



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/II

April 24, 2019

To:

Hon. Michael W. Gage
Circuit Court Judge
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Suzanne L. Hagopian
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Melinda J. Tempelis
District Attorney
320 S. Walnut Street
Appleton, WI 54911-5918

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Adam M. Ewert 623153
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2017AP2313-CRNM State of Wisconsin v. Adam M. Ewert (L.C. #2016CF817)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Adam M. Ewert appeals from a judgment of conviction entered upon his no contest pleas to one count of first-degree reckless homicide and one count of possession with intent to deliver heroin. Ewert's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE

809.32 (2017-18),¹ and *Anders v. California*, 386 U.S. 738 (1967). Ewert 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 no-merit report and our independent review of the record, 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.

Following the drug-related death of a young woman, Ewert was charged with first-degree reckless homicide by the delivery or manufacture of heroin, a Class C felony, and possession with the intent to deliver heroin in an amount of three grams or less, a Class F felony. As part of a negotiated settlement, Ewert pled no contest to the two charges, and two traffic cases were dismissed and read in. As to sentencing, the State agreed to recommend five to seven years of initial confinement followed by eight years of extended supervision, and the defense was free to argue. In addition, the State would ask for restitution in the amount of \$4241.48 that the family requested for the victim's funeral expenses. The circuit court imposed consecutive sentences amounting to six years of initial confinement followed by eight years of extended supervision.² The court ordered \$4241.48 in restitution, along with court costs and surcharges, including two DNA analysis surcharges. Ewert appeals.

Appellate counsel's no-merit report addresses whether Ewert's no contest pleas were knowingly, intelligently, and voluntarily entered. The record shows that the circuit court

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² On count one, the reckless homicide, the court imposed three and one-half years of initial confinement and five years of extended supervision. On count two, the possession with intent to deliver, the court imposed a consecutive term of two and one-half years of initial confinement and three years of extended supervision.

engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1),³ *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. See also *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Additionally, the circuit court properly relied upon Ewert’s signed plea questionnaire and its multiple attachments. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with appointed counsel that a challenge to the entry of Ewert’s no contest pleas would lack arguable merit.

Appellate counsel’s no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The circuit court’s sentencing remarks show that it considered the seriousness of the offense, noting that it involved a death of a young person “with great potential” whose mother was deeply affected, Ewert’s character, which the court believed reflected a person with abilities and capacities but also a long history of heroin and other drug use that should have caused him to be aware of the drugs’ risks, and the need to protect the public. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court stated that the need for community protection was reflected in the recommendations made by the parties and the author of the presentence investigation report—all three asked for no less than

³ As discussed in appellate counsel’s no-merit report, the circuit court did not personally provide Ewert with the deportation warning as required by WIS. STAT. § 971.08(1)(c). This deficiency does not provide grounds for relief because Ewert cannot show that his pleas are likely to result in deportation. See § 971.08(2).

five years' initial confinement and were "not that disparate." The court said that the sentence should be structured in a way that did not diminish the offense severity but would also encourage Ewert's rehabilitation. The court thus imposed a sentence that would permit Ewert to participate in the Substance Abuse and Challenge Incarceration Programs after he had served the three and one-half years of confinement ordered in connection with count one.⁴ Under the circumstances, it cannot reasonably be argued that Ewert's global fourteen-year bifurcated sentence, which is well below the maximum of fifty-two and one-half years, is so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel that a challenge to Ewert's sentence would lack arguable merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Ewert on appeal. Therefore,

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

⁴ The circuit court and parties recognized that Ewert was not statutorily eligible for either prison program on count one due to its offense classification. *See* WIS. STAT. § 973.01(3g) & (3m). The court found that Ewert was not eligible for Challenge Incarceration or Substance Abuse Programming on count one, but that he was eligible for both programs on count two.

IT IS FURTHER ORDERED that Suzanne L. Hagopian is relieved from further representing Adam M. Ewert in this appeal. 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