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DISTRICT II

January 3, 2013

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

2012AP1527-CRNM State of Wisconsin v. Jason W. Mussell (L.C. #2011CF364)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jason W. Mussell appeals from a judgment of conviction for kidnapping while armed with a dangerous weapon contrary to WIS. STAT. §§ 940.31(1)(b) and 939.63(1)(b) (2009-10).[1]

[1] The information charged a violation of WIS. STAT. § 940.31(1)(b). The judgment of conviction erroneously indicates that Mussell is convicted under § 940.31(1)(a). This is a mere defect in the form of the certificate of conviction, which may be corrected in accordance with the actual determination by the trial court. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The trial court may either correct the clerical error in the description portion of the written judgment of conviction or may direct the clerk's office to make such a correction. ***Id.***, ¶5. We order that the judgment be corrected on remand to indicate that Mussell is convicted of a violation of § 940.31(1)(b).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Mussell'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). Mussell 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, we remand the matter for modification of the judgment and the judgment, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Mussell approached a female mail carrier at a shopping center and complained that he had not received his unemployment check. When the carrier's response did not satisfy Mussell, he put his left arm around her and, with his right arm at her chest, pointed a knife towards her throat. He indicated to the carrier that they were going to drive to his house and go inside his house and if she cooperated, she would not be harmed. The carrier was able to break free and seek help. Mussell ran away and was later arrested after a standoff with police. The criminal information charged Mussell with kidnapping by use of a dangerous weapon and failure to comply with an officer's attempt to take the person into custody. A plea agreement was reached for Mussell to plead no contest to the kidnapping charge and have the other charged dismissed and read in at sentencing. The prosecution agreed to recommend fifteen years' initial confinement and ten years' extended supervision. That recommended sentence was imposed at sentencing.

The no-merit report first addresses the potential issue of whether Mussell's plea was freely, voluntarily, and knowingly entered. The report correctly concludes that the trial court's plea colloquy with Mussell fulfilled the requirements of WIS. STAT. § 971.08(1)(a), ***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. The trial court also addressed the effect of the read-in offense with Mussell. *See* ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d

835 (a trial court should advise defendants of the effects of read-in charges). No issue of merit exists from the plea taking.

The no-merit report next addresses whether the sentence was the result of an erroneous exercise of discretion. We agree with the report's conclusion that the sentencing court relied on the facts of record and appropriate considerations and adequately explained that the need to protect the public was the basis for the length of the sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197 (the basic objectives of the sentence include the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others and the court is to identify the general objective of most import). Additionally, the sentence is well within the applicable maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). No issue of merit exists with regard to the length of the sentence.

At sentencing, the trial court required Mussell to provide a DNA sample and pay the surcharge. No reason was given by the trial court for imposing the DNA surcharge. Where, as here, the trial court has discretion under WIS. STAT. § 973.046(1g) to impose the DNA surcharge, when a sample is ordered, "in exercising its discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can." ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. The no-merit report identifies the trial court's failure to set forth a reason for its discretionary decision as a potentially meritorious issue.

However, appointed counsel explains that he discussed the benefit and drawback of pursuing the DNA surcharge issue by a postconviction motion and that Mussell "affirmatively forfeits any arguable error in connection with the DNA surcharge" in order to obtain a no-merit review of the length of the sentence.[2] As noted earlier, Mussell has not filed a response to the no-merit report and does not dispute counsel's representation to the court. Thus, we conclude that because Mussell forfeits his right to argue error in connection with the imposition of the DNA surcharge, it is not an issue that can be raised on appeal.

Our review of the record discloses no other potential issues for appeal. We conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, this court accepts the no-merit report, remands and directs that the judgment be modified as set forth in footnote 1, affirms the judgment as modified, and discharges appellate counsel of the obligation to represent Mussell further in this appeal.

[2] A strict application of WIS. STAT. RULE 809.32, does not permit a no-merit disposition when a meritorious issue for appeal exists. Although RULE 809.32 does not mandate or expressly authorize a "partial no-merit" procedure and a defendant is not constitutionally entitled to such a disposition, a no-merit appeal is "but an example of a 'prophylactic' procedure that a state may, but is not required to, follow in order to satisfy due process and equal protection concerns" attendant to a defendant's right to postconviction and appellate counsel. ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶9-10, 296 Wis. 2d 119, 722 N.W.2d 609. One purpose of a no-merit appeal is to demonstrate that appointed counsel has made the same diligent and thorough evaluation of the case as a retained lawyer would and has served the client's interest to the best of counsel's ability in evaluating the case and advising the client as to the prospects for success. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 438 (1988). It is appropriate to adapt the procedure to fit the circumstances in which appointed counsel's motion to withdraw is made. *See* ***id.*** at 439 (the no-merit report assists the court in determining whether counsel should be permitted to withdraw).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction be modified and, as modified, the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21. The matter is remanded with directions to amend the judgment of conviction.

IT IS FURTHER ORDERED that Attorney William E. Schmaal is relieved from further representing Jason W. Mussell in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals