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DISTRICT IV/II

July 24, 2013

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

2013AP175-CRNM State of Wisconsin v. Andre D.P. Carter (L.C. #2010CF107)

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

Andre D.P. Carter appeals from a judgment convicting him of possession with intent to deliver 200 grams or less of THC. 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). Carter received a copy of the report and has filed a response. Upon consideration of the no-merit report and response and our independent review of the record as mandated by ***Anders***, we conclude that

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

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 Donna L. Hintze of further representing Carter in this matter.

Carter ultimately was charged in Wood county case no. 10CF107 with a felony—possession with intent to deliver 200 grams or less of THC—and three misdemeanors—possession of a controlled substance, possession of an illegally obtained prescription drug, and misdemeanor bail jumping. Carter entered into a negotiated plea and diversion contract with the State to resolve the charges against him by entering the Wood County Drug Court Program ("drug court"). Carter pled guilty to the three misdemeanors, sentence was withheld, and he was placed on two years' probation on each count. He also pled guilty to the felony, but pursuant to the contract, the court reserved a finding of guilt and diverted him to drug court. The contract provided that discharge from drug court short of successful completion for any reason would result in a felony conviction and sentencing on the diverted charge.

Carter's probation on the three misdemeanors was revoked three months later and he was sentenced to seven months in jail with Huber privileges. It did not affect his participation in drug court, however. When Carter later withdrew from drug court, he was convicted of felony possession with intent to deliver, for which the circuit court sentenced him to six months in jail with Huber privileges. This no-merit appeal followed.[2]

[2] Carter did not file a notice of intent to pursue postconviction relief with regard to the three misdemeanors either when placed on probation or when sentenced after revocation.

The no-merit report addresses whether Carter should be allowed to withdraw his guilty pleas for not having knowingly, voluntarily, and intelligently entered them. A defendant must understand the constitutional rights he or she waives upon entering a guilty plea. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Carter's signed guilty plea questionnaire and waiver of rights form is in the record, and Carter confirmed that he reviewed it with his trial counsel and understood it. The circuit court explained to Carter that by pleading guilty he would give up the constitutional rights listed on the form, and the court reviewed each of those rights. Carter again confirmed that he understood. The court properly used the signed questionnaire in conjunction with the substantive colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. The defense stipulated that the court could use the criminal complaint to ascertain that the plea had a factual basis. *See* ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The negotiated plea and diversion contract Carter signed is further evidence of the parties' agreement and his understanding of it. The court's careful, thorough colloquy satisfied the requirements of WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Our review of the record provides no other arguably meritorious basis for Carter to pursue plea withdrawal.

We further conclude that Carter could not pursue an arguably meritorious challenge to the sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence …." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court must consider the primary sentencing factors of "the gravity of the offense,

the character of the defendant, and the need to protect the public" and may consider a wide range of other factors as well. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court has discretion to determine which factors are relevant to the imposition of sentence and to determine the weight to assign to each. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The circuit court properly considered the necessary factors, including numerous positives such as Carter's involvement in the parenting of his young son, his steady employment and the strides he made while in drug court. The court fully explained its rationale for imposing a six-month sentence, one well under the three and a half years Carter faced and less than half of what the State recommended. We agree with appellate counsel that further proceedings to challenge Carter's sentence would lack arguable merit.

Carter's response raises what we construe to be a sentence credit challenge and an ineffective-assistance-of-counsel claim. Pointing out that the probation revocation order states that it revoked "all cases" under case no. 10CF107, Carter contends he "should be allowed credit for the time [he] sat." We understand him to argue that the seven months he served on the misdemeanors should have been credited against the six-month jail term he received for the felony, which also was part of 10CF107. Instead, he complains, his trial attorneys "didn't try to fight for him," and "botched" his "whole case."

A revocation order revokes probation. He was on probation only for the misdemeanors. The felony was the subject of the diversion contract. Our review of the record reveals nothing to indicate that any of his trial counsel were ineffective in regard to this or in any other way.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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 Donna L. Hintze is relieved of further representing Carter in this matter.

Diane M. Fremgen
Clerk of Court of Appeals