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DISTRICT III

January 26, 2016

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

2014AP1821-CRNM State of Wisconsin v. Troy B. Birkenmeier (L. C. No. 2012CF219)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Troy Birkenmeier has filed a no-merit report concluding there is no basis to challenge Birkenmeier's conviction for first-degree reckless injury. Birkenmeier has responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable issue of merit that could be raised and summarily affirm.

The criminal complaint charged attempted first-degree intentional homicide and aggravated battery arising out of the beating of Birkenmeier's wife. He pled no contest to

first-degree reckless injury and the aggravated battery charge was dismissed and read in. The circuit court imposed ten years' initial confinement and ten years' extended supervision.

There is no manifest injustice upon which Birkenmeier could withdraw his plea. *See State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, together with the plea questionnaire and waiver of rights form, informed Birkenmeier of the constitutional rights he waived by pleading no contest, the elements of the offense, and the potential penalty. The court specifically advised Birkenmeier that it was not bound by the parties' agreement and could impose the maximum penalty. Although the court failed to specifically advise Birkenmeier of the potential deportation consequences of his plea, as required by WIS. STAT. § 971.08(1)(c),¹ Birkenmeier represented in open court at the sentencing hearing that he was born in Rice Lake, Wisconsin, and there is no arguable issue that could arise from the court's omission in that regard. Birkenmeier conceded the allegations in the complaint were substantially true regarding first-degree reckless injury, and an adequate factual basis thus supported the conviction. The record shows the plea was knowingly, voluntarily, and intelligently entered. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid no contest plea constitutes a waiver of nonjurisdictional defects and defenses. *Id.* at 265-66.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered Birkenmeier's character, the seriousness of the offense, and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court stated,

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

“But of all three of these factors, the gravity of the offense really takes the forefront. I think it can easily be said by the grace of God you did not kill [your wife] that night.” The sentence imposed was authorized by law and not overly harsh or excessive.

In his response, Birkenmeier requests a new sentencing hearing. At the sentencing hearing, the circuit court asked if Birkenmeier had a chance to review the presentence investigation report, and if “he [found] any factual errors in that report?” Birkenmeier sat silent while trial counsel stated, “No. Obviously, Judge, there are some disputes as to assertions made within the report, but factually it appears fairly accurate.” Birkenmeier now insists his attorney’s statement was “incorrect” and “I [Birkenmeier] have found some factual errors that I would like to address at this time.” Birkenmeier insists the PSI “be thrown out.” Birkenmeier will not be heard to challenge purported factual errors in the PSI when he sat silent at the sentencing hearing.

Birkenmeier also requests this court “consider the following evidence when determining what an appropriate sentence would be.” Birkenmeier asserts he will not receive adequate treatment for disorders, including post-traumatic stress disorder, while an inmate. He also alleges inadequate educational opportunities. Birkenmeier further proposes this court “grant me a 20-year bifurcated sentence but that it is structured as three ½ years initial confinement and 16 ½ years on extended supervision.” However, Birkenmeier could not meet his burden to prove that the court relied upon inaccurate information when sentencing him. *See State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. Birkenmeier also provides no legitimate basis that could serve as grounds for a sentence modification. *See Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975) (new factor defined as a fact or set of facts highly relevant to the

imposition of sentence, but not known to the trial judge at the time of sentencing, either because it was not then in existence or it was unknowingly overlooked by all of the parties).

Our independent review of the record discloses no other issues of arguable merit.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2013-14).

IT IS FURTHER ORDERED that attorney Susan Alesia is relieved of further representing Birkenmeier in this matter.

Diane M. Fremgen
Clerk of Court of Appeals