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October 21, 2015

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

2014AP2319-CRNM State of Wisconsin v. Abrian E. Kane (L.C. #2013CF629)

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

Abrian Kane appeals from a judgment convicting him of delivering narcotics (heroin) contrary to WIS. STAT. § 961.41(1)(a) (2013-14).[1] Kane's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Kane filed a response to the no-merit report. Upon consideration of the report, Kane's response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we

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

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 Kane's no contest plea was knowingly, voluntarily, and intelligently entered 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 no contest plea, Kane answered questions about the plea and his understanding of his constitutional rights 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 Kane's no contest 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 Kane 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 Kane's no contest plea.[2]

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. Kane gave heroin to a woman who used it and died of heroin intoxication. The circuit court adequately discussed the facts and factors relevant to sentencing Kane to a six-year term (four years of initial confinement and two years of extended supervision). In fashioning the sentence, the court considered the seriousness of the offense; Kane's conduct in the offense, character, untreated substance abuse issues, history of other offenses, and previous failure on probation; and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court declared Kane statutorily ineligible for the challenge incarceration program due to his age, WIS. STAT. § 302.045(2)(b), and declined to approve the earned release program due to the severity and nature of Kane's offense and because the program would not serve the court's sentencing rationale. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

[2] The circuit court did not warn Kane that it would not be bound by any sentencing recommendation incorporated into the plea agreement. ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. This issue lacks arguable merit for appeal because the plea agreement did not contain any recommended sentence; both parties were free to argue.

Kane raises potential appellate issues in his response. We conclude that the record refutes Kane's issues and they lack arguable merit for appeal.

Kane complains that the circuit court erroneously imposed restitution for the funeral expenses of the overdose victim. Although Kane was originally charged with first-degree reckless homicide, the State later amended the charge to delivery of heroin because the State did not believe it could prove the homicide beyond a reasonable doubt. Kane contends that he should not have to pay funeral expenses because he was not convicted in the victim's death.

Kane's argument lacks arguable merit for three reasons. First, the plea agreement required Kane to pay restitution for the funeral expenses. The restitution requirement was acknowledged at the plea hearing and at sentencing, both by Kane's counsel and by Kane. During allocution, Kane admitted delivering heroin to the victim, and he conceded that restitution was due. During sentencing, the court confirmed with counsel that restitution for funeral expenses was a component of the plea agreement. Kane did not object or indicate that he did not understand.[3]

Second, in it sentencing remarks, the circuit court acknowledged that Kane was not being sentenced for the death. However, the court explained that it would consider the death because it occurred in proximity to Kane's delivery of heroin and was part of the facts surrounding Kane's crime of conviction.

[3] At the conclusion of sentencing, the circuit court asked Kane if he understood "what the Court's done here today?" Kane replied that he understood, and he did not have any questions of the circuit court.

Third, restitution is properly imposed when the restitution claimant is a "direct victim" of the crime and there is a causal connection between the defendant's conduct and the claimant's harm. ***State v. Hoseman***, 2011 WI App 88, ¶16, 334 Wis. 2d 415, 799 N.W.2d 479. Here, the circuit court drew the reasonable inference that there was a causal connection between Kane's conduct (delivering heroin) and the victim's death by heroin intoxication. Even though Kane was not charged with the victim's death, her death was connected with the crime to which Kane pled no contest and was properly considered by the circuit court. *See* ***State v. Fisher***, 211 Wis. 2d 665, 678, 565 N.W.2d 565 (Ct. App. 1997). No issue with arguable merit arises from the restitution order.

Kane complains that his trial counsel was ineffective because counsel did not explain all of the legal aspects of the restitution request when counsel presented the plea agreement. This issue lacks arguable merit for appeal. The restitution provision was not complicated and was proper under Wisconsin law, Kane subscribed to the restitution provision on more than one occasion during court proceedings, and Kane faced a significantly reduced charge as a result of the plea agreement.

Kane complains that his trial counsel should have argued in favor of the earned release program and did not explain the program to him. The circuit court has discretion to declare a defendant ineligible for the earned release program. ***State v. Owens***, 2006 WI App 75, ¶6, 291 Wis. 2d 229, 713 N.W.2d 187. The court's discretionary decision about program participation is part of the overall exercise of sentencing discretion. ***Id.***, ¶9. The circuit court declined to make Kane eligible for the earned release program due to the severity of his offenses and the sentencing rationale, which the court found would not be served by the earned release program. *See* ***id.*** On

this record, any argument in favor of the earned release program would not have been successful. This issue lacks arguable merit for appeal.

Kane complains that the circuit court barred him from having contact with his co-actor or the victim's family. We see no misuse of circuit court discretion in this regard. This issue lacks arguable merit for appeal.

Kane raises an issue about the signed plea agreement. It is unclear to which document Kane refers. Kane's plea was set out in the plea questionnaire/waiver of rights form filed in the circuit court on November 4, 2013. That questionnaire is mistakenly captioned for Washington county. However, the questionnaire, which bears a signature for Kane, accurately states the plea agreement later placed on the record at the plea and sentencing hearings. Whether Kane signed the plea questionnaire or not, the plea agreement was stated on the record. This issue lacks arguable merit for appeal.

In addition to the issues discussed above, we have independently reviewed the record. 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 Mark Rosen of further representation of Kane 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 Mark Rosen is relieved of further representation of Abrian Kane in this matter.

Diane M. Fremgen
Clerk of Court of Appeals