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DISTRICT III

May 3, 2016

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

2014AP2510-CRNM
2014AP2511-CRNM
2014AP2512-CRNM
2014AP2513-CRNM

State of Wisconsin v. Kyle M. Kennedy
(L. C. Nos. 2012CM2110; 2013CM208; 2013CM482; 2013CF497)

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

Counsel for Kyle Kennedy has filed a no-merit report concluding no grounds exist to challenge Kennedy's convictions for one count of delivering three grams or less of heroin, and four counts of misdemeanor bail jumping, the bail jumping counts as a repeater. Kennedy filed a response challenging his sentence. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.[1]

The State charged Kennedy with the following eight offenses, arising from Marathon County Circuit Court case Nos. 2012CM2110, 2013CM208 and 2013CM482: party to a crime of both misdemeanor theft and misdemeanor retail theft; disorderly conduct; four counts of misdemeanor bail jumping; and one count of obstructing an officer, all counts as a repeater. In exchange for his no contest pleas to four counts of misdemeanor bail jumping, as a repeater, the State agreed to dismiss and read in the remaining counts from those cases and recommend six months' jail time with Huber privileges, if eligible, to be served within sixty days of the plea.

Before the sentencing hearing on the misdemeanors, however, Kennedy was charged with the following eight offenses in Marathon County Circuit Court case No. 2013CF497: one count of delivering three or less grams of heroin; three counts of obstructing an officer; and four counts of misdemeanor bail jumping, all counts as a repeater. The parties consequently entered into a new plea agreement that appears to supersede the earlier agreement. In exchange for his no contest plea to delivering three grams or less of heroin without the repeater allegation, the State agreed to dismiss and read in the remaining charges from case No. 2013CF497 and refrain from pursuing any additional charges from the course of conduct in that case, as well as any criminal charges stemming from an investigation in a separate case. The State also agreed to recommend that any sentence imposed on the misdemeanor offenses run concurrent with the sentence imposed on the felony offense. Out of a maximum possible sentence of twenty and

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

one-half years, the court imposed concurrent sentences resulting in a total of twelve and one-half years, consisting of seven and one-half years' initial confinement followed by five years' extended supervision.

The record discloses no arguable basis for withdrawing Kennedy's no contest pleas. The circuit court's plea colloquies, as supplemented by plea questionnaire and waiver of rights forms that Kennedy completed, informed Kennedy of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no contest pleas. The court confirmed Kennedy's understanding that it was not bound by the terms of the plea agreements, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and found that a sufficient factual basis existed to support the conclusion that Kennedy committed the crimes charged.

During the plea colloquy on the felony offense, the circuit court advised Kennedy of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1). Although the court failed to give the same advisement when accepting Kennedy's no contest pleas to the bail jumping offenses, the record shows that Kennedy was born in Wisconsin and thus not subject to deportation. Therefore, any challenge to the pleas on this ground would lack arguable merit. The record shows the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The no-merit report also acknowledges that the circuit court did not personally address Kennedy regarding the effect of read-in charges. Our supreme court has held:

> A circuit court should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty

> of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge.

State v. Straszkowski, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. The no-merit report indicates, however, that after discussing the matter with Kennedy, counsel cannot argue that Kennedy did not understand the effects of read-in charges. Any challenge to the plea on this basis would therefore lack arguable merit.

The record discloses no arguable basis for challenging the sentences imposed. Before imposing sentences authorized by law, the circuit court considered the seriousness of the offenses; Kennedy's character, including his criminal history; the need to protect the public; and the mitigating factors Kennedy raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court placed particular emphasis on the gravity of the felony offense, noting that Kennedy delivered heroin to Michael Dixon at a gas station, with Dixon's four-year-old son in the vehicle. The court further recounted that Dixon ingested the heroin and was then involved in a one-car crash resulting in Dixon's death and "severe, life-altering injuries" to Dixon's young son. The court noted that although Dixon died from injuries sustained in the crash, the medical examiner opined that heroin was a major contributing factor to the crash. Under these circumstances, it cannot reasonably be argued that Kennedy's sentences are so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We observe that, at sentencing, the circuit court referenced the Department of Corrections' COMPAS assessment. Currently pending before our supreme court is the issue of

whether the right to due process prohibits circuit courts from relying on COMPAS assessments when imposing sentence. ***State v. Loomis***, 2015AP157-CR, certification granted (WI Nov. 4, 2015). The arguably meritorious claim that a sentencing court's reliance on the COMPAS assessment violates due process is not implicated in this case. In addressing COMPAS, the court noted that it had "concerns about the validity of that instrument" and consequently "did not put a great deal of weight on the COMPAS assessment." The record shows that the sentencing court made its own assessment on the facts, finding "based on the record before the court that [Kennedy] is a high risk to re-offend," has a history of undesirable behavior, and has a very real and severe addiction to heroin that has to be addressed. Even if our supreme court, in ***Loomis***, questions the COMPAS assessment as a sentencing tool, the record does not support a claim that the court relied on the COMPAS assessment in this case. Any challenge to the sentences based on the court's passing reference to COMPAS would therefore lack arguable merit.

We examine the propriety of the $250 DNA surcharge imposed for the single felony offense.[2] When Kennedy committed his crime in March 2013, a DNA surcharge was discretionary with the court. *See* WIS. STAT. § 973.046(1g) (2011-12). In June 2013, the legislature made the DNA surcharge mandatory at sentencing following conviction for all felonies. *See* 2013 Wis. Act 20, §§ 2353-55. The change was effective for all sentences imposed, rather than crimes committed, after January 1, 2014. *See* ***id.***, § 9423(1)(am). Ex post facto challenges have been made to the mandatory surcharge where, as here, the offense occurred before January 1, 2014 but the sentencing occurred after that date. In denying Kennedy's motion

[2] The court initially imposed DNA surcharges in the misdemeanor cases, but later removed those surcharges.

to vacate the surcharge for his felony conviction, the court noted Kennedy had not previously been convicted of a felony or paid the surcharge. As this was Kennedy's first submission of a DNA sample, the nominal related fee is not punitive in effect and, therefore, did not arguably violate the prohibition against ex post facto laws. *See* ***State v. Scruggs***, 2015 WI App 88, ¶¶14, 18-19, 365 Wis. 2d 568, 872 N.W.2d 146. Even if viewed under the former statute, imposition of the surcharge for a first felony where the defendant has not previously paid the surcharge constitutes a proper exercise of discretion. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12. Any challenge to the DNA surcharge in this case would lack arguable merit.

In his response to the no-merit report, Kennedy asserts he is entitled to resentencing on grounds the circuit court relied on inaccurate information. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. In order to establish a due process violation, the defendant has the burden of proving both that the information was inaccurate and that the court actually relied on the inaccurate information in sentencing. ***Id.***, ¶26. Here, Kennedy challenges the credibility of Jessie Utecht, who gave statements to police that were incorporated into the assistant district attorney's sentence recommendation. Specifically, Utecht claimed she saw Kennedy sell heroin on prior occasions and that Kennedy had traveled to Chicago to obtain heroin the day before the sale to Dixon.

Kennedy takes issue with the A.D.A.'s characterization of him as a "drug dealer." Even assuming the information from Utecht was inaccurate, there is no indication the sentencing court relied on this information at sentencing. The sentencing court recognized that Dixon knew

whom to contact for heroin and further stated: "When you're delivering heroin, you're basically handing that other person poison." Although Kennedy denies being a "dealer," he admitted selling heroin to his friends, including Dixon. Because the record does not support Kennedy's claim that the sentencing court relied on inaccurate information, any claim he is entitled to resentencing on these grounds lacks arguable merit.

Our independent review of the records discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Timothy T. O'Connell is relieved of further representing Kennedy in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals