sentenced him to seven years' initial confinement and five years' extended supervision and ordered restitution, the amount of which Kienast challenged. After a series of hearings, the court determined that he owed the victims $9,861.41.

Postconviction, Kienast sought sentence reduction and raised two issues related to the restitution order. He argued that his sentence should be reduced because he was remorseful and accepted full responsibility and the "while armed" element[2] was less egregious because he used the hunting knife police found at the scene only to pry open the apartment door, not against the occupants, who were not even home. While Kienast did not dispute the amount of restitution,[3] he sought to have the order modified to require police to immediately release to the victims the $2714 seized from him on his arrest, and for a stay pending appeal of the automatic twenty-five

[2] Armed burglary requires that the defendant committed the burglary while armed with a dangerous weapon. WIS. STAT. § 943.10(2)(a). A knife is capable of producing death or great bodily harm. *See* WIS. STAT. § 939.22(10).

[3] The no-merit report indicates that, after discussion with counsel, Kienast decided not to contest the amount of restitution in his postconviction motion "even though a challenge with arguable merit may have been presented under § 973.20, Wis. Stats., and case law authority."

percent deduction for restitution from his prison account. The court denied his motion. This no-merit appeal followed.

The no-merit report first considers whether there is arguable merit to a challenge to Kienast's guilty plea. We agree with appellate counsel that there is not. Kienast executed a plea questionnaire and waiver-of-rights form that, along with the court's colloquy, informed him of the constitutional rights he waived by pleading guilty, the elements of the offense, and the potential sentence of fifteen years' imprisonment and a $50,000 fine. The court emphasized that it was not bound by the plea negotiations or the presentence investigation recommendation and could sentence him to the maximum prison term. Kienast acknowledged his guilt. The record shows that the plea was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986); ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14.

The record also discloses no basis for challenging the sentencing court's discretion. The court viewed the seriousness of the crime, the character and rehabilitative needs of the defendant, and the protection of the public as the most important sentencing objectives in this case. These are legally recognized objectives and meet the criteria set out in ***State v. Gallion***, 2004 WI 42, ¶¶38-46, 270 Wis. 2d 535, 678 N.W.2d 197.

Explaining its rationale, the court noted that victims of a home invasion suffer particular harm that restitution cannot repair. It considered that twenty-three-year-old Kienast committed the crimes to support his long-time drug habit, had virtually no work history, and had failed at various community treatment efforts, and that his poor support system was a result of his having stolen from family members. It was unimpressed that he did not use the knife against anyone in

committing the burglary. The court appropriately concluded that probation would unduly depreciate the seriousness of the offense and that protection of the public was critical. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

Finally, the no-merit report examines whether the trial court properly denied Kienast's postconviction motion for modification of his sentence and the restitution order. Having already concluded that Kienast's sentence presents no issue of arguable merit, we also conclude that no meritable challenge could be posed to the court's refusal to modify it.

As to restitution, there can be no dispute that the circuit court could impose restitution generally. *See* WIS. STAT. § 973.20(1r). "When there is no dispute whether the sentencing court had authority to order restitution in the first instance, we review the restitution order's terms for an erroneous exercise of discretion." ***State v. Kayon***, 2002 WI App 178, ¶5, 256 Wis. 2d 577, 649 N.W.2d 334. Likewise, WIS. STAT. § 808.07(2) affords a circuit court "broad discretion to stay the execution of a judgment and to condition such a stay upon terms it deems appropriate." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 224 Wis. 2d 312, 330, 592 N.W.2d 279 (Ct. App. 1998). "We may reverse a discretionary decision only if the trial court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." ***State v. Behnke***, 203 Wis. 2d 43, 58, 553 N.W.2d 265 (Ct. App. 1996).

The court explained that the seized money was controlled by the District Attorney's office, via the police department, making it more an administrative than a court matter, and that

the money would be disbursed once all appellate avenues were exhausted. It also said it wanted Kienast to pay restitution from his prison funds during the pendency of the appeal because, simply to fuel a drug habit, he took "very hard-earned pay" from two "industrious individuals." A challenge to the court's exercise of discretion would fail.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Scott A. Szabrowicz is relieved of further representing Kienast in this matter.

Diane M. Fremgen
Clerk of Court of Appeals