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DISTRICT IV

September 27, 2016

To:

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Circuit Court Judge
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Hon. Michael A. Haakenson
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2016AP1132-CRNM State of Wisconsin v. Joseph Steven Lounsbury
(L.C. # 2014CF1760)

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

Attorney Catherine Malchow, appointed counsel for Joseph Steven Lounsbury, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether

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

there would be arguable merit to a challenge to Lounsbury's plea or sentencing or the court's order denying Lounsbury's postconviction motion for sentence modification.[2] Lounsbury 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.

Lounsbury was charged with one count of operating a motor vehicle while intoxicated (OWI), seventh offense, with a minor in the vehicle, and one count of operating a motor vehicle after his operating privileges were revoked for an OWI offense (OAR). The information added a charge of operating a motor vehicle with a prohibited blood alcohol concentration (PAC), seventh offense, with a minor in the vehicle. Lounsbury pled guilty to the OWI and PAC charges, both as seventh offense and with a minor in the vehicle, and the OAR charge was dismissed. The court sentenced Lounsbury to six years of initial confinement and five years of extended supervision on the OWI conviction, and denied Lounsbury eligibility for the Earned Release Program (ERP).

Lounsbury filed a postconviction motion seeking eligibility for ERP. He argued that the sentencing court relied on inaccurate information in denying Lounsbury eligibility for ERP, and that new information indicated that Lounsbury was an appropriate candidate for the program. The circuit court denied the motion.

[2] The Honorable Kenneth W. Forbeck presided over the plea and sentencing hearings. The Honorable Michael A. Haakenson presided over postconviction proceedings.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Lounsbury's plea. A post-sentencing 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 satisfied the court's mandatory duties to personally address Lounsbury and determine information such as Lounsbury's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea.[3] *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 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 Lounsbury's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Lounsbury'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 court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Lounsbury's character, and the need to protect the public. *See* ***State v. Gallion***, 2004

[3] The circuit court failed to personally advise Lounsbury of the potential immigration consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). However, no-merit counsel suggests that Lounsbury cannot show that he is likely to suffer any immigration-related consequences. *See* § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, ¶¶19-25, 253 Wis. 2d 173, 646 N.W.2d 1 (if defendant was not personally advised as to immigration consequences, and "plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization," defendant is entitled to plea withdrawal) (quoting § 971.08(2)). Lounsbury has not filed a response disputing that he would be unable to seek plea withdrawal based on the court's failure to advise Lounsbury as to the potential immigration consequences of his plea.

WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was well within the maximum Lounsbury faced, and therefore 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 the circuit court order denying Lounsbury's postconviction motion seeking sentence modification to find Lounsbury eligible for ERP. Lounsbury argued that, contrary to the sentencing court's statements, Lounsbury's substance abuse treatment needs made him an appropriate candidate for the program. Lounsbury cited the following statement by the court in denying Lounsbury eligibility: "We just went through three days of a sentencing seminar indicating what works and what doesn't work, and, unfortunately, that program is not something I think is appropriate under the facts and circumstances of this case." Lounsbury argued that he had been unable to discover what relevant information the court received from the sentencing seminar, and attached a report explaining the benefits of ERP for individuals with Lounsbury's type of treatment needs. Lounsbury argued that the court was misinformed as to Lounsbury's appropriateness for treatment through ERP, and that the report was a new factor warranting sentence modification. The circuit court denied the motion. It explained that Lounsbury had not established a new factor warranting sentence modification because he had not shown that the sentencing court lacked any of the information in the report or that the court had been misinformed as to any of that information, and the sentencing court had relied on the seriousness of the offense and the need to protect the public in denying Lounsbury eligibility for ERP.

We agree with no-merit counsel that a challenge to the court's decision denying postconviction relief would lack arguable merit. A motion for sentence modification based on a

new factor must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is one that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Additionally, "[e]rroneous or inaccurate information used at sentencing may constitute a 'new factor' if it was highly relevant to the imposed sentence and was relied upon by the trial court." ***State v. Norton***, 2001 WI App 245, ¶9, 248 Wis. 2d 162, 635 N.W.2d 656.

Here, there would be no arguable merit to a claim that the circuit court erred by determining that Lounsbury failed to demonstrate a new factor warranting sentence modification. As the court explained, Lounsbury did not show by clear and convincing evidence that any of the information as to ERP or Lounsbury's treatment needs was unknown by the sentencing court. The record clearly establishes that the sentencing court was aware of ERP and Lounsbury's treatment needs, and its reference to material at a sentencing seminar "indicating what works and what doesn't work" does not establish that the court was misinformed in that regard. Moreover, as the court explained, the sentencing court weighed the severity of the offense and the need to protect the public to determine that eligibility for ERP was not appropriate under the facts and circumstances of this case.

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 Catherine Malchow is relieved of any further representation of Joseph Lounsbury in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals