OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

September 17, 2013

To:

Hon. D. T. Ehlers
Circuit Court Judge
Door County Justice Center
1209 S. Duluth Ave.
Sturgeon Bay, WI 54235

Nancy Robillard
Clerk of Circuit Court
Door County Justice Center
1205 S. Duluth Ave.
Sturgeon Bay, WI 54235

Raymond L. Pelrine
District Attorney
1215 S. Duluth Ave.
Sturgeon Bay, WI 54235-3849

Christina C. Starner
P.O. Box 9273
Green Bay, WI 54308

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Craig L. Danek
c/o Door County Jail
1203 S. Duluth Ave.
Sturgeon Bay, WI 54235

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

2013AP1218-CRNM State of Wisconsin v. Craig L. Danek (L.C. # 2012CF26)

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

Counsel for Craig Danek filed a no-merit report concluding there is no arguable basis for Danek to withdraw his no contest plea or challenge the sentence imposed for possession of THC with intent to deliver, second or subsequent offense. Danek was advised of his right to respond to the 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 basis for appeal.

Pursuant to a plea agreement, Danek entered a no contest plea in return for the State's agreement to drop one count of possession of drug paraphernalia. As jointly recommended by

the parties, the court withheld sentence and placed Danek on probation with a condition that he serve six months in jail.

The record discloses no manifest injustice upon which Danek could withdraw his no contest plea. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court, aided by a plea questionnaire and waiver of rights form, informed Danek of the constitutional rights he waived by pleading no contest and the elements of the offense.

There were three defects in the plea colloquy. However, none of the defects provide grounds for appeal. First, the court did not determine the extent of Danek's education and general comprehension at the plea hearing. However, as in ***State v. Moederndorfer***, 141 Wis. 2d 823, 829 n.2, 416 N.W.2d 627 (Ct. App. 1997), Danek does not claim any comprehension problem or any lack of comprehension skills or learning capacity. Danek completed eleven years of schooling and earned a GED. At the sentencing hearing, he stated he could understand everything. Therefore, the record discloses no basis for Danek to withdraw his no contest plea based on lack of understanding of the proceeding.

Second, the court failed to ask Danek if any threats or promises were made in exchange for his no contest plea. Danek's appellate counsel indicates she would have to discuss matters outside the record including confidential statements from her client to address that issue. Therefore, she would only reveal the information if Danek filed a response to the no-merit report alleging the existence of any threats or promises. Because Danek did not file a response, counsel was not called upon to file a supplemental no-merit report addressing that issue. Because Danek does not allege the existence of any threats or promises and the record does not suggest any, the court's failure to ask about threats or promises does not create a viable issue for appeal.

Third, the court misinformed Danek of the maximum penalties he faced for this offense. The court informed Danek that he could be imprisoned up to three and one-half years, neglecting to take into account the repeater enhancer which increased the maximum term of imprisonment by four years. The Wisconsin Supreme Court recently decided a similar issue in ***State v. Taylor***, 2012 WI 34, ¶¶34-39, 347 Wis. 2d 30, 829 N.W.2d 482. In ***Taylor***, the court held the plea was knowingly, voluntarily and intelligently entered because the record made clear that, despite the court's misstatement at the plea hearing, Taylor knew the maximum penalty that could be imposed. The same circumstances apply in this case. At the initial appearance, the court informed Danek that he could be imprisoned for up to seven and one-half years because of the penalty enhancer. The complaint also stated in bold print that the maximum term of imprisonment could be increased by four years. The plea questionnaire also correctly stated the maximum penalty, and Danek confirmed that he went through the form with his attorney. Danek also acknowledged his prior drug offense at the plea hearing. Because the circumstances of this case are almost identical to those in ***Taylor***, any challenge to the validity of the no contest plea based on the court's misstatement of the maximum sentence would lack arguable merit.

Entry of a valid no contest plea constitutes a waiver of all nonjurisdictional defects and defenses. *See* ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986). However, an order denying a motion to suppress evidence can be reviewed despite entry of a no contest plea. WIS. STAT. § 971.31(10). Because no suppression motion was filed, any review of the search would entail questioning the effective assistance of counsel for failing to file a suppression motion.

The drugs, drug paraphernalia and text messages suggesting drug dealing were seized by Danek's probation agents when they noticed drug paraphernalia in plain view while they were

administering a preliminary breath test to Danek. Any claim that Danek's trial attorney was ineffective for failing to move to suppress the evidence would fail. To establish ineffective assistance of counsel, Danek would have to show both deficient performance and prejudice to his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's strategic choices made with full understanding of the facts and law are virtually unchallengeable on appeal. ***Id.*** at 690-91. The decision not to challenge the search constituted a reasonable strategy because the State's plea offer was contingent on the defense filing no motion to suppress evidence and waiving a preliminary hearing. Ultimately, it was Danek's decision whether to accept the State's offer with that contingency. Further, any motion to suppress the fruits of the search would have been unlikely to succeed because supervision of probationers is a "special need" that may justify departures from the usual warrant and probable cause requirements. ***Griffin v. Wisconsin***, 483 U.S. 868, 870-80 (1987). Although the facts leading up to the probation agents' decision to administer a preliminary breath test to Danek at his residence have not been disclosed, Danek's trial counsel could reasonably advise Danek to accept the State's contingent offer rather than file a suppression motion that would have had little chance of succeeding.

Finally, the record discloses no arguable basis for challenging the sentencing court's discretion. The court imposed the sentence jointly recommended by the parties. A defendant cannot challenge a sentence on appeal that he jointly requested. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

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

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Christina Starner is relieved of her obligation to further represent Danek in this matter. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals