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DISTRICT II

February 17, 2016

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Thomas A. Lockhart
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You are hereby notified that the Court has entered the following opinion and order:

2015AP1640-CRNM State of Wisconsin v. Thomas A. Lockhart (L.C. #2013CF217)

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

Appointed appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding that no grounds exist to challenge the judgment convicting Thomas A. Lockhart of fourth-offense OWI, disorderly conduct, operating after revocation (OAR), and misdemeanor bail jumping. Lockhart was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

notified of his right to file a response but died before he was able to do so.[2] Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal. We accept the no-merit report and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Lockhart was charged with fourth-offense OWI,[3] disorderly conduct, OAR, carrying a concealed weapon, two counts of misdemeanor bail jumping, and operating with a prohibited alcohol concentration (PAC). All but the OWI charge carried a repeater enhancer. The PAC charge was dismissed outright. One bail-jumping charge and the concealed-carry charge were dismissed and read in.

The trial court imposed and stayed two years' initial confinement and two years' extended supervision for the OWI, three years' probation with a year of condition time consecutive to a sentence Lockhart currently was serving, and thirty days' jail time on each of the other three charges, concurrent to each other and to the conditional time. He was also fined $600, the minimum available. The court denied Lockhart's subsequent pro se requests for sentence credit. This no-merit appeal followed.

The no-merit report first examines whether Lockhart's no-contest pleas present any grounds for an arguably meritorious challenge. Under the United States Constitution, a guilty or no contest plea must be affirmatively shown to be knowing, intelligent, and voluntary. ***State v.***

[2] Lockhart's appeal nonetheless continues. *See* ***State v. McDonald***, 144 Wis. 2d 531, 537-39, 424 N. W. 2d 411 (1988).

[3] The OWI initially was charged as third-offense OWI in Racine county case no. 12-CM-536, but was dismissed with prejudice and reissued as fourth-offense OWI in Racine county case no. 13-CF-217.

Brown, 2006 WI 100, ¶25, 293 Wis. 2d 594, 716 N.W.2d 906. WISCONSIN STAT. § 971.08 also establishes certain requirements for ensuring that a plea is knowing, voluntary, and intelligent. Our supreme court has provided additional requirements in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and subsequent cases. ***Brown***, 293 Wis. 2d 594, ¶23.

To withdraw his plea after sentencing, Lockhart would have to carry "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The court addressed Lockhart personally and engaged him in a colloquy that verified his understanding and that his plea was knowing, voluntary, and intelligent. *See* ***Brown***, 293 Wis. 2d 594, ¶35. Besides the colloquy, the court properly looked to the plea questionnaire/waiver of rights form Lockhart signed reflecting his understanding of the elements, the potential penalties, and the rights he agreed to waive. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Lockhart would be unable to make a prima facie case that the court did not comply with the procedural requirements of WIS. STAT. § 971.08 and that he did not understand or know the information that should have been provided. *See* ***Bangert***, 131 Wis. 2d at 274.[4] We have identified nothing in the record that would support a claim that a manifest injustice would result if he were not allowed to withdraw his plea. *See* ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482 (giving examples of manifest injustice).

[4] The no-merit report notes the court did not give Lockhart the "deportation warning" WIS. STAT. § 971.08(1)(c) requires. That is true in regard to the plea hearing after the OWI charge was reissued as a fourth offense. At the original plea hearing, however, the court gave the warning verbatim. The record as a whole shows that Lockhart was instructed about and understood the rights he waived by his pleas. That is sufficient. *See* ***Edwards v. State***, 51 Wis. 2d 231, 235-36, 186 N.W.2d 193 (1971).

The no-merit report also addresses the propriety of the sentence imposed. Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Here, the court examined the gravity of Lockhart's offense, his character, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). It noted that he is "just fine" when sober, but his "true addiction to alcohol" poses an "incredible risk" to the public and that rehabilitation was warranted. The court's "rational and explainable basis" for the sentence satisfies this court that discretion was exercised. ***Gallion***, 270 Wis. 2d 535, ¶39 (citation omitted). Lockhart faced about eight years' incarceration and a $23,500 fine. His penalty cannot be said to be so excessive, unusual, or disproportionate "to the offense committed as to shock public sentiment." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The report also considers whether Lockhart should have been awarded the presentence confinement credit he requested. We agree that no issue of arguable merit could arise from this point.

A defendant is entitled to sentence credit "for all days spent in custody in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1)(a). Lockhart was arrested in this case on March 16, 2012. The time he spent in custody from that date to the date he arrived at the institution to serve his eighteen-month revocation sentence on Kenosha county case no. 07-CF-1120 was credited to 07-CF-1120. The revocation sentence was completed before he was sentenced in this case. An offender is not entitled to sentence credit for custody being served to satisfy another, unrelated criminal sentence. ***State v. Gavigan***, 122 Wis. 2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984).

Likewise, Lockhart was not entitled to credit for the subsequent 270 days he spent in custody on Racine county case no. 11-CT-912, which he was serving at the time of sentencing in this case. Defendants are not entitled to dual credit on a consecutive sentence. ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988).

Our independent review of the record discloses no other potentially meritorious issue for appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved from further representing Lockhart in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals