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May 5, 2015

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

2015AP104-CRNM State of Wisconsin v. Diane Deseree Barnes (L.C. # 2008CF6312)

Before Curley, P.J., Brennan and Kessler, JJ.

Diane Deseree Barnes appeals a judgment convicting her of arson.[1] Attorney Jeffrey Jensen filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Barnes filed a response. After considering the no-merit report and the response, and after conducting an independent

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[1] Barnes is also known as Diane Jones, the name she took when she married. She is referred to as Diane Jones in some of the transcripts.

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

review of the record, we conclude that there are no issues of arguable merit that Barnes could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be any arguable basis for Barnes to move to withdraw her guilty plea. In order to ensure that a defendant is knowingly, voluntarily and intelligently waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which she is pleading guilty, the constitutional rights she is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

During the plea hearing, the prosecutor stated the plea agreement on the record and the circuit court explained to Barnes that it was not required to follow the recommendation of either the prosecutor or Barnes's lawyer. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court conducted a colloquy with Barnes during which it reviewed the elements of the crime to which Barnes was pleading guilty and the maximum penalties Barnes faced by entering a plea. Barnes informed the court that she understood. The circuit court personally reviewed the constitutional rights Barnes was waiving with her. The circuit

court informed Barnes that if she was not a citizen of the United States of America, she could be deported if she pled guilty to the crime. *See* ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1.

The circuit court ascertained that Barnes had reviewed the plea questionnaire and waiver-of-rights form, that her lawyer had explained it to her, that she had signed it and that she understood it. The circuit court asked Barnes whether she had reviewed the criminal complaint and whether it could use the facts alleged in the complaint as the basis for the plea. Barnes said that she was pleading guilty to arson because she was guilty of the crime—she intentionally burned the building. Barnes's lawyer explained to the court that he had a competency evaluation done on Barnes and believed that, although she has a serious underlying mental illness, she was competent to proceed. Based on the circuit court's thorough plea colloquy with Barnes, and Barnes's review of the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion. The circuit court sentenced Barnes to sixteen years of imprisonment, with ten years of initial confinement and six years of extended supervision. The circuit court delayed sentencing Barnes directly after taking her plea because it concluded it needed a presentence investigation report to flesh out the details of her juvenile criminal history. In deciding the sentence, the court concluded that Barnes presented a significant danger to society because she acted out violently when she was angry or stressed. The court acknowledged that she suffered from difficult circumstances growing up and that she was mentally ill, but concluded that substantial prison time was necessary to prevent Barnes from harming others. The circuit court considered appropriate factors in deciding what length of

sentence to impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

Barnes argues in her response that her mental illness was not considered by the circuit court. This is inaccurate. The circuit court questioned Barnes about her illness, her medications and her decision *not* to pursue a plea of not guilty by reason of mental disease or defect before it took her plea. Barnes also argues that her first appellate attorney, Angela Kachelski, did not properly close her case. There is no basis for raising this argument on appeal about Kachelski's actions, or lack thereof, because Barnes's successor appellate counsel, Jeffrey Jensen, filed a no-merit appeal on Barnes's behalf and we have reviewed the entire record looking for potential appellate issues she could raise, but have found none.

Barnes argues in her response that there are some discrepancies she would like to bring to this court's attention. First, she says that she was not charged with disorderly conduct. In fact, Barnes was initially charged with disorderly conduct, but the charge was dropped pursuant to the plea agreement. Therefore, she was not *convicted* of disorderly conduct. Second, she says that she did not argue with her mother the morning of the arson. The criminal complaint, which Barnes said could serve as a factual basis for the plea, states that Barnes told the police she had a fight with her mother before she set the fire. More importantly, whether or not Barnes and her mother had a fight, Barnes is still guilty of the crime of arson. The fight does not change the legal outcome of this case. There is no arguably meritorious appellate issue that could be raised based on the issues Barnes has brought to our attention.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Jeffrey W. Jensen of further representation of Barnes.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of any further representation of Barnes in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals