



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/IV

December 14, 2015

To:

Hon. James A. Morrison
Circuit Court Judge
Marinette County Courthouse
1926 Hall Avenue
Marinette, WI 54143

Sheila Dudka
Clerk of Circuit Court
Marinette County Courthouse
1926 Hall Avenue
Marinette, WI 54143

Allen R. Brey
District Attorney
1926 Hall Avenue
Marinette, WI 54143-1717

Steven D. Grunder
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Dennis J. Kivioja 280025
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2014AP2891-CRNM State of Wisconsin v. Dennis J. Kivioja (L.C. # 2013CF106)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Attorney Shelley Fite, appointed counsel for Dennis Kivioja, has filed a no-merit report seeking to withdraw as appellate counsel.¹ See WIS. STAT. RULE 809.32 (2013-14)² and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Kivioja's plea or sentencing, or to the circuit court's decision

¹ After the no-merit report was filed, Attorney Steven Grunder substituted for Attorney Fite as counsel for Kivioja.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

denying Kivioja's postconviction motion for sentence modification. Kivioja was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Kivioja was charged with burglary and misdemeanor theft. Pursuant to a plea agreement, Kivioja pled no-contest to burglary and the theft charge was dismissed but read-in for sentencing purposes, and the parties jointly recommended three years of initial confinement and three years of extended supervision. The court sentenced Kivioja to six years of initial confinement and five years of extended supervision, consecutive to any other sentence. Kivioja moved for sentence modification, arguing that the circuit court failed to exercise its sentencing discretion to determine whether to grant Kivioja eligibility for the Substance Abuse Program (SAP). The court denied sentence modification.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Kivioja's plea. A postsentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire and waiver of rights form that Kivioja signed, satisfied the court's mandatory duties to personally address Kivioja and determine information such as Kivioja's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for

plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Kivioja's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Kivioja's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the circuit court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Kivioja's character and criminal history, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Kivioja faced and, given the facts of this case, was not so excessive or unduly harsh as to shock the conscience. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the court's sentencing discretion.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision denying Kivioja's postconviction motion for sentence modification. We agree with counsel's assessment that, given the court's explanation of its reasoning at the postconviction motion hearing, a challenge to the court's exercise of discretion would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Grunder is relieved of any further representation of Kivioja in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals