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DISTRICT II

October 3, 2018

To:

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

2017AP828-CRNM State of Wisconsin v. Zachary J. Schmitz (L.C. #2016CM62)

Before Neubauer, C.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).

Zachary J. Schmitz appeals from a judgment of conviction entered upon his no contest plea to one count of misdemeanor theft. Schmitz's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967), concluding

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.

that no arguably meritorious issues arise from the plea and sentencing procedures in this case. Schmitz was advised of his right to file a response and elected not to do so. Upon consideration of the no-merit report and our independent review of the record,² 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.

Schmitz stole the victim's wallet from her shopping cart in a Walmart parking lot. Schmitz pled no contest to the single theft count charged in this case. In exchange, the State moved to dismiss and read in a second misdemeanor theft count charged in a separate case. The circuit court imposed a seven-month jail sentence and a \$200 fine, plus costs. Schmitz appeals.

The no-merit report first addresses the potential issue of whether Schmitz's plea was knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon the defendant's signed plea questionnaire. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). No issue of merit exists from the plea taking.

² Counsel's no-merit report discusses the restitution ordered at Schmitz's December 2016 sentencing and restitution hearings. During our review, we discovered that the circuit court apparently took further action on its restitution order. Specifically, it appeared from the electronic circuit court docket entries that there was a recorded hearing on January 27, 2017, relating to restitution, and that the circuit court entered an amended judgment of conviction on August 10, 2017, and an amended restitution order on September 12, 2017. On June 19, 2018, we ordered that the record be supplemented with the January 27, 2017 transcript, and with "any other papers filed in the circuit court after June 8, 2017."

The no-merit report next addresses the circuit court's exercise of its sentencing discretion. It is a well-settled principle of law that sentencing is committed to the circuit court's discretion and our review is limited to determining whether the court erroneously exercised that discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the sentencing court considered appropriate factors, did not consider improper factors, and reached a reasonable result. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76; *State v. Grindemann*, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507. Further, we cannot conclude that the seven-month sentence is so excessive or unusual as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguably meritorious challenge to the sentence imposed in this case.

Finally, the no-merit report discusses the restitution order which, as to this victim, was originally set at \$446.22.³ The victim requested \$379.32 in restitution for the value of her stolen wallet and its contents and for lost wages and mileage in connection with this case. Additionally, she requested \$66.90 as compensation for the six hours she spent placing holds on her credit cards and accounts. Though she performed these tasks during non-work hours, she calculated the requested amount using her hourly wage of \$11.15. Following a contested hearing, the circuit court awarded her \$446.22. Thereafter, at a January 27, 2017 hearing, the circuit court stayed enforcement of the disputed \$66.90 restitution amount. Then, on September 12, 2017, the circuit court entered an amended restitution order reducing the amount owed to the victim by \$66.90, to \$379.32.

³ Restitution in the read-in case was set at \$399.99.

We agree with appellate counsel that no arguably meritorious issue arises from the \$379.32 in restitution ultimately awarded by the circuit court in its September 12, 2017 amended restitution order. Under WIS. STAT. § 973.20(5)(a), the court may order a defendant to

[p]ay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.

When the circuit court has the authority to order restitution for a loss, its decision to order restitution in a particular amount is discretionary. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Here, the circuit court had the authority to order restitution for the stolen items, lost wages, and mileage. The court properly exercised its discretion in determining that the amounts requested for these items were supported by evidence in the record and were reasonable. There is no arguably meritorious challenge to the circuit court's exercise of discretion in setting restitution at \$379.32.⁴

Our independent review of the record reveals no other potential issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

⁴ Because the circuit court entered an amended restitution order removing the \$66.90 for time spent placing credit card and account holds, we need not address whether this amount is properly recoverable under the restitution statute.

IT IS FURTHER ORDERED that Attorney Daniel Goggin II is relieved from further representing Zachary J. Schmitz 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