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DISTRICT IV

August 31, 2018

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

2017AP262-CRNM State of Wisconsin v. Erin N. Alsum (L.C. # 2015CF116)

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

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 Jennifer A. Lohr, appointed counsel for Erin N. Alsum, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there

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

would be arguable merit to a challenge to Alsum's plea, to the sufficiency of the evidence to establish that Alsum breached her deferred prosecution agreement (DPA), or to the sentence imposed by the circuit court. Alsum was sent a copy of the report, and has filed a response arguing that she was unfairly discharged from the Dodge County Treatment Alternatives and Diversion Program (TAD) based on false positive drug tests and her admission to an earlier relapse, and that the court erred by relying on the drug test results after ruling that they were inadmissible. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.[2]

In March 2015, Alsum was charged with possession of heroin, possession of drug paraphernalia, and two counts of misdemeanor bail jumping. Pursuant to a plea agreement, Alsum pled guilty to the charges, and the parties jointly recommended that the court approve their DPA as to the possession of heroin count and withhold sentence and impose two years of probation on the remaining counts. The court followed the parties' joint recommendation at the August 17, 2015 sentencing.

In May 2016, the State moved to terminate Alsum's participation in TAD and to revoke the DPA. The State asserted that Alsum violated the terms of the DPA by failing to complete TAD and by unlawfully using controlled substances. The court prohibited the State from using the drug test results to prove its case because Alsum had not had the opportunity to

[2] By prior order of this court, this appeal was placed on hold pending a decision as to whether a defendant had grounds to seek plea withdrawal if the defendant was not advised of multiple mandatory DNA surcharges at the time of the plea. This court has now issued a published decision concluding that recent decisions by the Wisconsin Supreme Court preclude that argument. *See* ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __.

independently verify the test results. At the conclusion of the evidentiary hearing, the court found that the State had established that Alsum failed to comply with the requirements of TAD and the DPA. The court therefore terminated Alsum from TAD and revoked the DPA. At the August 2016 sentencing hearing for the possession of heroin count, the State recommended three years of probation with six months of jail time, and Alsum argued for three years of probation with no conditional jail time. The court withheld sentence and imposed three years of probation with no conditional jail time.

First, the no-merit report addresses whether there would be arguable merit to a challenge to Alsum'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, together with the plea questionnaire and waiver of rights form that Alsum signed, satisfied the court's mandatory duties to personally address Alsum and determine information such as Alsum's understanding of the nature of the charges and the range of punishments she faced, the constitutional rights she waived by entering a plea, and the direct consequences of the plea.[3] There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Alsum's plea would lack arguable merit.

[3] Although the court failed to inform Alsum that it was not bound by the terms of the plea agreement, as required under ***State v. Hampton***, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14, Alsum received the benefit of the plea agreement. Therefore, this defect in the colloquy does not present a manifest injustice warranting plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the sufficiency of the evidence to support the court's decision to terminate Alsum from TAD and to revoke the DPA. We agree with counsel's assessment that the evidence at the hearing on the State's motion, including Alsum's admission that she had used heroin and cocaine while in TAD, was sufficient to support the circuit court's decision. A challenge to the court's decision would be wholly frivolous.

Alsum argues in her no-merit response that she was treated unfairly by TAD, the State, and the circuit court. Alsum argues that TAD staff sought to terminate her from the program based on drug test results that Alsum claims were invalid. Alsum argues that relapse by TAD participants usually results in an adjustment to treatment. She asserts that, after her relapse during participation in the program, she went through inpatient treatment and then complied with the program upon her release. Alsum asserts that, when TAD staff had sought to terminate her based on the more recent drug test results, the State treated her unfairly when it relied on evidence of her prior relapse at the hearing. She contends that she was unprepared to defend against the State's new argument that the DPA should be revoked based on her earlier relapse, and that the court actually relied on the drug test results the court had found inadmissible when it granted the State's motion.

The record reveals that Alsum was given the opportunity to argue against the State's motion to revoke the DPA, and the court disallowed any use of the drug test results. However, the State presented evidence apart from the drug test results that established that Alsum had failed to comply with the DPA. We discern no arguable merit to a challenge to the circuit court's decision based on Alsum's claim that Alsum was treated unfairly by TAD staff, the State, or the circuit court.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to Alsum's sentence. We agree with counsel that this issue lacks arguable merit. Because Alsum received the sentence that she affirmatively approved at each of her sentencing hearings, she is barred from challenging the sentence on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 517-18, 451 N.W.2d 759 (Ct. App. 1989). We discern no other basis to challenge the sentence imposed by the circuit court.

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 Jennifer A. Lohr is relieved of any further representation of Erin N. Alsum in this matter. *See* 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