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June 7, 2017

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

2017AP330-CRNM State of Wisconsin v. Dustin J. Conrad (L.C. # 2013CF432)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Dustin J. Conrad appeals from a judgment of conviction for burglary, as a repeater, and from an order denying his postconviction motion. His 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). Upon consideration of the report, Conrad's response, and an independent review of the

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

record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Conrad entered a guilty plea to the charge that on July 30, 2013 he broke into a home and stole a large amount of jewelry and some coins. He was sentenced to ten years' initial confinement and five years' extended supervision. The sentencing court determined that Conrad was eligible for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP). Conrad was ordered to pay \$33,379.90 in restitution.

Two postconviction motions were filed.² The first sought to have the repeater portion of Conrad's sentence commuted because the State failed to prove beyond a reasonable doubt that Conrad was a repeat offender. It also sought modification of the sentence and restitution based on newly discovered evidence that one of the home owners had committed theft by contractor and owed more than \$135,000 for a civil judgment and restitution, a circumstance that Conrad argued raised an inference that the value of the stolen jewelry was inflated.³ The circuit court concluded that the repeater status was adequately proven by references to the prior conviction in the presentence investigation report (PSI) which were not corrected by Conrad at sentencing and

² This court granted an extension of time to file a second WIS. STAT. RULE 809.30 postconviction motion.

³ The first postconviction motion also sought to vacate the \$250 mandatory DNA surcharge for Conrad's 2013 crime on the ground it was an *ex post facto* violation in light of the fact that Conrad had given a DNA sample and paid the related surcharge in a prior case. The DNA surcharge was vacated. Conrad also sought sentence modification to require restitution to be paid only as a condition of extended supervision because under the existing judgment of conviction, the Department of Correction was deducting 25% from Conrad's prison account twice, once for restitution and once for other surcharges. The judgment of conviction was amended to permit the collection of restitution at 25% of Conrad's prison wages and to stay the collection of any other court costs and surcharges until Conrad's release to extended supervision.

the stipulation during the plea taking that Conrad had a prior conviction satisfying the repeater enhancer. The court determined that because the dollar value of the heirloom jewelry was not the focus of the sentencing court's assessment of the severity of crime, the home owner's liability for a civil judgment and restitution was not a new factor for sentence modification.

Conrad's second postconviction motion alleged that trial counsel was ineffective for not objecting to the amount of restitution. Conrad sought an order vacating restitution and setting the matter for a restitution hearing. A *Machner*⁴ hearing was held. Conrad's trial counsel testified that he was aware of the amount of restitution sought before the plea was entered, he spoke with Conrad about restitution, and they agreed not to challenge the restitution in order to demonstrate at sentencing that Conrad accepted responsibility for the crime. Conrad testified that he never discussed restitution with counsel, never saw the discovery which may have included the restitution request, and had no idea until he was sentenced how much restitution was requested. The circuit court found trial counsel's testimony more credible. It concluded that there was no deficient performance by trial counsel because a legitimate strategy decision was made not to challenge restitution.

The no-merit report addresses the potential issues of whether Conrad's plea was freely, voluntarily and knowingly entered, whether the State complied with the terms of the plea agreement at sentencing, whether the sentence was the result of an erroneous exercise of

⁴ A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

discretion or unduly harsh, whether the sentencing court used the COMPAS⁵ assessment included in the PSI in a manner prohibited by *State v. Loomis*, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749, whether the repeat offender enhancer should be vacated, whether the home owner's liability for a civil judgment and restitution constitutes a new factor for sentence modification, and whether trial counsel was ineffective for not objecting to the amount of restitution. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

Conrad's response first claims that the COMPAS assessment was used in a determinative fashion in violation of the *Loomis* holding. We disagree with Conrad's reading of the sentencing court's remarks. The court noted that COMPAS placed Conrad at high risk for violent recidivism, general recidivism, and pretrial release and highly probable for criminal associates and peers, criminal opportunity, social isolation, substance abuse, and residential instability. However, the court did not link those assessments to the determination that probation was not an appropriate sentence or the length of the sentence. Numerous factors were relied on in imposing sentence including the fact that Conrad was a career burglar, he committed the crime four days after being placed on probation for a prior burglary conviction, and the crime was aggravated because Conrad invaded the privacy of the victims' home and stole irreplaceable heirloom jewelry.

Conrad also suggests that delay in receiving meaningful treatment is a new factor entitling him to sentence modification. As the no-merit report recites, a new factor "refers to a

⁵ "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" *State v. Loomis*, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of 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.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Conrad latches on to the sentencing court’s comment that Conrad’s “need for close rehabilitative control is an essential element of this sentence,” and suggests that is why the court made him eligible for CIP and SAP. Conrad explains that he must wait nearly seven years until he is suitable for SAP and that the wait thwarts the sentencing court’s desire that Conrad get treatment sooner rather than later. The sentencing court recognized that in past incarcerations in Illinois, Conrad had not received any treatment and that such treatment would be essential prior to Conrad’s release so Conrad could attempt to be drug free and consequently crime free in the future. The need for treatment did not detract from the sentencing court’s desire to protect the public and punish Conrad. The sentencing court specifically stated that Conrad “is deserving of a lengthy prison sentence.” There is no arguable merit to a claim that delay in treatment until Conrad is closer to a release date is a new factor supporting sentence modification.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Conrad further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved from further representing Dustin J. Conrad in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals