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June 26, 2013

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

2012AP2304-CRNM State of Wisconsin v. Robyn L. McIntyre (L.C. # 2011CF234A)

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

Robyn McIntyre appeals from a judgment convicting her of possessing drug paraphernalia relating to methamphetamine as party to the crime contrary to WIS. STAT. § 961.573(3)(a) (2011-12).[1] McIntyre's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). McIntyre received a copy of the report and was advised of her right to file a response. She has not done so. Upon

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

consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report is deficient. A no-merit report is supposed to "identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit." WIS. STAT. RULE 809.32(1)(a). Counsel fails to discuss whether an arguable issue arises from the circuit court's denial of McIntyre's motion to suppress. Appointed counsel is reminded that a no-merit report must offer "a statement of reasons why the appeal lacks merit …." ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987). Future no-merit reports may be rejected if they do not fulfill the purpose of RULE 809.32.

The no-merit report addresses the following possible appellate issues: (1) whether McIntyre's no contest plea was knowingly, voluntarily, and intelligently entered and had a factual basis; and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

In a colloquy with the circuit court, McIntyre answered questions about her no contest plea and her understanding of her constitutional rights. The colloquy complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that McIntyre's no contest plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form McIntyre signed is competent evidence of a knowing

and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of McIntyre's no contest plea.[2]

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing McIntyre to a three-year term. In fashioning the sentence, the court considered the seriousness of the offense, McIntyre's character and history of other offenses, her need for drug treatment, her previous failure on probation, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court stated reasons for refusing to consider the Challenge Incarceration Program. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

[2] At the plea colloquy, the circuit court did not discuss the significance of the two charges that were dismissed and read-in. A court should advise a defendant at the plea colloquy that it may consider read-in charges when imposing sentence, the court may require the defendant to pay restitution on a read-in charge, and the State may no longer prosecute a dismissed and read-in charge. ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835. Even though the circuit court failed to so advise McIntyre, we conclude that no arguable appellate issue arises from the omission because the circuit court did not rely upon or refer to the dismissed and read-in charges at sentencing and did not impose any restitution relating to those charges.

We turn to the issue that appellate counsel omitted from his no-merit report: McIntyre's motion to suppress. McIntyre and a co-actor were arrested in a motel room when a police officer executed an arrest warrant for the co-actor. McIntyre moved to suppress the methamphetamine-related evidence found in the motel room during the arrest.

After an evidentiary hearing, the circuit court made the following findings, which are supported by the record. McIntyre's co-actor was subject to a Wisconsin arrest warrant. The arresting officer was alerted by Iowa police to the co-actor's presence in Wisconsin. The officer visited the motel where the co-actor had been seen and observed the co-actor and McIntyre through the motel room's open door. The next day, the officer confirmed with the motel clerk that McIntyre and the co-actor still occupied the motel room. The officer then entered the motel room with a key and found McIntyre on the bed and the co-actor in the bathroom. The co-actor was arrested and consented to a search of the motel room. During the search, the officer found methamphetamine-related evidence that formed the basis for the charges against McIntyre.

The circuit court concluded that the officer had a reasonable belief that the co-actor would be present in the room and the co-actor validly consented to the search. The circuit court's ruling is supported by ***State v. Blanco***, 2000 WI App 119, ¶¶16-19, 237 Wis. 2d 395, 614 N.W.2d 512 (the officer had a reasonable belief that the co-actor was staying at a particular residence and would be present when the officer entered to execute the search warrant), and ***State v. Turner***, 136 Wis. 2d 333, 351-53, 401 N.W.2d 827 (1987) (supporting the validity of a suspect's consent to search a premises before receiving ***Miranda***[3] warnings). Any challenge to

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

the circuit court's order denying McIntyre's motion to suppress would lack arguable merit for appeal.

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, affirm the judgment of conviction, and relieve Attorney Farheen Ansari of further representation of McIntyre 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 Farheen Ansari is relieved of further representation of Robyn McIntyre in this matter.

Diane M. Fremgen
Clerk of Court of Appeals