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DISTRICT IV

January 8, 2013

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

2011AP2373-CRNM State of Wisconsin v. Nathan A. Knutson (L.C. # 2010CM72)

Before Lundsten, P.J.

Nathan Knutson appeals a judgment of conviction for disorderly conduct and battery, both with use of a dangerous weapon, following his no contest pleas. Attorney William Schmaal has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses the validity of Knutson's pleas and sentencing. Knutson was sent a copy of the report and has filed a

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

response. 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.

Knutson was charged with disorderly conduct and misdemeanor battery, both with use of a dangerous weapon, based on a fight between Knutson and Mark Silverstein. At Silverstein's preliminary hearing on charges arising out of the same incident, Knutson testified that, based on a phone call from his friend Molly McCarron, Knutson went to McCarron's home to confront Silverstein about his temper and as security for the situation at the house. He stated that he brought an extension, described as a ten- or twelve-inch bar, for protection. Knutson testified that, when he got to the house, he exited his vehicle, and Silverstein came out of the house and came toward him swinging. Knutson said he shoved Silverstein aside and picked up the extension. Silverstein ran to the house, and Knutson chased him. In the entranceway to the house, Silverstein came towards Knutson with a knife. Knutson shut the door, and Silverstein opened it and stabbed Knutson in the arm. Silverstein ran back into the house, and Knutson chased him, and then Silverstein stabbed Knutson in the face with another knife. Knutson pushed or tackled Silverstein, and the two fell together down the basement stairs. Knutson stated that he "may have" struck Silverstein with the extension at that point. Knutson ultimately pled no contest to the charges against him.

After our review of the no-merit report and response and the record, we directed counsel to address whether there would be arguable merit to a postconviction motion for plea withdrawal based on a claim that Knutson did not understand his potential defenses at the time he entered his pleas. We directed counsel to review that issue and consult with Knutson. Counsel then informed us that Knutson had not responded to counsel's letter of inquiry, which was sent to the

same address used by this court on our correspondence with Knutson. Counsel stated that the letter was not returned as undeliverable, and that the phone number he has for Knutson is not active. We noted that our records indicated that correspondence we have sent to Knutson at that same address has not been returned as undeliverable. We noted that it was Knutson's responsibility to stay in touch with counsel if he wanted to pursue postconviction relief. We set a deadline for Knutson to file a response, and advised Knutson that we would accept Knutson's non-response as indication that he does not want to pursue plea withdrawal. We have not received any further correspondence from Knutson. Accordingly, we accept Knutson's non-response as his indication that he does not want to pursue plea withdrawal, and we do not address the issue further.

We agree with counsel that a challenge to Knutson's sentence would lack arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Knutson was afforded the opportunity to address the court prior to sentencing, and informed the court that he only intended to remove Silverstein from the house, not to fight him, and that he acted out of fear for the safety of the other occupants in the house. The State recommended an imposed and stayed sentence of one year of jail time, and two years of probation with 90 days of conditional jail time. Knutson's counsel agreed with the recommendation, except that he argued for no conditional jail time.

The court explained that it considered the standard sentencing factors and objectives, including Knutson's character, the gravity of the offense, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced

Knutson to a total of one year of jail time, imposed and stayed, and two years of probation with 75 days of conditional jail time. The sentence was within the applicable penalty range. *See* WIS. STAT. §§ 947.01 (providing that disorderly conduct is a Class B misdemeanor); 939.51(3)(b) (providing that Class B misdemeanors are punishable by up to 90 days of imprisonment and a \$1,000 fine); 940.19(1) (providing that battery is a Class A misdemeanor); 939.51(3)(a) (providing that Class A misdemeanors are punishable by up to nine months of imprisonment and a \$10,000 fine); and 939.63(1)(a) (providing that, if a person commits a misdemeanor while possessing a dangerous weapon, the maximum term of imprisonment may be increased by six months) (all 2007-08 Stats.). The sentence was well within the maximum Knutson faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

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 William Schmaal is relieved of any further representation of Nathan Knutson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals