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DISTRICT II

March 6, 2013

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

2012AP2242-CRNM State of Wisconsin v. Eric A. Neilsen (L.C. #2010CF369)

Before Brown, C.J., Reilly and Gundrum, JJ.

Eric A. Neilsen appeals from a judgment convicting him of operating a motor vehicle while intoxicated as a fourth offense with a prior offense within five years. Neilsen's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738 (1967). Neilsen received a copy of the report, was advised of his right to file a response, and has elected not to do so. After reviewing the record and counsel's report,

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses the following appellate issues: (1) whether Neilsen’s plea of no contest was knowingly, intelligently, and voluntarily entered and (2) whether the circuit court erroneously exercised its discretion at sentencing.

With respect to the entry of the no contest plea, the record shows that the circuit court engaged in a colloquy with Neilsen that satisfied 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, ¶¶33, 38, 274 Wis. 2d 379, 683 N.W.2d 14.² In addition, a signed plea questionnaire and waiver of rights form was entered into the record. We agree with counsel that any challenge to the entry of Neilsen’s no contest plea would lack arguable merit.

With respect to the sentencing hearing, the record reveals that the circuit court’s decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In withholding sentence and ordering Neilsen to complete three years of probation

² There are two exceptions to this. First, the circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, however, as there is no indication that Neilsen’s plea is likely to result in his deportation, exclusion from admission to this country, or denial of naturalization. Sec. 971.08(2). Second, the court failed to inform Neilsen of all of the constitutional rights he was waiving by entering his plea. This failure also does not present a potentially meritorious issue for appeal. As counsel explains in his report, “the record does not include any information that Mr. Neilsen did not understand the constitutional rights he was waiving.” Indeed, the record affirmatively supports the conclusion that Neilsen understood his constitutional rights. To begin, Neilsen acknowledged going over with counsel the plea questionnaire and waiver of rights form, which contained a list of the constitutional rights he was waiving. When asked by the court whether he had any questions about the form, Neilsen replied, “No, sir.” Furthermore, the court, apparently relying on the fact that Neilsen had seen other pleas entered in court that day, asked, “[Y]ou heard me read the constitutional rights a person gives up when they enter a plea previously, correct?” Neilsen affirmed that he heard those rights and was giving them up voluntarily.

with one year of conditional jail time, the court considered the seriousness of the offense, Neilsen's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Neilsen's behavior of speeding, lying to a police officer, and driving with a suspended license, the court's decision does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, we agree with counsel that a challenge to the circuit court's decision at sentencing would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Dustin C. Haskell of further representation in this matter.

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 Dustin C. Haskell is relieved of further representation of Neilsen in this matter.

Diane M. Fremgen
Clerk of Court of Appeals