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DISTRICT IV

July 24, 2017

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

2016AP2264-CRNM State of Wisconsin v. Dashaun J. Smith (L.C. # 2015CT284)

Before Blanchard, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorney Vicki Zick, appointed counsel for Dashaun Smith, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 and ***Anders v.***

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

California, 386 U.S. 738, 744 (1967). The only potential issue identified in the no-merit report is whether there would be arguable merit to a claim that the sentence imposed by the circuit court was unduly harsh. The no-merit report concludes that it appears that an argument that the sentence was unduly harsh would be frivolous, and therefore further proceedings would be wholly frivolous. Upon my independent review of the record, as well as the no-merit report, I conclude that the no-merit report does not establish that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and RULE 809.32. Accordingly, I reject the no-merit report.

Smith was charged with operating a motor vehicle after his operating privileges had been revoked (OAR), with the revocation resulting from a prior conviction for operating while intoxicated. *See* WIS. STAT. §§ 343.44(1)(b) and (2)(ar)2. Smith pled no-contest, and the court sentenced Smith to sixty days in jail and a $100 fine.

The no-merit report addresses only whether there would be arguable merit to a claim that the sentence imposed by the circuit court was unduly harsh. It concludes that the sixty-day sentence was not unduly harsh because the sentence was well within the maximum Smith faced. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

The no-merit report also concludes that the circuit court considered the required statutory factors under WIS. STAT. § 343.44(2)(b).[2] The no-merit report notes that the circuit court did not comment explicitly on all of the statutory factors at sentencing, but concludes that the court satisfied the statute because the State presented information about Smith's prior and current OAR offenses. I disagree with counsel's assessment that this issue lacks arguable merit.

Under WIS. STAT. § 343.44(2)(b):

> In imposing a sentence under [WIS. STAT. § 343.44(2)(ar) or (br)], the court shall review the record and consider the following:
>
> 1. The aggravating and mitigating circumstances in the matter, using the guidelines described in par. (d).
>
> 2. The class of vehicle operated by the person.
>
> 3. The number of prior convictions of the person for violations of this section within the 5 years preceding the person's arrest.
>
> 4. The reason that the person's operating privilege was revoked, or the person was disqualified or ordered out of service, including whether the person's operating privilege was revoked for an offense that may be counted under [WIS. STAT. §] 343.307(2).
>
> 5. Any convictions for moving violations arising out of the incident or occurrence giving rise to sentencing under this section.

In ***State v. Villamil***, 2016 WI App 61, ¶¶23-29, 371 Wis. 2d 519, 885 N.W.2d 381, *aff'd*, 2017 WI 74, ___ Wis. 2d ___, ___ N.W.2d ___, we concluded that the word "shall" in § 343.44(2)(b)

[2] The no-merit report discusses whether the circuit court complied with the requirement to consider specific factors under WIS. STAT. § 343.44(2)(b) as a component of whether the sentence was unduly harsh. I note that they are two separate issues. One potential argument would be that Smith is entitled to sentence modification because the sentence imposed was unduly harsh, that is, that it would shock the public sentiment, *see* ***State v. Grindemann***, 2002 WI App 106, ¶¶30-31, 255 Wis. 2d 632, 648 N.W.2d 507, and another would be that Smith is entitled to resentencing because the circuit court failed to consider required statutory factors, *see* ***State v. Villamil***, 2016 WI App 61, ¶23, 371 Wis. 2d 519, 885 N.W.2d 381, *aff'd*, 2017 WI 74, __ Wis. 2d ___, ___ N.W.2d ___.

is mandatory. We concluded that the record of the sentencing hearing must demonstrate that a circuit court actually considered the statutory factors in imposing sentence for OAR. ***Id.*** Because the record of Villamil's sentencing hearing did not demonstrate that the circuit court actually considered the factors it was required to consider under § 343.44(2)(b), we reversed and remanded for resentencing. ***Id.***[3]

Here, the circuit court did not refer to the required statutory factors at the sentencing hearing. As the no-merit report notes, the court's only sentencing comment that related to a statutory factor was its comment that it was bothered by Smith's number of prior OAR offenses. *See* WIS. STAT. § 343.44(2)(b)3. (one factor a sentencing court must consider is "[t]he number of prior convictions of the person for violations of this section within the 5 years preceding the person's arrest"). The court did not comment on any of the other factors. I am not persuaded by no-merit counsel's assertion that the State's comments regarding the facts of Smith's OAR offenses established that the court considered the required statutory factors. Accordingly, I do not share no-merit counsel's assessment that it would be wholly frivolous to argue that the record fails to demonstrate that the sentencing court actually considered the required statutory factors.

Additionally, the no-merit report states that Smith's no-contest plea waived any challenge to his sentence. That is incorrect. A valid no-contest plea waives all non-jurisdictional defects and defenses that may have existed *prior* to the plea. *See* ***Belcher v. State***, 42 Wis. 2d 299, 308-09, 166 N.W.2d 211 (1969). Thus, even if Smith entered a valid no-contest plea, Smith did not waive any challenge to the sentence imposed following the plea.

[3] We note for context that the circuit court here did not have the benefit of ***Villamil*** when it sentenced Smith, because ***Villamil*** had not yet been released.

Moreover, no-merit counsel's assertion that the only potential issue is whether the sentence was unduly harsh suggests that counsel may not have considered whether there are other grounds to challenge Smith's sentence. A challenge to the sentence imposed by the circuit court is not limited to whether the sentence was unduly harsh. *See, e.g.*, ***State v. Harbor***, 2011 WI 28, ¶¶2, 40, 333 Wis. 2d 53, 797 N.W.2d 828 (providing that a defendant may seek sentence modification based on a new factor, that is, "'a 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 … it was unknowingly overlooked by all of the parties'") (quoted source omitted); ***State v. Tiepelman***, 2006 WI 66, ¶¶9, 26, 291 Wis. 2d 179, 717 N.W.2d 1 (providing that "[a] defendant has a constitutionally protected due process right to be sentenced upon accurate information," and may seek resentencing if that right is violated) (citation omitted); ***State v. Odom***, 2006 WI App 145, ¶¶7-10, 294 Wis. 2d 844, 720 N.W.2d 695 (explaining that a circuit court must exercise discretion at sentencing by "'engag[ing] in a process of reasoning based on legally relevant factors,'" and that "[t]he primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection") (citations omitted).

The no-merit report is also insufficient in that it does not address whether there would be arguable merit to a challenge to the validity of Smith's no-contest plea. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (defendant may seek plea withdrawal to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary). It appears from the no-merit report that no-merit counsel concluded that the only potential issue at this point in the proceedings would be a challenge to Smith's sentence as unduly harsh, and that counsel therefore did not consider whether any facts extrinsic to the plea colloquy would support

a non-frivolous motion for plea withdrawal. *See* ***State v. Hoppe***, 2008 WI App 89, ¶¶8, 14-34, 312 Wis. 2d 765, 754 N.W.2d 203 (defendant may seek to withdraw plea based on facts outside the record that rendered the plea infirm). Thus, the no-merit report does not allow me to meaningfully assess whether there would be arguable merit to a motion for plea withdrawal.

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that the time to file a postconviction motion or notice of appeal is extended to sixty days from the date of this opinion and order.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals