OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 25, 2015

To:

Hon. Charles H. Constantine
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

W. Richard Chiapete
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Kevin Michael Gaertner
Law Office of Kevin M. Gaertner
230 W. Wells St., Ste. 600
Milwaukee, WI 53203

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Scott D. Mertins Sr., #301161
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2014AP1152-CRNM State of Wisconsin v. Scott D. Mertins, Sr. (L.C. #2012CF1142)

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

Scott D. Mertins, Sr. appeals from a judgment convicting him upon his no-contest plea of first-degree reckless homicide, use of a dangerous weapon. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Mertins was advised of his right to file a response, but has not exercised his right to do so. Upon consideration of the report and our independent review of the record as required by

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Anders and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal and that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment, accept the no-merit report, and relieve Attorney Kevin M. Gaertner of further representing Mertins in this matter.

Mertins was charged with first-degree reckless homicide, use of a dangerous weapon, armed burglary, operating a motor vehicle without owner's consent, and felon in possession of a firearm. He pled no contest to the homicide charge; the remaining charges were dismissed and read in at sentencing. The trial court sentenced Mertins to thirty-eight years' initial confinement and thirteen years' extended supervision.

The no-merit report considers the integrity of Mertins's plea and whether there exists any basis upon which he could claim a manifest injustice demands withdrawal of the plea. We agree with counsel's analysis and conclusion that there is no issue of arguable merit in this regard.

A defendant seeking to withdraw a guilty or no-contest plea after sentencing bears "the 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). Here, the trial court substantially followed WIS. STAT. § 971.08 to ensure that Mertins's plea was knowingly, voluntarily, and intelligently entered by ascertaining that he understood the essential elements of the charge to which he was pleading, the potential punishment for the charge, and the constitutional rights he was giving up. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶¶24, 33,

38, 274 Wis. 2d 379, 683 N.W.2d 14.[2] Besides the colloquy, the court looked to the plea questionnaire/waiver of rights form Mertins signed reflecting his understanding of the elements, the potential penalties, and the rights he agreed to waive. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. A review of the record discloses nothing that qualifies as one of the recognized examples of a "manifest injustice." *See, e.g.*, ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177. A challenge to the plea would be meritless.

The no-merit report also considers whether there exists a potential issue in regard to the sentence imposed. We agree there is not.

Sentencing is left to the discretion of the trial 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. The court fully addressed the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999), and the relevant sentencing objectives—protection of the public, punishment or rehabilitation of the defendant, and deterrence to others, ***Gallion***, ¶¶40-41. The weight to be given each of the factors is a determination particularly within the court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentence is unduly harsh only if its length is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and

[2] While the court failed to include the mandatory advisory regarding the potential for deportation or denial of naturalization, the record indicates that Mertins was born in Racine, Wisconsin.

violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Id.***

The court noted that the senselessness of the crime, Mertins's long criminal history, and his failure to follow through and address his AODA and mental health issues outside of prison necessitated a sentence that would protect the public. The sentence the court imposed was less than the potential forty-five years' initial confinement and twenty years' extended supervision. It provided a "rational and explainable basis" for the sentence it imposed, satisfying this court that discretion in fact was exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76 (citation omitted). No basis exists to disturb the sentence.

Our independent 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 Kevin M. Gaertner is relieved of further representing Mertins in this matter.

Diane M. Fremgen
Clerk of Court of Appeals