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DISTRICT II

May 13, 2015

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Circuit Court Judge
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Fond du Lac, WI 54935

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Circuit Court Judge
Fond du Lac County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2013AP2327-CRNM State of Wisconsin v. Jonathon M. Mark (L.C. #2010CF186)
2013AP2328-CRNM State of Wisconsin v. Jonathon M. Mark (L.C. #2011CF333)

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

In these consolidated appeals, Jonathon M. Mark appeals judgments convicting him upon pleas of no contest of operating with a prohibited alcohol concentration (PAC), fifth or sixth offense, and felony bail jumping. Mark's appointed appellate counsel has filed a no-merit report

pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967), and Mark has filed a response. Upon consideration of the report, the response, and our independent review of the record as mandated by ***Anders***, we conclude there is no arguable merit to any issue that could be raised on appeal. We also conclude that the judgments may be summarily affirmed. *See* WIS. STAT. RULE 809.21. We accept the no-merit report and relieve Attorney Melinda R. Alfredson of further representing Mark in this matter.

In July 2010, Mark was charged in Fond du Lac county case No. 2010CF186 with fleeing/eluding an officer, operating while intoxicated (OWI), fifth or sixth offense, and operating with a PAC of .02 or more, fifth or sixth offense, after leading police on a high-speed chase and crashing into a tree. On the day trial was to begin and with a jury pool waiting, Mark entered a no-contest plea to the PAC charge. The other two charges were dismissed and read in. The court, the Honorable Gary R. Sharpe, sentenced him to three years' initial confinement (IC) and three years' extended supervision (ES), and found him ineligible for both the Challenge Incarceration and Earned Release Programs (CIP, ERP), to be reconsidered after serving eighteen months' IC. Mark also was ordered to reimburse the county $930.77 in jury fees. *See* WIS. STAT. § 814.51.

In September 2011, Mark was charged in Fond du Lac county case No. 2011CF333 with felony bail jumping after he displayed signs of intoxication to police who stopped him for urinating in public. He pled no contest. Two felony bail-jumping charges from another Fond du Lac county case were dismissed and read in. The court, the Honorable Peter L. Grimm,

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

sentenced him to two years' probation, consecutive to case No. 2010CF186. It also imposed and stayed one year in jail, with two years' ES if he violated his probation, consecutive to any other sentence. This no-merit appeal followed. This court consolidated the cases for purposes of briefing and disposition.

The no-merit report first considers whether all jurisdictional requirements were met. Here, the courts had subject-matter jurisdiction because the complaints alleged offenses known to law. *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). They had personal jurisdiction because the crimes were committed in Fond du Lac county and Mark appeared before the courts pursuant to lawful arrests. *See* ***State v. Chabonian***, 55 Wis. 2d 723, 726, 201 N.W.2d 25 (1972). Once Mark entered his pleas without objecting to personal jurisdiction, he can not now claim a defect in that respect. *See* ***Madison v. State***, 64 Wis. 2d 564, 571, 219 N.W.2d 259 (1974). No jurisdictional challenge would have arguable appellate merit.

The no-merit report next considers whether there is arguable merit to a challenge to Mark's no-contest pleas. Although we must expand on her analysis, we agree with appellate counsel that there is not.

The circuit courts substantially followed WIS. STAT. § 971.08 to ensure that Mark's pleas were knowingly, voluntarily, and intelligently entered by ascertaining that he understood the elements of the charges to which he was pleading, the potential punishments he faced, and the constitutional rights he was giving up. *See* WIS. STAT. § 971.08(1), ***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 substantive colloquies, the courts looked to the plea questionnaires/waiver of rights forms Mark signed reflecting his understanding. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. A review of the records discloses nothing that qualifies as the "manifest injustice" a defendant must establish to withdraw a plea after sentencing. *See* ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177. A challenge to the pleas would be meritless.

The no-merit report also considers whether there exists a potential issue in regard to whether the sentence imposed was unduly harsh or excessive.[3] We agree that there would be no arguable basis to assert that the circuit court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶41-43 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***Gallion***, 270 Wis. 2d 535, ¶17. The courts here 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,

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[2] The court in case No. 2011CF333 failed to include the mandatory advisory regarding potential noncitizenship consequences. *See* WIS. STAT. § 971.08(1)(c); *see also* ***State v. Douangmala***, 2002 WI 62, ¶31, 253 Wis. 2d 173, 646 N.W.2d 1. Mark received the advisory during the prior plea-taking in case No. 2010CF186, however, and acknowledged his understanding there. In addition, the record indicates that Mark was born in Wisconsin, is a Native American, and receives quarterly stipends from the Ho-Chunk Nation. No arguable issue could be raised that the no-contest plea in case No. 2011CF333 is likely to result in deportation. *See* § 971.08(2); *see also* ***Douangmala***, 253 Wis. 2d 173, ¶¶25, 31.

[3] A no-merit report also must examine the circuit court's overall exercise of sentencing discretion.

punishment or rehabilitation of the defendant, and deterrence to others, ***Gallion***, 270 Wis. 2d 535, ¶¶40-41. The weight to be given each of the factors is a determination particularly within the court's discretion. ***Ocanas***, 70 Wis. 2d at 185.

