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DISTRICT I

January 9, 2013

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

2012AP1594-CRNM State of Wisconsin v. Marsha L. Kopan
(L.C. #2010CF5377)

Before Curley, P.J., Fine and Kessler, JJ.

Marsha Kopan appeals from a judgment of conviction for three counts of theft in a business setting (greater than $10,000), contrary to WIS. STAT. § 943.20(1)(b) (2009–10), and from an order denying her motion for sentence modification.[1] Kopan's postconviction/appellate

[1] We construe the notice of appeal as encompassing both the judgment of conviction and the trial court's subsequent order denying Kopan's motion for sentence modification, both of which are discussed in the no-merit report. *See* ***East Winds Props., LLC v. Jahnke***, 2009 WI App 125, ¶1, 320 Wis. 2d 797, 800, 772 N.W.2d 738, 739 (because the notice of appeal postdated the order following the judgment, jurisdiction is extended to the order even though the notice only mentioned the judgment).

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

lawyer, Natalia Lindval, Esq., has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Kopan has not responded. We have independently reviewed the Record and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

Kopan was charged with five felonies related to her theft of over $400,000 from three associations for whom Kopan was providing accounting and business services. She entered a plea bargain with the State. Pursuant to that plea bargain, the State agreed to dismiss and read in two counts of forgery (uttering) and Kopan agreed to plead guilty to three counts of theft in a business setting (each greater than $10,000). The State further agreed to recommend a total sentence of three years of initial confinement and five years of extended supervision. Kopan was free to argue for any sentence.

The trial court conducted a plea colloquy with Kopan, accepted her guilty pleas, and found her guilty. It said the other two charges would be dismissed and read in. The trial court sentenced Kopan to three concurrent terms of thirty months of initial confinement and sixty months of extended supervision. It found Kopan eligible for the Earned Release Program (ERP) and waived the DNA surcharge.

Kopan's postconviction/appellate lawyer filed a motion seeking sentence modification or new sentencing on grounds that a change in the law concerning the ERP undermined the sentence that the trial court imposed. The trial court denied the motion in a written order, stating:

> The defendant asserts that the particular early release program (ERP) for which the court made the defendant eligible was rescinded, and she is unable to be released early as contemplated by the court. The court did not specifically contemplate an early release. The court's eligibility finding for an early release program does not automatically mean that a person will be permitted to be released early, and the court is aware of that when it imposes sentence. That determination is solely within the jurisdiction and discretion of the Department of Corrections. The court did not specifically rely on the defendant's ability to be released early when it determined the length of the sentence, and therefore, rescission of this program does not have a direct bearing … on the term sentence imposed by the court. The termination of an early release program that was ordered is not a new factor which warrants a modification or restructuring of the sentence.

The no-merit report identifies five potential issues for appeal: (1) whether Kopan's pleas were knowingly, intelligently, and voluntarily entered; (2) whether there is a basis to withdraw the pleas; (3) whether the trial court erroneously exercised its sentencing discretion; (4) whether there are new factors that would justify modifying Kopan's sentence; and (5) whether Kopan's trial lawyer provided constitutionally deficient representation. We agree with the analysis of these issues and the conclusion that they lack arguable merit.

There is no arguable basis to allege that Kopan's pleas were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266–272, 389 N.W.2d 12, 22–25 (1986). She completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827–828, 416 N.W.2d 627, 630 (Ct. App. 1987), and the trial court conducted a thorough plea colloquy addressing Kopan's understanding of the charges against her, the penalties she faced, and the constitutional rights she was waiving by entering her pleas, *see* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24; ***Bangert***, 131 Wis. 2d at 266–272, 389 N.W.2d at 22–25.

Kopan acknowledged that her lawyer had gone through the plea questionnaire and waiver of rights form with her and indicated that she understood the legal rights she was giving up. The trial court confirmed that Kopan's trial lawyer had discussed the elements of the crime with Kopan, which were attached to the plea questionnaire. It also accepted the parties' stipulation that the criminal complaint provided a factual basis for the three counts to which Kopan was pleading guilty and for the two counts that were being read in. The plea questionnaire, waiver of rights form, Kopan's discussions with her lawyer, and the trial court's colloquy appropriately advised Kopan of the elements of the crime and the potential penalties she faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the validity of the pleas, and we agree with the no-merit report that the Record discloses no other basis to seek plea withdrawal.

There would also be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the

sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the trial court's discretion. ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the nature of the crime, including the amount of money stolen and the fact that Kopan sent false financial reports to her business clients so that they would not know of the thefts. Considering Kopan's character, the trial court noted that she had no previous criminal record and said she was an enabler who allowed her family to spend the money she stole from her business clients. The trial court also considered the need to protect society and the need to deter others so that they know "if you're gonna steal money, a large amount of money, there's consequences to that action." The trial court concluded that the crime was "too aggravating" to justify probation and that a sentence slightly less than that recommended by the State was appropriate.

With respect to the severity of the sentence, we note that Kopan could have been sentenced to a total of fifteen years of initial confinement and fifteen years of extended supervision. The sentence of less than one-third the maximum in this case does not shock the public's sentiment. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 109, 622 N.W.2d 449, 456 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Given the amount of money involved, the number of counts, the read-in crimes, and Kopan's methods of hiding her criminal actions, we cannot say that the

sentence would "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461. For these reasons, there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentence.

Next, we consider whether there would be merit to arguing that the trial court should have granted Kopan's motion to modify her sentence based on changes in the ERP. A trial court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 72, 797 N.W.2d 828, 837. The analysis involves a two-step process. ***Id.***, 2011 WI 28, ¶36, 333 Wis. 2d at 72, 797 Wis. 2d at 838. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Ibid.*** Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, 2011 WI 28, ¶37, 333 Wis. 2d at 73, 797 Wis. 2d at 838.

A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***Id.***, 2011 WI 28, ¶40, 333 Wis. 2d at 74, 797 Wis. 2d at 838 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, 2011 WI 28, ¶33, 333 Wis. 2d at 71, 797 Wis. 2d at 837. If "the facts do not constitute a new factor as a matter of law," a court "'need go no further in its analysis.'" ***Id.***, 2011 WI 28, ¶38, 333 Wis. 2d at 73, 797 Wis. 2d at 838 (citation omitted).

In this case, the trial court concluded in its order denying the motion for sentence modification that a change in the ERP that may make Kopan unable to participate was not a new factor because the trial court had not "specifically contemplate[d] an early release" at sentencing. The trial court explained that although it found Kopan eligible for the ERP, it knew that whether she would be permitted to be released early was a decision left to the Department of Corrections. It concluded that in imposing sentence, it "did not specifically rely on the defendant's ability to be released early when it determined the length of the sentence and therefore, rescission of this program does not have a direct bearing … on the term sentence imposed by the court." Therefore, the trial court reasoned, a change in the ERP was "not a new factor which warrants a modification or restructuring of the sentence."

There would be no arguable merit to challenging the trial court's legal conclusion. The sentencing transcript demonstrates that the trial court did not rely on Kopan's ERP eligibility when it imposed her sentence. Instead, the trial court simply stated that Kopan would be eligible for the ERP. The subsequent change to that program was not a new factor that justifies sentence modification.

Finally, Kopan's postconviction/appellate lawyer states that she identified nothing in the Record that would suggest that Kopan's trial lawyer provided constitutionally deficient representation. We agree, and our independent review of the Record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Natalia Lindval, Esq., is relieved of further representation of Kopan in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals