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DISTRICT II

October 21, 2015

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

2015AP1408-CRNM State of Wisconsin v. Nikita Lee Spalding (L.C. #2014CM128)

Before Hagedorn, J.[1]

Nikita Lee Spalding appeals a judgment entered upon her guilty plea to misdemeanor theft. Her appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Spalding has elected not to exercise her right to file a response. Upon considering the no-merit report and independently reviewing the record as required by ***Anders*** and RULE 809.32, we conclude that there is no arguable merit to any issue

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

that could be raised on appeal and that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment, accept the no-merit report, and relieve Attorney Patricia M. Padurean of further representing Spalding in this matter.

In November 2013, Spalding's brother reported that a television, handgun, video games, and DVDs were stolen from his apartment. He told police he believed Spalding had taken the items to get money to support her heroin addiction. He had allowed her to live with him for a few weeks while she was on extended supervision so she could "get[] back on her feet." Spalding admitted pawning the video games and DVDs but steadfastly denied taking the TV or the gun.

Spalding entered a guilty plea to theft of movable property (<=$2500). The court sentenced her to nine months' jail with Huber privileges and, after a restitution hearing, ordered her to pay $265 plus the ten percent surcharge. *See* WIS. STAT. § 973.06(1)(g).[2] This no-merit appeal followed.

The no-merit report examines two possible issues, the validity of Spalding's guilty 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

[2] The court also imposed a $200 DNA analysis surcharge, *see* WIS. STAT. § 973.046(1r)(b), but removed it at the restitution hearing. The transcript of that hearing is not in the record. We presume the court recognized that it had no authority to order a DNA surcharge for a misdemeanor committed before January 1, 2014, the date § 973.046(1r)(b) took effect. *See* WIS. STAT. § 973.046 (2011-12); *see also* 2013 Wis. Act 20, §§ 2355, 9426(1)(am).

Wis. 2d 594, 716 N.W.2d 906. The Wisconsin legislature established statutory requirements for ensuring that a plea is knowing, voluntary, and intelligent. WIS. STAT. § 971.08. 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 Spalding personally and engaged her in a colloquy that largely satisfied the requirements set forth in ***Brown***. *See* ***id.***, ¶35.[3] Besides the colloquy, the court properly looked to the plea questionnaire/waiver of rights form Spalding signed reflecting her understanding of the elements, the potential penalties, and the rights she agreed to waive. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Our independent review satisfies us that Spalding could not prove by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363.

The report also addresses the court's exercise of sentencing 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. The court must address sentencing factors that include, but are not limited to, the gravity of the offense, the character of the offender, and the need to protection the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). It also must provide a "rational and

[3] The court failed to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c) regarding advising Spalding that a plea has potential deportation consequences. Nothing in the record suggests Spalding faces such a risk, however. Further, Spalding told the court that she read and understood the whole of the plea questionnaire/waiver of rights form, which gives the deportation advisement. She could not show "that the plea is likely to result in [her] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76.

Spalding told the court she took responsibility for her actions and recognized that she "need[s] to change some things in [her] life" and "to get this done and over with and move on with [her] life." The court observed that Spalding "seem[ed] like an intelligent, articulate person who would be a productive member of society if [she] hadn't succumbed to the addiction," that she engaged in criminal behavior because of her addiction, and that if she did not change, she either would end up facing future incarceration "or else dead like so many of the other people who are opiate addicts."

Spalding faced nine months' imprisonment and/or a $10,000 fine. Considering that she was on extended supervision when she committed the thefts and stole from the brother who was trying to help her, we cannot conclude that the imposed sentence is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). No basis exists to disturb the sentence imposed.

We identified one additional potential issue not raised in the no-merit report. Spalding appeared by video conferencing at the hearing on her request to withdraw her speedy trial demand and at the plea/sentencing hearing. A criminal defendant has the statutory right to be physically present in the same courtroom as the judge at such hearings. *See* WIS. STAT. § 971.04(1); *see also* ***State v. Soto***, 2012 WI 93, ¶34, 343 Wis. 2d 43, 817 N.W.2d 848. That right cannot be forfeited but it may be affirmatively waived. ***Soto***, 343 Wis. 2d 43, ¶44.

Spalding expressly consented to the use of video conferencing. The trial judge engaged her in a colloquy to ensure that she could hear the lawyers, could see, speak to, and hear him, and

that he could see, speak to, and hear her. The court permitted her to speak privately to her lawyer when she asked to do so. Spalding affirmatively waived her right to be physically present. *See* ***id.***, ¶50. No issue could arise in this regard.

Our review of the record discloses no other potential issues for appeal.

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 Patricia M. Padurean is relieved of further representing Spalding in this matter.

Diane M. Fremgen
Clerk of Court of Appeals