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**DISTRICT III**

August 6, 2013

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

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2013AP512-CRNM	State of Wisconsin v. Gerald R. Obernberger
2013AP513-CRNM	(L. C. ## 2012CF166, 2012CF172)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Gerald Obernberger has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),<sup>1</sup> concluding no grounds exist to challenge Obernberger's convictions for two counts of burglary of a building. Obernberger 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

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

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 judgments of conviction. See WIS. STAT. RULE 809.21.

The State charged Obernberger with felony theft; two counts of felony bail jumping; three counts of burglary of a building; possession of burglarious tools; criminal damage to property; and misdemeanor theft—the latter three counts and one of the felony bail jumping charges as a repeater. The charges were filed in two separate cases. In exchange for his guilty pleas to two counts of burglary of a building, the State agreed to dismiss and read in the remaining counts. Out of a maximum possible twenty-five-year sentence, the court imposed eight-year sentences consisting of four years' initial confinement and four years' extended supervision, to run concurrently with each other and with another sentence Obernberger was serving.

The court's plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Obernberger completed, informed Obernberger of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas. The court confirmed Obernberger'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 found that a sufficient factual basis existed in the criminal complaint to support Obernberger's pleas. 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).

Upon our independent review of the record, this court discovered that the circuit court failed to personally advise Obernberger of the deportation consequences of his plea, as mandated

by WIS. STAT. § 971.08(1)(c). A potential issue would arise if Obernberger could show that the plea is likely to result in his “deportation, exclusion from admission to this court or denial of naturalization.” See WIS. STAT. § 971.08(2); see also *State v. Douangmala*, 2002 WI 62, 253 Wis.2d 173, 646 N.W.2d 1. The record reveals, however, that Obernberger was born in Wisconsin and is, therefore, a citizen of the United States not subject to deportation. Any challenge to the pleas on this basis would therefore lack arguable merit.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Obernberger’s character, including his criminal history; the need to protect the public; and the mitigating factors Obernberger raised. See *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Obernberger’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).

The no-merit report acknowledges the disparity between Obernberger’s sentence and that imposed for his co-defendants. Disparity among co-defendants’ sentences is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation. *State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). Moreover, leniency in one case does not transform a reasonable punishment in another case into a cruel one. *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Here, the prosecutor noted that with respect to one of Obernberger’s co-defendants, the court deferred acceptance of a guilty plea on a felony burglary charge, found him guilty of three misdemeanors and placed him on probation for two years with a number of conditions. The prosecutor noted, however, that this co-defendant was a minor at the time of the offenses. With respect to the other co-defendant, the court

imposed probation because that individual did not have a lengthy criminal history. In addition to several read-in charges, nineteen-year-old Obernberger had a history of fourteen charged offenses as a juvenile and four adult criminal convictions. After considering the proper sentencing factors, the court emphasized that Obernberger's sentence was "unique" to him. There is no arguable merit to a claim that the court erroneously exercised its sentencing discretion when imposing a sentence that differed from that of Obernberger's co-defendants.

Finally, the no-merit report addresses whether Obernberger is entitled to additional sentence credit. In order to receive sentence credit, an offender must establish: (1) that he or she was in "custody" and (2) that the custody was in connection with the course of conduct for which the sentence was imposed. *State v. Dentici*, 2002 WI App 77, ¶5, 251 Wis. 2d 436, 643 N.W.2d 180. Obernberger sought 185 days' sentence credit for the time from his April 5, 2012 arrest in the first burglary case to the date he was sentenced in these cases, October 8, 2012. In an unrelated case for third-degree sexual assault, a deferred prosecution agreement was revoked. On July 10, 2012, Obernberger began serving a sentence imposed in the sexual assault case. Because Obernberger's confinement from July 10, 2012 to October 8, 2012 was not connected with the present conviction but, rather, occurred as a result of his conviction in an unrelated case, there is no arguable merit to a claim that he is entitled to additional sentence credit.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis S. Schertz is relieved of further representing Obernberger in these matters. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*