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DISTRICT I/III

January 23, 2013

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

2012AP1891-CRNM State v. Joshua Marcus Lusk
(L.C. #2010CF4067)

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

Counsel for Joshua Lusk has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2009-10),[1] concluding no grounds exist to challenge Lusk's conviction for party to the crime of robbery with use of force. Lusk was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Lusk with party to the crime of robbery by use of force. In exchange for his guilty plea to the crime charged, the State agreed to dismiss a burglary charge in another case and join in defense counsel's recommendation for a four-year sentence consisting of two years' initial confinement and two years' extended supervision. Out of a maximum possible fifteen-year sentence, the court imposed an eight-year sentence consisting of four years' initial confinement and four years' extended supervision. Lusk's postconviction motion for plea withdrawal was denied after a hearing.[2]

Although the no-merit report does not address it, there is no arguable merit to challenge the circuit court's determination that Lusk was competent to proceed. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. ***Id.***, ¶31. A trial court's competency determination should be reversed only when clearly erroneous. ***Id.***, ¶45.

At the originally scheduled preliminary hearing, defense counsel questioned Lusk's competency to proceed. The court consequently deferred the preliminary hearing and ordered a

[2] The Honorable Paul R. Van Grunsven presided over the plea hearing. The Honorable David A. Hansher presided over the sentencing and postconviction motion hearing.

competency evaluation. The evaluating physician, Philip Lomas, submitted a report opining to a reasonable degree of medical certainty that Lusk "has substantial mental capacity to understand the proceedings and assist in his defense at the present time." At the competency hearing, neither the State nor Lusk challenged the report and the court ultimately accepted the doctor's opinion. The record supports the trial court's determination.

With respect to Lusk's plea, the court's plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Lusk completed, informed Lusk of the elements of robbery by use of force, the penalties that could be imposed, and the constitutional rights he waived by entering a guilty plea. The court advised Lusk of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), and confirmed Lusk's understanding that the court was not bound by the terms of the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The court also found that a sufficient factual basis existed in the criminal complaint to support Lusk's plea.

In his postconviction motion for plea withdrawal, Lusk claimed the circuit court failed to inform him of the elements of party to a crime and further alleged that he did not know the elements of party to a crime. At a hearing on Lusk's motion, his trial counsel testified it is his typical practice to go over the elements of party to a crime and he believed he did so with Lusk. The court found that counsel was more credible than Lusk, that counsel had explained the party to a crime elements to Lusk, and that Lusk "understood what party to a crime is." The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS. STAT. § 805.17(2). The record discloses no arguable basis for withdrawing Lusk's guilty plea.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Lusk's character, including his criminal history; the need to protect the public; and the mitigating factors Lusk raised. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Lusk's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Timothy T. O'Connell is relieved of further representing Lusk in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals