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DISTRICT III

June 28, 2016

To:

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

2015AP766-CRNM State v. Toua Yang (L. C. No. 2012CF322)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Toua Yang has filed a no-merit report concluding no grounds exist to challenge Yang's convictions for delivering an imitation drug and delivering less than or equal to three grams of a designer drug as a party to the crime, both counts as a second and subsequent offense. Yang was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on

appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.[1]

The State alleged the following five offenses against Yang, listed as charged on the amended complaint: (1) delivering between ten and fifty grams of the designer drug methylenedioxymethamphetamine (MDMA), as party to a crime; (2) delivering between ten and fifty grams of MDMA, as party to a crime; (3) delivering greater than fifty grams of MDMA, as party to a crime; (4) delivering three grams or less of MDMA, as party to a crime and as a second or subsequent offense; and (5) delivering between ten and fifty grams of MDMA, as a second or subsequent offense. In exchange for Yang's no contest pleas to counts 4 and 5, the State agreed to dismiss and read in the remaining charges and recommend four years' initial confinement and five years' extended supervision, and the defense remained free to argue.

Yang filed a presentence motion to withdraw his plea, claiming a "genuine misunderstanding" of the terms of the plea. Specifically, Yang claimed he entered his plea to count 5 believing it would be amended from a Class D felony to the Class I felony of delivering an imitation controlled substance, as lab results showed the substance submitted for examination did not contain "any controlled substance." The circuit court agreed to allow Yang to withdraw his plea to count 5 and enter a no contest plea to an amended charge of delivering an imitation controlled substance, as a second and subsequent offense. The new plea agreement remained the same as the old agreement with respect to Yang's no contest plea to count 4 and the dismissal and read in of the other charges. Under the new plea agreement, however, the parties jointly

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

recommended a nine-year sentence consisting of four years' initial confinement and five years' extended supervision, but remained free to argue whether the sentence should be concurrent or consecutive to any sentence Yang was already serving. Out of a maximum twenty-four-year sentence, the circuit court imposed concurrent sentences consistent with the joint recommendation and made the sentences concurrent to the sentence Yang was already serving, as requested by Yang.

The record discloses no arguable basis for withdrawing Yang's no contest pleas. The court's plea colloquies, as supplemented by plea questionnaire and waiver of rights forms that Yang completed, informed Yang of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no contest pleas. The court confirmed Yang's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Yang of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Yang committed the crimes charged. The record shows the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Any challenge to the sentence imposed would lack arguable merit. The length of the sentence imposed was consistent with the joint recommendation, and the circuit court made the sentence concurrent to Yang's existing sentence, as Yang requested. Yang is estopped from challenging a sentence he requested. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471, 583 N.W.2d 843 (Ct. App. 1998). In any event, it cannot reasonably be argued that Yang's sentence is so

excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Daniel R. Goggin II is relieved of further representing Yang in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals