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Memo

Friday, August 07, 2009

Re: What are my rights to appeal if I plead guilty to a crime?

Dear Badger Lawyer User:

Appealing any kind of case is difficult. It is the general philosophy of appeals that the decision of a trial court should be left "undisturbed" unless there is a really, really good reason to overturn it. That means that unless the trial court made an egregious error which denied you your fair trial, the appeals court is probably going to affirm the verdict. (See "What is harmless error?" on our criminal law website).

The toughest appeal to win is an appeal following a guilty plea. If you plead guilty to a crime, the chances of getting your conviction overturned are very slim.

The attached document is an actual court of appeals decision which thoroughly discusses the law surrounding appeals of guilty pleas. It provides citations to case law and statutes relating to guilty pleas, and provides a good explanation of why guilty pleas are rarely overturned and how it is that they sometimes are overturned.

Enjoy!

Chris

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DISTRICT II

March 18, 2009

To:

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

State of Wisconsin v. Joshua D. H(

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

Joshua D. Hopkins has appealed from a judgment convicting him of the delivery of more than one gram and not more than five grams of cocaine in violation of WIS. STAT. § 961.41(1)(cm)1r. (2007-08).[1] The judgment was entered pursuant to Hopkins' guilty plea. In exchange for the plea, a second count of delivery of cocaine was dismissed. In addition, the State agreed to refrain from making a specific sentence recommendation.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

At the sentencing hearing, the trial court sentenced H to a bifurcated sentence of nine years, consisting of four years of initial confinement followed by five years of extended supervision. It stated that the sentence was to be served "consecutive to and not concurrently with any sentence previously pronounced."[2] It also determined that H was ineligible for the earned release and challenge incarceration programs.

Appellate counsel for H has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). H was served with a copy of the report and has filed a response. Based upon an independent review of the report, response, and record as required by *Anders* and RULE 809.32, we conclude that no issue of arguable merit could be raised on this appeal.

It is well established that a guilty plea, knowingly and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). The sole issues on appeal are whether an arguable basis exists to challenge H guilty plea or sentence.

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[2] The written judgment entered in this case does not state whether the sentence is consecutive or concurrent. However, because the trial court clearly and unambiguously ordered that the sentence was consecutive to any sentence previously pronounced on H , its oral pronouncement controls the written judgment. *State v. Schordie*, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). The difference between the sentence portion of the written judgment of conviction and the trial court's unambiguous oral pronouncement constitutes a clerical error. *See State v. Prihoda*, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857. A court has the power to correct a clerical error at any time. *Id.*, ¶17. A circuit court may either correct a clerical error in the written judgment of conviction or may direct the clerk's office to make such a correction. *Id.*, ¶5. Because the written judgment fails to state that H ' sentence is consecutive and thus contains a clerical error, this court orders modification of the written judgment to state that the sentence is consecutive to any sentence previously pronounced on

(continued)

To be constitutional, a guilty plea must affirmatively be shown to be knowing, voluntary and intelligent. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). When accepting a guilty plea, the trial court must address the defendant personally to determine that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment if convicted. WIS. STAT. § 971.08(1)(a). It must ascertain the defendant's understanding of the constitutional rights he is waiving after informing him of those rights or ascertaining that he knows what those rights are. ***Bangert***, 131 Wis. 2d at 270-72. Pursuant to § 971.08(1)(b), the trial court must also make such inquiry as satisfies it that the defendant has, in fact, committed the crime charged. A trial court may consider a plea questionnaire and waiver of rights form in ascertaining the defendant's understanding and knowledge at the time the plea is taken. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

A plea questionnaire and waiver of rights form was executed by H. At the plea hearing, H stated that he had read the plea questionnaire and understood the information in it. Both the questionnaire and H responses to the trial court at the time he entered his guilty plea establish that he understood the constitutional rights he was waiving, the plea agreement, the nature of the offense, the maximum penalties faced by him, and the trial court's right to impose the maximum penalties. The record also establishes that the trial court discussed H mental health issues with him, and ascertained his ability to understand the plea proceedings.

Hopkins. We direct the circuit court to enter an amended judgment of conviction consistent with this order on remand.

At the plea hearing, the trial court also correctly determined that the complaint provided an adequate factual basis for the plea. No arguable basis therefore exists to conclude that H guilty plea was unintelligent, involuntary or unknowing, or that it was not supported by an adequate factual basis.

In his response, H objects to the sentence imposed by the trial court, contending that the trial court should have determined that he was eligible for the challenge incarceration program or the earned release program based on his drug addiction. He contends that placement in one of these programs would have facilitated his receipt of drug treatment, thus assisting him to become a productive member of society and furthering the trial court's goal of deterring his commission of new crimes.

The record provides no arguable basis for disturbing the sentence imposed by the trial court. Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, this court follows a strong and consistent policy of refraining from interference with the trial court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. We afford a strong presumption of reasonability to the trial court's sentencing determination because that court is best suited to consider the relevant factors and demeanor of the convicted defendant. ***Id.***

To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to,

protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.*** The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***Ziegler***, 289 Wis. 2d 594, ¶23. The weight to be given each of the sentencing factors remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

The record provides no basis for disturbing the sentence imposed by the trial court. The trial court listened to the arguments of counsel, heard H ' statement, and considered the PSI.[3] It considered the seriousness of the underlying offense, which was committed the month after H was released from prison in another case. It discussed the harmful impact on society of cocaine sales and use. While acknowledging that H was still young, it considered his lengthy criminal record, his child support arrearages, and his prior failures on supervision. It noted that H became involved with cocaine immediately after his release from prison in August 2006.

The trial court's discussion of the nature of the offense and H character and criminal history clearly reflected its concern with protecting the public from new criminal behavior by H In addition to these factors, the trial court stated that it was premising the sentence on its determination that punishment deters crime, including the sale of illegal drugs. It concluded that a stern sentence was necessary to send a message to H and others that engaging in drug sales will not be tolerated. Relying on these factors, it imposed a sentence

[3] This is not an offense for which sentencing guidelines exist. WISCONSIN STAT. § 973.017(2)(a) and ***State v. Grady***, 2007 WI 81, ¶30, 302 Wis. 2d 80, 734 N.W.2d 364, *reconsideration denied*, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488, are therefore not implicated in this case.

consisting of four years of initial confinement and five years of extended supervision, to be served consecutively to the sentence previously pronounced on H

Because the trial court discussed the relevant sentencing factors and applied them in a reasoned and reasonable manner in sentencing H , no arguable basis exists to conclude that it erroneously exercised its discretion in imposing sentence. H sentence was within the limits of the maximum sentence and does not shock public sentiment or violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Whether to make a sentence consecutive is committed to the sound discretion of the trial court. ***State v. Ramuta***, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483. Because the trial court could reasonably conclude that separate offenses warranted separate sentences, no basis exists to conclude that it erroneously exercised its discretion by imposing a consecutive sentence. *See* ***State v. LaTender***, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979).

The trial court also acted within the scope of its discretion in determining that H was ineligible for the challenge incarceration and earned release programs. Even if a defendant meets all of the department of corrections' eligibility requirements for the challenge incarceration program, the circuit court has discretion under WIS. STAT. § 973.01(3m) to declare the defendant ineligible. ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. When determining eligibility for the challenge incarceration and earned release programs, the trial court must consider the same factors it considers for sentencing. *See* ***id.***, ¶¶9-10; ***State v. Owens***, 2006 WI App 75, ¶¶8-9, 291 Wis. 2d 229, 713 N.W.2d 187.

In ordering that H was ineligible for the challenge incarceration and earned release programs, the trial court relied upon H ' lengthy criminal record, his previous failures on supervision, the nature of the offense, and the need to deter his commission of new crimes. Contrary to H argument, the trial court was not required to conclude that his interest in receiving drug treatment outweighed the concerns expressed by the trial court. Because the trial court considered proper factors in determining that H was ineligible for the earned release and challenge incarceration programs, no arguable basis exists to disturb its decision. Because the record discloses no other potential issues for review, we accept the no-merit report, modify the written judgment of conviction to state that the sentence is consecutive to any sentence previously imposed and, as modified, affirm the judgment pursuant to WIS. STAT. RULE 809.21. We direct the circuit court to enter an amended judgment of conviction consistent with this order on remand.

Upon the foregoing reasons,

IT IS ORDERED that this court modifies the written judgment of conviction to state that the sentence is consecutive to any sentence previously imposed and, as modified, we affirm the judgment pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the circuit court shall enter an amended judgment of conviction consistent with this order on remand.

IT IS FURTHER ORDERED that Attorney Christopher A. Doerfler is relieved of any further representation of H this matter. *See* WIS. STAT. RULE 809.32(3).

David R. Schanker
Clerk of Court of Appeals