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January 21, 2015

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

2014AP1511-CRNM State of Wisconsin v. Dylan J. Karnitz (L.C. #2013CF92)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Dylan J. Karnitz appeals from a judgment convicting him of two counts of homicide by intoxicated use of a vehicle and one count of injury by intoxicated use of a vehicle. Karnitz's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Karnitz received a copy of the report, was advised of his right to file a response, and has elected not to do so. After reviewing the record and

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

counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Karnitz was charged with multiple criminal counts based on a collision between his vehicle and another vehicle in the city of Manitowoc. According to the complaint, Karnitz drove his vehicle at a high rate of speed, failed to stop at a stop sign, and struck the passenger side of another vehicle, killing two people and seriously injuring a third. Responding officers smelled intoxicants on Karnitz's breath, and Karnitz acknowledged that he had consumed marijuana and alcohol. A blood sample later revealed a blood alcohol concentration of .196 percent.

Karnitz eventually entered no contest pleas to two counts of homicide by intoxicated use of a vehicle and one count of injury by intoxicated use of a vehicle. The circuit court imposed twelve years of imprisonment on each homicide count, consisting of six years of initial confinement and six years of extended supervision. The court ordered those sentences to run consecutively. It then withheld sentence on the injury count and ordered six years of probation to run consecutively to the imposed sentences. This no-merit appeal follows.

The no-merit report focuses on the following appellate issues: (1) whether Karnitz's no contest pleas were knowingly, voluntarily, and intelligently entered and had a factual basis and (2) whether the circuit court properly exercised its discretion at sentencing.

With respect to the entry of Karnitz's no contest pleas, the record shows that the circuit court engaged in a colloquy with Karnitz that satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a) and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. A signed plea questionnaire and waiver of rights form was entered into the record. Furthermore, the court correctly determined that the allegations in the complaint provided a factual basis for

the crimes charged. We agree with counsel that any challenge to the entry of Karnitz's no contest pleas would lack arguable merit.

With respect to sentencing, the record reveals that the circuit court's decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing an aggregate sentence of twenty-four years of imprisonment and ordering six years of probation, the court considered the seriousness of the offenses, Karnitz's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, the court's decision, which was well within the maximum sentence, does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, we agree with counsel that a challenge to the circuit court's decision at sentencing would lack arguable merit.[2]

Although not discussed in the no-merit report, we note that the circuit court did not state a reason for requiring Karnitz to pay the $250 DNA surcharge under WIS. STAT. § 973.046.[3] While the circuit court erroneously exercises discretion when it fails to delineate the facts that influenced its determination, "regardless of the extent of the [circuit] court's reasoning, we will

[2] The circuit court judge disclosed at the outset of sentencing that he had, some twenty years earlier while in private practice, represented the father of one of the victims. He said that he had not realized this until reading the presentence investigation report. Although he did not believe that the prior representation prejudiced him in any way, he asked the parties if they wanted him to recuse himself. Both parties responded in the negative. Defense counsel then indicated that he had talked to Karnitz about the issue, and Karnitz wished to proceed with sentencing. Based on this record, we are satisfied that the circuit court judge's decision to proceed with sentencing does not present a potentially meritorious issue for appeal.

[3] The circuit court simply stated that it would have to order a DNA surcharge.

uphold a discretionary decision if there are facts in the record which would support the [circuit] court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting ***State v. Shillcutt***, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983)). We have rejected the notion that the circuit court must explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. The court's entire sentencing rationale may be examined to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

For arguable merit to exist to a claim that the circuit court erroneously exercised its discretion in imposing the DNA surcharge, Karnitz would have to show that imposition of the surcharge is unreasonable. ***Id.***, ¶12. In its sentencing remarks, the circuit court noted that Karnitz had accepted responsibility for his actions and understood that he needed to pay the consequences for what he did. The court also learned at sentencing that Karnitz did not object to claimed amount of restitution—$6999.65—on any grounds, including inability to pay. Based on the foregoing, Karnitz cannot show that the surcharge was unreasonable.[4] Accordingly, we are satisfied that a challenge to the imposition of the surcharge would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.[5] Because we conclude that there would be no arguable merit to any issue that could

[4] The surcharge is also supported by the fact that the State sought and obtained a DNA sample from Karnitz in connection to the case. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393.

[5] Karnitz did move to suppress certain inculpatory statements he made to police. However, he elected not to litigate the motion prior to entering his pleas. Thus, we deem the issue abandoned and will not discuss it further. *See* ***State v. Woods***, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988).

be raised on appeal, we accept the no-merit report and relieve Attorney Erica L. Bauer of further representation in this matter.

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 Erica L. Bauer is relieved of further representation of Karnitz in this matter.

Diane M. Fremgen
Clerk of Court of Appeals