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DISTRICT IV/II

July 10, 2013

To:

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

2012AP2439-CRNM State of Wisconsin v. Kody K. Johnson (L.C. # 2011CF374)

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

Kody Johnson appeals from a judgment convicting him of the unauthorized use of another's personal identifying information contrary to WIS. STAT. § 943.201(2)(a) (2009-10).¹ Johnson's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12) and *Anders v. California*, 386 U.S. 738 (1967). Johnson received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report

¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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 (2011-12).

The no-merit report addresses the following possible appellate issues: (1) whether Johnson'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.

With regard to the entry of his no contest plea, Johnson answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.² We conclude that Johnson'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 Johnson 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.

² Because Johnson did not receive the deportation warning as part of the plea colloquy, *State v. Bedolla*, 2006 WI App 154, ¶5, 295 Wis. 2d 410, 720 N.W.2d 158, we directed appellate counsel to evaluate and investigate this issue and advise this court of Johnson's status. Counsel has confirmed for this court that Johnson is a United States citizen.

Johnson entered his no contest plea as a repeat offender. The record reveals that Johnson admitted his prior convictions. WIS. STAT. § 973.12(1). The circuit court also advised Johnson of the effect of the two dismissed and read-in counts. *State v. Straszkowski*, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Johnson’s no contest plea.

The circuit court imposed a three-year term of probation and stayed sixty days in jail. 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 Johnson. In fashioning the sentence, the court considered the seriousness of the offense of conviction and the read-in offenses, Johnson’s character and history of other offenses, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

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 Jefren Olsen of further representation of Johnson 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 (2011-12).

IT IS FURTHER ORDERED that Attorney Jefren Olsen is relieved of further representation of Kody Johnson in this matter.

Diane M. Fremgen
Clerk of Court of Appeals