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July 1, 2015

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

2014AP2228-CRNM State of Wisconsin v. Kaleel Buchanan (L.C. #2012CF4384)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Kaleel Buchanan appeals from a judgment convicting him of first-degree reckless homicide as party to the crime contrary to WIS. STAT. § 940.02(1) (2011-12).[1] Buchanan's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Buchanan received a copy of the report and has filed a response. Upon consideration of the report, Buchanan's response and an independent review of

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

the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Buchanan's guilty plea was knowingly, voluntarily and intelligently entered and had a factual basis; and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty plea, Buchanan answered questions about the plea and his understanding of his constitutional rights and waived defenses during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Buchanan's guilty plea was knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Buchanan signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Buchanan's guilty plea.

The record does not demonstrate that the circuit court determined that Buchanan understood the party to the crime liability to which he entered a guilty plea. Nevertheless, we conclude that the court's omission did not render the plea colloquy defective. In ***State v. Brown***, 2012 WI App 139, ¶1, 345 Wis. 2d 333, 824 N.W.2d 916, we held that a plea colloquy at which the circuit court fails to explain party to the crime liability is not defective if the defendant admits to directly committing the act. Such an admission renders superfluous the explanation of party to the crime liability. ***Id.*** Here, Buchanan admitted at the plea hearing that he shot the victim. Therefore, the circuit court's failure to explain party to the crime liability did not render the plea colloquy defective.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Buchanan to a forty-year term consisting of twenty years of initial confinement and twenty years of extended supervision. In fashioning the sentence, the court considered the seriousness of the offense and the manner in which Buchanan committed it, Buchanan's youth and 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. Because he was convicted of a crime under WIS. STAT. ch. 940, Buchanan was not eligible for the Challenge Incarceration Program or the Earned Release Program. WIS. STAT. § 973.01(3g) and (3m). The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. Buchanan stipulated to $5511 in restitution. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

Without stating any reasons, the circuit court required Buchanan to pay the DNA surcharge under WIS. STAT. § 973.046. Nevertheless, we conclude that any challenge to the imposition of the DNA surcharge would lack arguable merit for appeal.

At Buchanan's September 2013 sentencing, the circuit court had discretion under WIS. STAT. § 973.046(1g) to impose the DNA surcharge. "Regardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial 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 (alteration omitted) (citation omitted). 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. We may examine the court's entire sentencing rationale to determine if imposition of the DNA surcharge was a proper exercise of discretion. *See* ***id.***, ¶¶11-13. To establish arguable merit to a claim that the circuit court erroneously exercised its discretion in imposing the surcharge, the defendant would have to show that imposition of the surcharge was unreasonable. ***Id.***, ¶12.

We conclude that the circuit court's entire sentencing rationale supports the discretionary decision to impose the DNA surcharge. Moreover, Buchanan cannot show that the surcharge was unreasonable. *See* ***id.***, ¶12. At sentencing, Buchanan expressed remorse, took responsibility for his conduct, and did not object to $5511 in restitution on any grounds. *See* ***id.***, ¶11. The DNA surcharge was substantially less than the restitution to which Buchanan did not object. In this sentencing environment, imposing the DNA surcharge was a proper exercise of discretion.

In his response, Buchanan requests a shorter sentence. We have concluded that the circuit court properly exercised its discretion at sentencing.

We have reviewed the record relating to Buchanan's WIS. STAT. § 970.032(2) reverse waiver hearing. The circuit court concluded that Buchanan, who was fourteen at the time he was charged in adult court with first-degree intentional homicide, would not be waived to juvenile court. The decision was a proper exercise of discretion. ***State v. Verhagen***, 198 Wis. 2d 177, 191, 542 N.W.2d 189 (Ct. App. 1995). The record supports the circuit court's determination that Buchanan did not meet his burden to show that waiving him to juvenile court would not depreciate the seriousness of the offense. ***Id.*** at 190; sec. 970.032(2)(b).

Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Eileen Hirsch of further representation of Buchanan 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 Eileen Hirsch is relieved of further representation of Kaleel Buchanan in this matter.

Diane M. Fremgen
Clerk of Court of Appeals