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DISTRICT II

December 2, 2015

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

2015AP379-CRNM State of Wisconsin v. Erin A. Heinz (L.C. #2013CF574)

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

Erin A. Heinz appeals a judgment convicting her of first-degree reckless homicide by the delivery or manufacture of heroin. Heinz's appellate counsel 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). Heinz was advised of her right to file a response but she has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32,

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

we conclude that there is no arguable merit to any issue that could be raised on appeal. We accept the no-merit report and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Heinz was charged with two felony counts of delivery of three grams or less of heroin and one misdemeanor count of possession of drug paraphernalia. The persons to whom Heinz sold the heroin provided some of the drug to a woman who died after using it. Three months later, the State filed an amended complaint also charging Heinz and her co-actors with first-degree reckless homicide by the delivery or manufacture of heroin. As she had with the initial counts, Heinz waived a preliminary hearing on the added count. Heinz pled no contest to first-degree reckless homicide by delivery of narcotics as alleged; the remaining counts were dismissed and read in. The court sentenced her to seven years' initial confinement and five years' extended supervision and ordered her to provide a DNA sample and pay the $250 DNA analysis surcharge. This no-merit appeal followed.

The no-merit report first examines whether Heinz's no-contest plea presents any grounds for an arguably meritorious challenge. 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. WISCONSIN STAT. § 971.08 also establishes 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.

To withdraw her plea after sentencing, Heinz would have to carry "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). The

court addressed Heinz personally and engaged her in a colloquy that verified her understanding and that her plea was knowing, voluntary, and intelligent. *See* ***Brown***, 293 Wis. 2d 594, ¶35. Besides the thorough colloquy, the court properly looked to the plea questionnaire/waiver of rights form Heinz 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. Heinz 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 she did not understand or know the information that should have been provided. *See* ***Bangert***, 131 Wis. 2d at 274. We have identified nothing in the record that would support a claim that a manifest injustice would result if she were not allowed to withdraw her 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 the propriety of the sentence imposed. 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 Heinz's offense, her 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 mitigating factors such as her regular employment, lack of a criminal history, remorse, and decision to accept responsibility. It also noted, however, that she used and was a "mid-level seller" of heroin despite knowing the potential, now actual, devastating consequences, and had shown herself to be "an abject failure" on bond, continuing to use heroin until her bond was revoked. 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). Heinz faced twenty-five years' initial confinement and fifteen years' extended supervision. Her total

sentence 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).

We examine the propriety of the DNA surcharge. When Heinz committed her crime in March 2013, a DNA surcharge was discretionary with the court. *See* WIS. STAT. § 973.046(1g) (2011-12). At her March 2014 sentencing, WIS. STAT. § 973.046(1r)(a) required a convicted felon to provide a DNA sample and pay a $250 surcharge. 2013 Wis. Act 20, §§ 2355, 9426(1)(am). This is not an ex post facto violation. *See* ***State v. Scruggs***, 2015 WI App 88, ¶1, ___ Wis. 2d ___, ___ N.W.2d ___. As this was Heinz's first submission of a DNA sample, the nominal related fee is not punitive in effect. *See* ***id.***, ¶¶14, 18. Even if viewed under the former statute, the court's entire sentencing rationale, including its reference to Heinz's employment history and decision not to order restitution, satisfies us that ordering her to pay the DNA surcharge reflects a proper exercise of discretion. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶11-13, 338 Wis. 2d 151, 807 N.W.2d 241. Our independent review of the record discloses no other potentially meritorious issue for appeal. Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved from further representing Heinz in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals