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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 29, 2013

To:

Hon. Robert J. Wirtz
Circuit Court Judge
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Eric Toney
District Attorney
Fond du Lac County
160 South Macy Street
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Linda J. Schaefer
242 Michigan Street, Suite 1
Sturgeon Bay, WI 54235-2548

Christopher A. Jordan, #382765
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2013AP53-CRNM State of Wisconsin v. Christopher A. Jordan (L.C. #2012CF80)

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

Christopher A. Jordan appeals from a judgment convicting him of harboring or aiding a felon, theft, and disorderly conduct. 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). Jordan received a copy of the report but did not exercise 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

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

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 Linda J. Schaefer of further representing Jordan in this matter.

Jordan and a friend, a convicted felon who was on bail, punched an acquaintance of the friend in the face and robbed him. They got $37. Remorseful, the friend gave the money back the next day. Jordan initially denied the friend's involvement. Jordan entered no-contest pleas to harboring or aiding a felon, a felony, and to theft and disorderly conduct, both misdemeanors. The trial court sentenced him to three years and six months in prison on the felony, bifurcated as one year, six months of initial confinement and two years of extended supervision, to nine months in jail on the theft, and to ninety days in jail on the disorderly conduct, all sentences to run consecutively. This no-merit appeal followed.

The no-merit report[2] addresses whether Jordan's no-merit 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), ***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 Jordan, *see* ***Bangert***, 131 Wis. 2d at 268, properly used his signed plea questionnaire in conjunction with the substantive colloquy,

[2] The no-merit report addresses the issues without citation to a single statute or case. Appointed counsel is reminded that a no-merit report must satisfy the discussion rule that requires a statement explaining why the appeal lacks merit. *See* ***State ex rel. McCoy v. Appeals Ct.***, 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987). The discussion should include a brief summary of any case or statutory authority that appears to support counsel's conclusions. ***Id.*** *See also* ***McCoy v. Court of Appeals, Dist. 1***, 486 U.S. 429, 440 (1988) (stating that WIS. STAT. RULE § 809.32 "appears to require that the attorney cite the principal cases and statutes and the facts in the record that support the conclusion that the appeal is meritless").

see ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794, and personally determined that Jordan's conduct constituted the offenses to which he pled, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). No issue of merit could arise from the plea taking.

Jordan received the maximum sentence permitted by the legislature. The report addresses whether the sentence reflects a proper exercise of the trial court's discretion. In considering whether a sentence is unduly harsh, this court first determines if the trial court properly exercised its discretion and then whether the sentence was excessive. *See* ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The exercise of discretion requires the court to consider 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. ***State v. Gallion***, 2004 WI 42, ¶¶39, 76, 270 Wis. 2d 535, 678 N.W.2d 197. Appellate courts are reluctant to interfere with a trial court's sentence, and a defendant must show an unreasonable or unjustifiable basis for the sentence. ***Glotz***, 122 Wis. 2d at 524.

Here, the court considered the primary factors during its colloquy. The court was not persuaded that the small amount taken and the lack of permanent injury were significant because "the real injury is the violation of someone's personal liberty and their security." The court noted that Jordan's history of similar crimes was evidence that the public needed protection from him, and because he had been revoked off probation, ordering probation would be "ridiculous." 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). Discretion was properly exercised.

We then examine whether the sentence is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). In light of the trial court's sentencing comments and our deference to the trial court, *see* ***id.*** at 183, we cannot conclude that the sentence is excessive.

The no-merit report next considers whether the trial court erroneously exercised its discretion in denying Jordan sentence credit. We first note that granting or denying sentence credit under WIS. STAT. § 973.155 is not a matter within the court's discretion. *See* ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480 (sentence credit determinations are a question of law). Thus, whether a defendant is awarded sentence credit, and how much, is determined solely by whether he or she is entitled to it. Here, Jordan claimed no sentence credit and both the jail staff person present at his sentencing and his counsel told the court he was entitled to none. From the record before us, the court properly awarded no sentence credit.

Next, counsel queries whether an issue could be raised regarding finding Jordan ineligible for the Earned Release or Challenge Incarceration Programs (ERP, CIP). No issue of arguable merit could arise from this point. Whether a defendant is ERP- or CIP-eligible is a part of the exercise of the court's sentencing discretion. WIS. STAT. § 973.01(3g), (3m). The court applies the same criteria as those considered when imposing sentence. *See* ***State v. Steele***, 2001 WI App 160, ¶¶8-11, 246 Wis. 2d 744, 632 N.W.2d 112. The court specifically found Jordan ineligible "given the nature of the charge." As the court already had noted the need to protect the public, it is reasonable to conclude that the court meant for Jordan to serve the full term to which it sentenced him. Discretion was properly exercised.

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

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 Linda J. Schaefer is relieved of further representing Jordan in this matter.

Diane M. Fremgen
Clerk of Court of Appeals