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**DISTRICT III**

June 30, 2015

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

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2014AP2948-CRNM      State of Wisconsin v. Leon L. Brzostowski, Jr. (L. C. #2012CF712)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Leon Brzostowski has filed a no-merit report concluding there is no arguable basis for Brzostowski to withdraw his no-contest plea or challenge the sentence imposed for burglary. Brzostowski filed a response alleging ineffective assistance of trial counsel, release of evidence without a court order, and entitlement to sentence credit. Brzostowski's counsel filed a supplemental report and, at this court's direction, a second supplemental report clarifying Brzostowski's claims of ineffective assistance of counsel. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Brzostowski with burglary as a repeat offender. It alleged that he pried open a door at his place of employment and stole cash and a Craftsman toolbox full of tools. A co-owner of the business told an investigating officer that Brzostowski had previously admitted stealing from the business and had made comments that “it would be easy to break into the north store. All you would have to do is pry it open with a crowbar.” That was the burglar’s means of entry. An investigating officer reported he found the tools that were stolen and a sales receipt made out to another employee at Brzostowski’s mother’s residence. That employee also reported that when he asked Brzostowski to help him fix the damaged door, Brzostowski walked to the door that was damaged without having been told which door had been damaged. The complaint further alleged Brzostowski’s ex-girlfriend, Nicole Warner, said she was awakened by a noise in her garage and saw Brzostowski unload a large, dark blue toolbox from the back of a white truck belonging to the business. She described the toolbox as approximately five feet tall and dark blue, with a large number of stickers on it. An employee confirmed the missing toolbox was blue and had a large number of stickers.

Pursuant to a plea agreement, Brzostowski entered a no-contest plea to one count of burglary in exchange for the State’s agreement to drop the repeater enhancer and to cap its sentence recommendation to three years’ initial confinement and five years’ extended supervision, consecutive to any other sentence Brzostowski was serving. The court accepted the no-contest plea and imposed the sentence recommended by the State.

The record discloses no arguable manifest injustice upon which Brzostowski could withdraw his no-contest plea. *See State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court’s colloquy, aided by a Plea Questionnaire and Waiver of Rights form, informed Brzostowski of the constitutional rights he waived by pleading no contest, the elements

of the offense and the potential penalties. As required by *State v. Hampton*, 2004 WI 117, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Brzostowski that it was not bound by the parties' sentence recommendations. The court also informed Brzostowski that this conviction could result in his deportation if he was not a citizen, and he would lose his right to vote and his right to carry a firearm. The record shows the plea was knowingly, voluntarily and intelligently entered. *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Entry of a valid no-contest plea constitutes a waiver of all nonjurisdictional defects and defenses. *Id.* at 293.

In his response to the no-merit report, Brzostowski complains "the attorneys wouldn't file any motions that I saw relevant to my case." He does not identify any specific motions and nothing in the record suggests any motion would have been arguably meritorious. His counsel filed standard motions in limine and for discovery. In the second supplemental no-merit report, Brzostowski's counsel indicates Brzostowski faulted his attorneys for failing to interview Brzostowski's mother and ex-girlfriend. He contends his mother would have testified she showed officers Brzostowski's shoes or boots and they did not match the tread pattern found at the crime scene. However, trial counsel had copies of police reports that included this information and sent an investigator to interview Brzostowski's mother. Therefore, Brzostowski's claim that his counsel did not consider the information is not accurate. In addition, the police reports do not necessarily suggest the footprints were left by the perpetrator or that there was only one perpetrator. Therefore, Brzostowski established neither deficient performance nor prejudice from his counsel's advice to accept the plea agreement rather than attempt to exploit the footprint evidence.

Brzostowski also believes counsel should have investigated Nicole Warner, who Brzostowski believes would have recanted the statement she made to police. Trial counsel

reviewed the police reports in which Warner described the stolen tool chest in great detail. Counsel also retained a private investigator to interview Warner. In that interview, she again described the blue tool chest with stickers. The record discloses no deficient performance or prejudice from counsel's failure to get Warner to retract her statements.

In his response to the no-merit report, Brzostowski also complains that his counsel would not stay in contact with him. He does not identify any specific information additional contact would have imparted.

Brzostowski also complains that evidence was released without a court order. Assuming an error occurred by returning some of the stolen property without a court order, Brzostowski does not identify any prejudice to his defense.

Brzostowski also indicates he believes he is entitled to additional jail credit. Because his sentence was consecutive to pre-existing sentences, he is not entitled to dual credit. *See State v. Boettcher*, 144 Wis. 2d 86, 101, 423 N.W.2d 533 (1988).

Finally, the record discloses no arguable basis for challenging the sentence. The court could have imposed a sentence of twelve and one-half years' imprisonment and a \$25,000 fine. The court appropriately considered the seriousness of the offense, Brzostowski's exploitation of his employer, his lengthy criminal history, prior supervision for fifteen cases—ten of which were revoked, the fact that he was on extended supervision at the time he committed these crimes, his history of drug use, and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the sentence is not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).

IT IS FURTHER ORDERED that attorney Daniel Goggin II is relieved of his obligation to further represent Brzostowski in this matter. WIS. STAT. RULE 809.32(3) (2013-14).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*