The record reveals that both courts set forth a "rational and explainable basis" for their decisions. *See* ***Gallion***, 270 Wis. 2d 535, ¶76 (citation omitted). They placed particular weight on the seriousness of the offense, Mark's character and persistent alcoholism, and the need for public protection. Judge Sharpe viewed Mark's numerous pro se correspondences with the court as evidence of his intelligence, not as a negative factor, as the State urged.

Although Judge Sharpe imposed the maximum sentence, we conclude there would be no arguable merit to further appeal on this issue. Mark does not take serious issue with it in his response and the court built into its sentence structure the possibility that it would find him eligible for CIP or ERP after he serves half of his three-year IC. Judge Grimm explained that he took into account the length of Mark's first sentence in fashioning the sentence he did. We cannot say that either sentence imposed "is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas***, 70 Wis. 2d at 185.

The no-merit report next discusses whether an arguable issue exists regarding the order to repay the jury fee because the jury demand was withdrawn the day trial was to commence. We agree no arguable issue exists.

The circuit court had the discretion to assess the jury fee cost against Mark. *See* WIS. STAT. § 814.51; ***Flottmeyer v. Circuit Court for Monroe Cnty.***, 2007 WI App 36, ¶16, 300

Wis. 2d 447, 730 N.W.2d 421. The case was pending nearly a year. Notice of cancellation was not given until the morning of the trial—after the jury was convened and had been waiting for a couple of hours. The court also noted that Mark has financial resources, his stipend from the Ho-Chunk Nation.

Mark responds that there is no evidence that he used the trial demand "as a wedge to force a settlement." *See* ***Jacobson v. Avestruz***, 81 Wis. 2d 240, 247, 260 N.W.2d 267 (1977). Bad faith is not a prerequisite to the assessment of jury fees, however. ***Flottmeyer***, 300 Wis. 2d 447, ¶17. He also argues that he never requested to have a jury trial, did not know about the jury trial until two days before the June 15, 2011 trial date, and should not have to pay the fee because he had no trust in his lawyer.

The record belies his lack-of-knowledge claim. The record contains three jury trial notices, due to date changes. The first was filed September 1, 2010. Mark was copied on all three notices. The jury trial also was discussed at motion hearings on November 5, 2010, and January 18, March 8, and May 24, 2011. Mark appeared in person at each hearing. The record is silent as to whether he himself requested a jury trial, but it also does not indicate that he objected to one. He offers no authority for the proposition that faith in one's counsel is a factor in the court's exercise of discretion.

Mark also contends he was denied his choice of counsel. A day or two before trial was to commence, he moved pro se for a continuance to find work so that he could afford the particular lawyer he wanted to retain. The court denied the motion.

A continuance is not a matter of right. ***Robertson-Ryan & Assocs., Inc. v. Pohlhammer***, 112 Wis. 2d 583, 586, 334 N.W.2d 246 (1983). The court noted that the case had been pending a

year, that Mark already had had two attorneys, both of them competent, that Mark was asking for an adjournment "on the hope and the prayer" that he could find employment and save enough to afford his desired lawyer's $5,000 retainer, with no assurance it would come to fruition, and that it's own trial calendar had little flexibility. There is no evidence of an erroneous exercise of discretion. ***Id.*** at 587. A challenge to the court's exercise of discretion would be frivolous.

Mark also contends his attorney failed to investigate other witnesses and to produce evidence in his favor. He raised this issue in a pro se motion to the trial court the day before trial. As the court observed on the morning trial was to begin, the substance of the motion was irrelevant to pretrial matters. We agree. Mark now has pled no contest. The issue is moot.

Finally, Mark claims he was sentenced on inaccurate and/or false information. A defendant has a constitutional due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To achieve resentencing, he or she must prove both that there was inaccurate information before the sentencing court and that the court actually relied on it. ***Id.***, ¶2.

The PSI stated that Mark said he has no desire to quit drinking, plans to drink while on parole, and has no desire to seek treatment unless his probation officer forces him to. The report also discussed Mark's history of schizophrenia. Mark asserts that he never made the drinking remarks and that he is not schizophrenic.

The court discussed Mark's alcohol abuse and his apparent unwillingness to address it. It said nothing about the alleged remark. Even if Mark did not say it or the PSI writer mischaracterized something he did say, he has not established that the court relied on it. Rather, the court focused on Mark's well-documented alcoholic history, a fact Mark does not dispute.

As to the schizophrenia, the PSI chronicles years of mental health treatment, including institutional stays, and states that Mark's father and sisters believe he is schizophrenic and wish he would pursue treatment. Mark's mere assertion that he is not schizophrenic does not establish that the information is false. Further, he points to nothing in the court's sentencing remarks that suggests it relied on a diagnosis of schizophrenia to fashion his sentence.

Beyond that, Mark exercised his right of allocution at sentencing. In no way did he object to the information in the PSI he now contends is false. He has forfeited the right to do so on appeal. *See* ***State v. Leitner***, 2001 WI App 172, ¶41, 247 Wis. 2d 195, 633 N.W.2d 207; ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. His contention that his sentence is unconstitutional has no arguable merit.

Our independent review of the record reveals no other nonfrivolous issues.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Melinda R. Alfredson is relieved of further representing Jonathon Mark in this matter.

Diane M. Fremgen
Clerk of Court of Appeals