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 IV

September 17, 2013

To:

Hon. Gregory J. Potter
Circuit Court Judge
Wood County Courthouse
400 Market Street, PO Box 8095
Wisconsin Rapids, WI 54494

Cindy Joosten
Clerk of Circuit Court
Wood County Courthouse
400 Market Street, PO Box 8095
Wisconsin Rapids, WI 54494

Andrew Hinkel
Assistant State Public Defender
P. O. Box 7862
Madison, WI 53707-7862

Craig S. Lambert
District Attorney
P. O. Box 8095
Wisconsin Rapids, WI 54494-8095

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

John F. Crump
2821 Boles Street, Apt. 32
Wisconsin Rapids, WI 54495-1311

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

2012AP185-CRNM State of Wisconsin v. John F. Crump (L.C. #2010CF20)

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

John Crump appeals a judgment convicting him, as a repeat offender, of possession with intent to deliver a controlled substance in or near a park. Attorney Devon Lee filed a no-merit report addressing the validity of Crump's plea and sentence. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32 (2011-12);[1] ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Lee has since

[1] All further references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

been replaced by Attorney Andrew Hinkel, who has made no motion to withdraw the no-merit report.

Crump was sent a copy of the report, and filed two responses raising complaints about: (1) the two-year delay between when Crump was first questioned and when he was charged; (2) the amount of his bail; (3) the denial of counsel at his preliminary hearing; (4) testimony at the preliminary hearing that Oxycontin and Oxycodone are the same substance; (5) the State's failures to disclose that the investigating officer who testified at his preliminary hearing was suspended and to turn over other discovery materials; (6) the failure of defense counsel, the district attorney, or the court to advise Crump that he might have an entrapment defense because the undercover police officer arranged the place for the controlled drug buy near the park; (7) the circuit court's failure to act on Crump's pro se speedy trial demand; (8) his first attorney's failure to return all of his retainer upon withdrawing; (9) successor counsel's threat to withdraw if Crump refused to enter a plea; and (10) successor counsel's promise that Crump would only need to serve two years of probation if he entered the plea. Upon reviewing the entire record, as well as the no-merit report and Crump's responses, we conclude that there are no arguably meritorious appellate issues.

First, the conviction was based upon the entry of a no-contest plea, and we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show at a minimum that the plea colloquy was defective, or demonstrate a manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to dismiss and read in another felony and to make a joint recommendation for a four-year term of probation in exchange for the plea, and the defendant himself stated on the record that he agreed with the recommendation. In addition the court made sure the defendant understood that it would not be bound by any sentencing recommendations and could impose the maximum penalty. Thus, the record does not support Crump's current claim that he was led to believe he would only have two years of probation.

The circuit court conducted a plea colloquy exploring the defendant's understanding of the nature of the charge, the penalty range and other direct consequences of the plea, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The court also inquired into the defendant's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire. Crump informed the court that he went over the form with his attorney, and is not now claiming to have misunderstood anything on it. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint and adduced at the preliminary hearing[2] provided a sufficient factual basis for the plea, and counsel stipulated to Crump's status as a repeat offender. The complaint specified that a confidential informant had tipped off the police as to where Crump was dealing drugs, an undercover officer had conducted a controlled drug buy, and that the recovered substances had been identified as cocaine and Oxycodone. There is no reason to

[2] We note that the circuit court offered Crump the opportunity to have a second preliminary hearing once he obtained counsel, but he waived that offer.

believe the State would not have been able to produce evidence confirming those facts if the matter had gone to trial, and those facts do not suggest entrapment. Even if Crump had been able to undermine the officer's credibility to some extent based upon his suspension, the State still had the actual recovered substances and the information provided by the confidential informant. Crump has not identified any other exculpatory materials that he believes would have been revealed by additional discovery from the State or investigation by defense counsel.

As to the assistance of counsel, Crump had filed a disciplinary complaint against successor trial counsel during the pendency of this action, which was determined to be unfounded. Under those circumstances, it would have been proper for successor counsel to inform Crump that he would need to withdraw due to a conflict of interest. Crump avoided the conflict of interest problem, however, by withdrawing any pending motions or complaints against counsel and informed the court that his differences with counsel did not affect his decision to enter a plea. As to Crump's dispute with his original attorney regarding the return of his retainer, that is outside the scope of this appeal. We see nothing else in the record to suggest that counsel's performance was in any way deficient or any other basis to challenge the plea.

By entering a valid plea, Crump waived all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; *see also* WIS. STAT. § 971.31(10). Thus, he cannot now raise any other issues regarding his bail, his preliminary hearing, or a speedy trial demand.[3]

[3] In any event, with respect to the speedy trial demand, we note that Crump agreed to a continuance after his first attorney withdrew at his request, and successor counsel explained that the joint recommendation took into account the age of the case.

A challenge to the defendant's sentence would also lack arguable merit because the circuit court followed the joint sentencing recommendation of the parties. A defendant may not challenge on appeal a sentence that he affirmatively approved. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that successor counsel, Attorney Andrew Hinkel, is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals