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May 22, 2013

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

2012AP2769-CRNM	State of Wisconsin v. Clark David Legener (L.C. #2011CF3566)
2012AP2770-CRNM	State of Wisconsin v. Clark David Legener (L.C. #2011CF5255)

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

Clark David Legener appeals judgments convicting him of one count of substantial battery and one count of intimidating a witness, as a party to a crime. Benjamin J. Peirce, Esq., filed a no-merit report seeking to withdraw as Legener's appellate lawyer. *See* WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738, 744 (1967). Legener was informed of his right to respond, but he has not responded. After considering the no-merit report and conducting an independent review of the Record, we agree with Peirce's assessment that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether Legener's guilty pleas were knowingly, intelligently, and voluntarily entered. The plea colloquy complied in all respects with the requirements of WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 266–272, 389 N.W.2d 12, 16 (1986). The prosecutor explained the plea bargain on the record and Legener acknowledged that he understood it. The circuit court addressed whether Legener knew the elements of the crimes, the penalties he faced, and the constitutional rights he would be waiving by entering the pleas. The circuit court also ascertained that Legener had reviewed plea questionnaires and waiver-of-rights forms with his attorney, and that he understood the information explained on those forms. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827–828, 416 N.W.2d 627, 629–630 (Ct. App. 1987). Legener agreed that the circuit court could use the facts stated in the criminal complaints as a factual basis for the charges. We therefore conclude that there would be no arguable merit to an appellate argument that the pleas were not knowingly, intelligently, and voluntarily entered.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion. The circuit court initially sentenced Legener to five years of imprisonment, with two years of initial confinement and three years of extended supervision, on the battery conviction, and a consecutive term of two years of imprisonment for intimidation, with one year of initial confinement and one year of extended supervision. The Department of Corrections sent a memo to the circuit court informing it that the battery sentence was illegal because the maximum period of initial confinement for a class I felony is one year and six months. The sentence was vacated and the case was returned to the same trial judge for resentencing.

On resentencing, the circuit court imposed consecutive sentences of three years and six months on each conviction, to be served consecutively, with one year and six months of initial confinement and two years of extended supervision. The total term of initial confinement and extended supervision was the same as the original sentence.

In imposing sentence, the circuit court considered the gravity of the offense, Legener's character, and the need to protect the public. The circuit court noted that Legener was sincerely remorseful, but that he had a lengthy past record, and most of his crimes were alcohol or drug related, as were these crimes, which indicated that he needed treatment. The circuit court also considered mitigating factors, such as Legener's strong work history, his desire to support his family and to be involved in the lives of his children, and the fact that he was clearly taking full responsibility for what he did. The circuit court explained its application of the various sentencing considerations in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39–46, 270 Wis. 2d 535, 559–560, 678 N.W.2d 197, 207–208, and reached a decision that was both reasoned and reasonable. Therefore, there would be no arguable merit to a claim that the circuit court misused its sentencing discretion.

The no-merit report next addresses whether Legener should be allowed to withdraw his guilty plea because the State breached the plea bargain by arguing that Legener should not be sentenced to probation. “A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement.” *State v. Bowers*, 2005 WI App 72, ¶7, 280 Wis. 2d 534, 541, 696 N.W.2d 255, 258. A defendant is entitled to relief only if the breach is “substantial and material.” *Id.*, 2005 WI App 72, ¶9, 280 Wis. 2d at 542, 696 N.W.2d at 259.

During the plea hearing, the prosecutor recited the plea bargain: “And based upon the defendant’s taking of responsibility and pleading to two felony charges in these matters, the State will recommend prison through the court.” Legener acknowledged that he understood and agreed. At the sentencing hearing, the prosecutor again stated the plea bargain: “Based upon the defendant taking responsibility, the State would recommend prison with sentence and conditions to the Court.” During its sentencing argument, the prosecutor stated: “So the State is recommending that the Court sentence the defendant to prison. The State believes that supervision is not appropriate. But in terms of length and amount, the State is going to leave that to the sound discretion of the Court.” We agree with the no-merit report that “[t]he record speaks for itself that a breach did not occur when the state argued that probation was not appropriate for Legener.” The prosecutor did exactly what he said he would do. He argued that Legener should receive a prison sentence, but left the length of the sentence to the circuit court’s discretion. Therefore, there would be no arguable merit to a claim that Legener should be allowed to withdraw his guilty plea because the State breached the plea bargain.

Accordingly,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Benjamin J. Peirce, Esq., is relieved of any further representation of Legener in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals