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DISTRICT III

September 11, 2018

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

2016AP1989-CRNM State of Wisconsin v. Justin Ryan VanNieuwenhoven
(L. C. No. 2015CF1014)

Before Stark, P.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).

Justin Ryan VanNieuwenhoven appeals from a judgment of conviction for the misdemeanor crimes of battery and disorderly conduct. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738

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

(1967). VanNieuwenhoven received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

VanNieuwenhoven got into an argument with a man and punched the man in the face, which caused the man to fall to the ground. VanNieuwenhoven was charged with felony substantial battery and disorderly conduct. He entered a no-contest plea to an amended charge of misdemeanor battery and to the disorderly conduct count. The parties made a joint sentencing recommendation for a withheld sentence and two years' probation. The circuit court imposed the jointly recommended sentence.[2]

The no-merit report addresses the potential issues of whether VanNieuwenhoven's plea was freely, voluntarily and knowingly entered, whether there was a factual basis for the plea, and whether the sentence was the result of an erroneous exercise of discretion. With respect to the plea colloquy, the no-merit report observes that the colloquy was rather abbreviated in that the circuit court relied heavily on the executed plea questionnaire, did not make any specific reference to the elements of the offenses or maximum penalties, failed to advise

[2] VanNieuwenhoven's plea to multiple counts resulted in the assessment of multiple mandatory DNA surcharges totaling $400, and that potential financial obligation was not addressed during the plea colloquy. This appeal was previously put on hold for a decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument in the Wisconsin Supreme Court. This appeal was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __ . ***Freiboth*** holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. ***Id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

VanNieuwenhoven that the court was not bound by any plea agreement or sentencing recommendation, and failed to give the required deportation warning. *See* ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794 (the circuit court may not rely entirely on a plea questionnaire as a substitute for a substantive in-court plea colloquy); ***State v. Brown***, 2006 WI 100, ¶¶46-48, 293 Wis. 2d 594, 716 N.W.2d 906 (a circuit court may fulfill its duty to determine that the plea is made with understanding of the nature of the charge by summarizing the elements of the crime by reading from the appropriate jury instructions or statute, asking defendant's counsel whether he explained the nature of the charge to the defendant and requesting him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing, or expressly referring to the record or other evidence of the defendant's knowledge of the nature of the charge established prior to the plea); ***State v. Hampton***, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14 (when a circuit court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court"); ***State v. Bangert***, 131 Wis. 2d 246, 269, 389 N.W.2d 12 (1986) (establishing a mandatory obligation on the part of the circuit court to inform the defendant of the charge's nature or to ascertain that the defendant possesses such information and to do so in a manner that is more than a perfunctory procedure).

The no-merit report indicates that despite what might be considered deficiencies in the colloquy, a motion for plea withdrawal "would be without arguable merit due to reasons outside of the record and [counsel] will address those reasons in a supplemental no merit report, if appropriate." VanNieuwenhoven has not refuted counsel's representation by filing a response to

the no-merit report. 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.

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 Justin Ryan VanNieuwenhoven further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that attorney Christina C. Starner is relieved from further representing VanNieuwenhoven in this appeal. *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