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DISTRICT II

December 9, 2015

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

2015AP559-CRNM State of Wisconsin v. Sean M. Regan (L.C. # 2013CF350)

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

Sean Regan appeals from judgments convicting him of two counts of first-degree recklessly endangering safety contrary to WIS. STAT. § 941.30(1) (2011-12)¹ and one count of criminal damage to property contrary to WIS. STAT. § 943.01(2)(d). Regan's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S.

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

738 (1967). Regan received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgments because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

Regan had a prior WIS. STAT. RULE 809.32 appeal. We rejected the no-merit report and dismissed that appeal in favor of further WIS. STAT. RULE 809.30 postconviction proceedings relating to the imposition of the DNA surcharge. *State v. Regan*, No. 2014AP1135-CRNM, unpublished op. and order (WI App Feb. 4, 2015). The circuit court granted Regan's motion to vacate the DNA surcharge. The DNA surcharge is no longer at issue.

The no-merit report filed in the pending appeal addresses the following possible appellate issues: (1) whether Regan's no contest pleas were knowingly, voluntarily and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether the circuit court properly awarded restitution. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest pleas, Regan answered questions about the pleas 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 Regan's no contest pleas were knowingly, voluntarily and intelligently entered, *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they 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 Regan signed is competent evidence of knowing and voluntary pleas. *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. The circuit court warned Regan of the significance of the dismissed and read-in charges. *State v. Straszkowski*, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Regan's no contest pleas.

With regard to the sentences, 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. The court adequately discussed the facts and factors relevant to sentencing Regan to two concurrent eleven-year terms. In fashioning the sentences, the court considered the seriousness of the offenses, Regan's character, substance abuse, health issues, history of other offenses and rehabilitation needs, 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 felony sentences complied with WIS. STAT. § 973.01 relating to the imposition of bifurcated sentences of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

The court imposed restitution after an evidentiary hearing. Restitution in criminal cases is governed by WIS. STAT. § 973.20. Subsection (1r) states that a circuit court "shall" order the defendant to pay restitution "to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record." The amount of restitution is generally within the circuit court's discretion. *State v. Johnson*, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284.

The arson charge against Regan was dismissed and read-in as part of the plea agreement. Regan stipulated to restitution except for the depreciation deemed not recoverable under the victims' insurance policy. The victims' insurance company calculated the victims' replacement cost at \$208,573.54, but paid the victims \$192,046.23, leaving \$15,527.31 in depreciated value and a \$1000 deductible unpaid. Regan stipulated to the \$1000 deductible as a component of restitution. The court found that the depreciation amount was a proper component of restitution for the replacement cost of the damaged building. WIS. STAT. § 973.20(2)(b). The circuit court made appropriate findings that Regan had the ability to pay restitution over what was expected to be a long working life without the burden of dependents. The restitution award does not suggest any issue with 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 judgments of conviction and relieve Attorney Michael S. Holzman of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of further representation of Sean Regan in this matter.

Diane M. Fremgen
Clerk of Court of Appeals