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DISTRICT II

September 30, 2015

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

2015AP881-CRNM State of Wisconsin v. Placido Molina Cruz (L.C. #2013CF665)

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

Daniel R. Goggin II, counsel for Placido Molina Cruz, 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), concluding that no grounds exist to challenge Cruz's conviction for manufacture/delivery of cocaine (>15-40 g). Cruz has not exercised his right to file a response. Upon consideration of the no-merit report and an independent review of the record, we conclude that any further proceedings on Cruz's behalf would be frivolous and without arguable merit within the meaning

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

of ***Anders*** and RULE 809.32(1). We accept the no-merit report and summarily affirm the judgment, as modified consistent with this opinion. *See* WIS. STAT. RULE 809.21.

Cruz was convicted on his pleas of no contest to two counts of manufacture/delivery of cocaine (>15-40 g). Two similar counts were dismissed and read in at sentencing. On each charge, the circuit court imposed a five-year sentence, with two and one-half years' initial confinement for each charge, ordered to run concurrently. This no-merit appeal followed.

The no-merit report examines two possible issues, the validity of Cruz's no-contest plea and the propriety of the sentence. We agree with counsel's analysis and conclusion that a postconviction or appellate challenge to either would be frivolous and without merit.

Under the United States Constitution, a guilty or no-contest plea must be affirmatively shown to be knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶25, 293 Wis. 2d 594, 716 N.W.2d 906. The legislature established in WIS. STAT. § 971.08 certain requirements for ensuring that a plea is knowing, voluntary, and intelligent. Our supreme court has provided additional requirements in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and subsequent cases. ***Brown***, 293 Wis. 2d 594, ¶23.

Here, the court addressed Cruz personally, through an interpreter, and engaged him in a colloquy that verified his understanding and that the pleas were knowing, voluntary, and intelligent. *See* ***id.***, ¶35. The court also looked to the plea questionnaire/waiver of rights form Cruz 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. The court verified that the form was completed with the assistance of an interpreter. Cruz would be unable to make a prima facie case that the court did not comply with the procedural

requirements of WIS. STAT. § 971.08 and that he did not understand or know the information that should have been provided. *See* ***Bangert***, 131 Wis. 2d at 274.

Counsel indicates that Cruz regrets pleading no contest as he believes the sentence is too harsh. To withdraw his plea now, after sentencing, Cruz would have "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). A manifest injustice is a serious flaw in the fundamental integrity of the plea, not simply disappointment in the sentence. *See* ***State v. Nawrocke***, 193 Wis. 2d 373, 379-80, 534 N.W.2d 624 (Ct. App. 1995). Neither counsel nor this court has identified anything in the record that would support a claim that a manifest injustice would result if Cruz were not allowed to withdraw his plea. *See* ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482 (giving examples of manifest injustice).

The no-merit report also addresses whether the sentence imposed constitutes an erroneous exercise of the court's discretion. Sentencing is left to the discretion of the circuit 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.

Here, the court examined the gravity of Cruz's offense, his character, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). It acknowledged Cruz's minimal criminal background, regular employment, and that he appeared to be merely a middleman in the drug deals, not dealing for personal use or significant compensation. Nonetheless, the court was troubled by the number of "fairly large-scale transactions" in a short period of time, the amounts of cocaine transacted in the read-in charges, and the public's need to get drugs out of the community. The court's "rational and explainable

basis" for the sentence satisfies this court that discretion was exercised. ***Gallion***, 270 Wis. 2d 535, ¶39 (citation omitted). Despite Cruz's disappointment with the concurrent five-year sentences and considering his exposure—twenty-five years' imprisonment and/or a $100,000 fine on each count—his punishment cannot be said to be so excessive, unusual, or disproportionate to the offense committed as to shock public sentiment. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). No issue of merit could arise in this regard.

The no-merit report did not address one aspect of the sentence that bears discussion: the DNA analysis surcharge. Cruz committed his offenses in March 2013 and was sentenced in November 2014. Those dates and the multiple convictions could set the stage for a possible ex post facto challenge, as the judgment of conviction indicates that Cruz must pay a $500 surcharge. *See* ***State v. Radaj***, 2015 WI App 50, ¶¶3-5, 35, 363 Wis. 2d 633, 866 N.W.2d 758.

Since being amended in 2013, WIS. STAT. § 973.046(1r)(a) requires that a convicted felon provide a DNA sample and pay a mandatory $250 surcharge per felony conviction for sentences imposed on or after January 1, 2014. 2013 Wis. Act 20, §§ 2355, 9426(1)(am). Under the law in effect at the time Cruz committed the drug crimes, however, he would have been subject to a discretionary, single $250 DNA surcharge. *See* WIS. STAT. § 973.046(1g), (1r) (2011-12).

Cruz should have been sentenced and had the surcharge statute applied under the law in effect at the time he committed his crimes. That law gave the circuit court the discretion to determine whether to assess a $250 DNA surcharge. *See* ***id.***; *see also* ***Radaj***, 363 Wis. 2d 633, ¶38; ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393.

Although the judgment of conviction recites a $500 surcharge, the sentencing transcript reflects only that the court ordered Cruz to "submit a DNA sample and … pay the cost." The DNA surcharge is part of a sentence. ***State v. Nickel***, 2010 WI App 161, ¶6, 330 Wis. 2d 750,

794 N.W.2d 765. We will not interfere with the circuit court's sentencing decision absent an erroneous exercise of it and will search the record to determine whether the sentence imposed can be sustained. ***State v. Lechner***, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998).

The court noted that fifty-three-year-old Cruz has maintained steady employment since very young. The record reveals that he works mainly as a roofer, a job at which, per the presentence investigation report, he earns about $700 a week. He denies any debts. We are satisfied that the record supports a discretionary imposition of a $250 DNA surcharge.

We conclude that the DNA surcharge in the written judgment of conviction is merely a clerical error, which may be corrected at any time. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. On remand, the circuit court may either correct the error in the judgment or direct the clerk's office to make the correction. ***Id.***, ¶5.

Our independent review of the record discloses no other potentially meritorious issue for appeal. We therefore accept the no-merit report, order that the judgment of conviction be modified, and as modified, affirm the judgment. We remand this matter to the circuit court with directions to amend the judgment of conviction to reflect a DNA surcharge of $250.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is modified to reflect a DNA surcharge of $250; as modified, the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21 and the cause is remanded for entry of a corrected judgment of conviction.

IT IS FURTHER ORDERED that once an amended judgment of conviction is entered Attorney Daniel R. Goggin II is relieved of further representing Cruz in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals