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DISTRICT II

February 13, 2013

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

2012AP1470-CRNM State of Wisconsin v. Justin A. Condroski (L.C. #2010CF320)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Justin A. Condroski appeals from a judgment convicting him of being party to the crimes of felony murder and first-degree reckless injury with a dangerous weapon. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Condroski received a copy of the report but did not exercise

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

his right to file a response. Upon consideration of the no-merit report and our independent review of the record as mandated by ***Anders***, 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. We affirm the judgment and relieve Attorney Dennis Schertz of further representing Condroski in this matter.

Condroski and three of his friends were involved to varying degrees in an armed robbery of an ice cream stand. Two young employees were shot, one fatally. While Condroski did not physically take part in the robbery, he was aware of the plans and helped two of his friends to flee, and so was charged as party to the crimes of first-degree intentional homicide, attempted first-degree intentional homicide, and armed robbery. He later pled guilty to the reduced charges in exchange for cooperating with the police against his co-defendants. The trial court sentenced him to a total of thirty-five years' initial confinement and twenty years' extended supervision. This no-merit appeal followed.

The no-merit report addresses whether Condroski's guilty pleas were knowingly, voluntarily, and intelligently entered. The record shows that the court engaged in a thorough colloquy satisfying the requirements of WIS. STAT. § 971.08(1),[2] ***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 court recited the elements of the crime to him, *see* ***Bangert***, 131 Wis. 2d at

[2] Condroski initialed the statement on the plea questionnaire indicating his understanding that, if not a United States citizen, his plea "could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law," but the court did not specifically so advise him. *See* WIS. STAT. § 971.08(1)(c). A plea withdrawal is permitted upon such a failure if the defendant later shows that the plea is likely to result in his or her deportation. Sec. 971.08(2). As the presentence investigation reports indicate that Condroski was born in Milwaukee, Wisconsin, we conclude that this issue has no arguable merit.

268, properly used his signed plea questionnaire in conjunction with the substantive colloquy, *see* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794, and, based on the defense's stipulation, used the criminal complaint to ascertain that the plea had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). To support the repeater allegation, Condroski admitted he had been convicted of a felony in Milwaukee county case number 04CF5477. No issue of merit could arise from the plea taking.

The no-merit report also considers whether the sentence was excessive. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must address sentencing objectives that include the protection of the public, punishment and rehabilitation of the defendant, and deterrence, ***id.***, ¶40, and the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). The court must provide a "rational and explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76.

We agree with appellate counsel that no basis exists to disturb the sentence. The court took into account Condroski's cooperation with law enforcement, his remorse, his troubled upbringing and his very young son, but concluded that it could not ignore the "very serious" and senseless nature of the crimes. The weight to be given the various factors is within the court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). Condroski faced seventy-two years' imprisonment. A sentence less than the maximum presumptively is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App. 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. We cannot say that the sentence imposed, although lengthy, is so excessive or

unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, the no-merit report considers whether Condroski could claim that defense counsel rendered ineffective assistance. Nothing in the record suggests an arguable basis for such a claim. Our review is limited, however, because claims of ineffective assistance of trial counsel must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz of is relieved of further representing Condroski in this matter.

Diane M. Fremgen
Clerk of Court of Appeals