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DISTRICT II

February 22, 2017

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

2016AP1177-CRNM State of Wisconsin v. Trevoy K. Britts (L.C. #2013CF1141)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Trevoy K. Britts appeals from a judgment convicting him of two counts of manufacture/delivery of heroin (< 3 grams) and one count each of possession with intent to deliver cocaine (>15–40 grams), possession with intent to deliver heroin (<= 3 grams), and manufacture/delivery of cocaine (>1–5 grams). Britts' appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding that there exist no issues of arguable merit. Britts was notified of his right to

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

file a response but has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

In August 2013, Britts was charged with sixteen drug-related felonies; the information added a seventeenth charge. Britts entered no-contest pleas to five counts; the others were dismissed and read in at sentencing. The trial court imposed an aggregate sentence of twelve years' initial confinement plus ten years' extended supervision. Appointed counsel filed a no-merit appeal. This court rejected the appeal because, as Britts' offenses and sentencing straddled the effective date of a newly enacted statute, the trial court mistakenly imposed five $250 DNA analysis surcharges at Britts' September 2014 sentencing. *See* ***State v. Britts***, No. 2015AP2070-CRNM, unpublished op. and order (WI App Mar. 1, 2016). In the meantime, the trial court sua sponte caught its misstep and amended the judgment of conviction, finding that one DNA surcharge was appropriate. The court denied Britts' postconviction motion requesting to have the single surcharge removed as well.

Counsel filed a second no-merit notice of appeal and, not unreasonably, asked this court to decide the no-merit appeal on materials already submitted in conjunction with appeal No. 2015AP2070-CRNM. *See* ***State v. Britts***, No. 2016AP1177-CRNM, unpublished order at 2 (WI App Aug. 31, 2016). We necessarily denied his request, however, as appeal No. 2015AP2070-CRNM had been dismissed. We thus directed counsel to file a report in connection with the new no-merit appeal. ***Britts***, No. 2016AP1177-CRNM, unpublished order at 3. He now has done so.

The no-merit report addresses the following issues: whether (1) Britts entered his no-contest pleas knowingly, voluntarily, and intelligently and in compliance with ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08; (2) the trial court misused its sentencing discretion and/or imposed a sentence that was unduly harsh and unconscionable; and (3) the trial court misused its discretion when it imposed the single DNA surcharge.[2] We agree with counsel's analysis and conclusion that none raise issues of arguable merit.

The trial court's decision regarding the withdrawal of a guilty plea is discretionary and is granted only when necessary to correct a manifest injustice. ***State v. Harrell***, 182 Wis. 2d 408, 414, 513 N.W.2d 676 (Ct. App. 1994). There is no manifest injustice that would justify plea withdrawal here. The court's colloquy with Britts, reinforced by the plea questionnaire and waiver-of-rights forms, informed him of the constitutional rights he waived by pleading, the elements of the offenses, and the potential penalties. An adequate factual basis supported the convictions. The court told Britts it was not bound by the plea agreement or any sentencing recommendation, could impose the maximum penalties, and expressly advised him of the significance of read-in charges. The record demonstrates that the pleas were knowingly, voluntarily, and intelligently entered. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 260-62.

[2] Appellate counsel alleged in his motion leading to this court's August 31, 2016 ruling in appeal No. 2016AP1177-CRNM that he discussed the matter of the single DNA surcharge with Britts after the telephonic postconviction motion hearing. Counsel stated that Britts indicated both that he "did not care about the single DNA surcharge" and agreed that the surcharge was "reasonable and appropriate." Counsel also said Britts' primary concern was the "severity of his sentence, and whether he was in his right state of mind" when he entered his pleas. Counsel reiterates the assertions in this no-merit report. Our independent review of the record reveals nothing whatsoever suggesting that Britts was not "in his right state of mind" when he entered his pleas.

Entry of a valid guilty or no-contest plea constitutes a waiver of nonjurisdictional defects and defenses. *See* ***Bangert***, 131 Wis. 2d at 293.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the seriousness of the offenses, Britts' character, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). It remarked on both the personal and the broad devastation heroin causes, calling Britts a "deliverer of … evil" and noted that his long-time personal addiction well may be why, not yet fifty years old, he is in "extremely poor" health. It observed that Britts' education and employment skills did not stop him from turning to illegality and that, even though his precarious health may prevent him from "working the streets" as he had before, the community needs to be protected from him because of his drug knowledge and connections.

Britts faced up to seventy-five years' imprisonment and/or $200,000 in fines. Under any view, his twenty-two-year total sentence cannot be said to be "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, when Britts committed his felonies in August 2013, whether to impose a DNA surcharge was a matter within the court's discretion. WIS. STAT. § 973.046(1g) (2011-12). The court found that Britts previously had not provided a DNA sample. Further, the record establishes a consistent work history, leading the court to reasonably find that he had or would have the financial wherewithal to pay the surcharge. Those reasons justify the imposition of a discretionary surcharge. *See* ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752

N.W.2d 393. Further, the surcharge was justified by the fact that the State would incur a cost for collecting Britt's sample, having it analyzed, and putting it into the DNA database. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12. We thus conclude there would be no arguable merit to challenging the imposition of a DNA surcharge in this case.

Our review of the record discloses no further potential issues for appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Hans P. Koesser is relieved of further representing Britts in this matter.

Diane M. Fremgen
Clerk of Court of Appeals