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DISTRICT IV

March 13, 2018

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

2017AP591-CRNM State of Wisconsin v. Evan W. Van Klei (L.C. # 2015CF46)

Before Sherman, 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).

Evan Van Klei appeals a judgment convicting him, based upon a no-contest plea, of misdemeanor battery. Attorney Tristan Breedlove has filed a no-merit report seeking to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16).

withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[2] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses Van Klei's plea and sentence. Van Klei was sent a copy of the report, and has filed a response asserting that the victim was still highly intoxicated when he signed off on the charges and that the victim did not appear at any of the proceedings. Van Klei also questions whether it is common to pay restitution and other court costs prior to sentencing, and asks what the next step is for him. Upon reviewing the entire record, as well as the no-merit report and response, I conclude that there are no arguably meritorious appellate issues.

First, I see no arguable basis for plea withdrawal. The circuit court conducted a plea colloquy, inquiring into Van Klei's ability to understand the proceedings and the voluntariness of his plea, and further exploring his understanding of the nature of the charge, the penalty range and other direct consequences of the plea, and the constitutional rights being waived. In addition, Van Klei provided the court with a signed plea questionnaire, with an attached sheet setting forth the elements of the offense, and indicated that he had gone over the information on those forms with his attorney.

The facts set forth in the complaint—namely, that Van Klei got into an altercation with another person in a parking lot, threw the other person head first into a truck and onto the ground, and then straddled the person and struck him multiple times in the face with his fists—provided a sufficient factual basis for the plea. To the extent that Van Klei may be suggesting

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

that the victim did not want to press charges, I note that the State had a third-party eyewitness to the incident, and did not need the victim's cooperation to proceed.

In conjunction with the plea questionnaire and complaint, the colloquy was sufficient to satisfy the court's obligations under WIS. STAT. § 971.08. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). I further note that there is nothing in the record to suggest that trial counsel's performance was in any way deficient, and Van Klei has not alleged any other facts that would give rise to a manifest injustice.

A challenge to Van Klei's sentence would also lack arguable merit.

The record shows that the circuit court considered relevant sentencing factors and rationally explained their application to this case, acknowledging that the incident appeared to be out of character for Van Klei, but concluding that jail time was appropriate given that Van Klei had continued to beat the victim when he was down. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

The court sentenced Van Klei to six months in jail, and ordered restitution in the amount of $2638.77, as stipulated by the parties. The court also awarded three days of sentence credit and directed that Van Klei's cash bail of $500.00 be applied to the restitution amount. The court further determined that the offense could be expunged after Van Klei served the sentence and paid restitution and costs.

The sentence imposed did not exceed the maximum available penalty. *See* WIS. STAT. §§ 940.19(1) (classifying battery as a Class A misdemeanor); 939.51(3)(a) (providing maximum

imprisonment of nine months for a Class A misdemeanor). Nor was the sentence unduly harsh, taking into account that the victim was hospitalized with a broken nose and other facial injuries, and that three additional charges arising from the same incident were dismissed and read in. *See generally* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

It is not clear what Van Klei means when he asks whether it is common to pay restitution prior to sentencing. As a general matter, a defendant with the means to pay restitution may do so prior to the sentencing hearing as a show of good faith to the sentencing court, or to avoid the need for a longer period of probation or extended supervision to pay off the restitution award. If Van Klei is referring to having his cash bond applied to restitution, that procedure is directly authorized by WIS. STAT. § 969.03(4). If he is referring to the requirement that he pay his entire restitution amount before his conviction can be expunged, we note that WIS. STAT. § 973.015 permits expungement only upon the successful completion of a sentence, and restitution is part of a sentence under WIS. STAT. § 973.20.

As to what happens next, after Van Klei has successfully completed his sentence, the detaining authority should issue a certificate of discharge and forward it to the circuit court to effectuate the expungement. If Van Klei disagrees with this court's decision that he has no arguable grounds for an appeal, he can petition the Wisconsin Supreme Court for review of this decision.

Upon an independent review of the record, I have found no other arguable basis for reversing the judgment of conviction. I conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Tristan Breedlove is relieved of any further representation of Evan Van Klei in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals