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September 23, 2013

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

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2012AP699-CRNM State of Wisconsin v. Devonta Rashad Grover (L.C. #2010CF1585)

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

Devonta Grover appeals a judgment convicting him of second-degree sexual assault with use of force. Attorney Dustin Haskell has filed a no-merit report seeking to withdraw as appellate counsel. *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). The no-merit report addresses whether Grover has

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

grounds for plea withdrawal or to challenge his sentence. Grover was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

The State agreed to dismiss two felonies and recommend a total sentence of twenty years, with ten to thirteen years of initial confinement, in exchange for the plea, and it followed through on that agreement. 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; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court made sure the defendant understood that it would not be bound by any sentencing recommendations. The court also inquired into the defendant's ability to understand the proceedings and the voluntariness of the plea decision. Grover acknowledged that he was entering a plea because he believed he was guilty of the offense. In addition, the record includes a signed plea questionnaire. Grover indicated during the plea hearing that he understood the information explained on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Grover subsequently moved to withdraw his plea, claiming that he had not understood he was admitting to sexual intercourse, as opposed to touching, and that he thought he would only get ten years. In response to questioning from the circuit court, Grover admitted that he was also upset that the presentence investigation report recommended a longer sentence than the State. The court determined that this was the true reason for Grover's plea withdrawal request, and did not find his allegations that he had misunderstood anything about the plea to be credible.

In deciding whether to allow a defendant to withdraw a plea, the circuit court may properly assess the credibility of the proffered explanation for the plea withdrawal request. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

The facts set forth in the complaint, which Grover acknowledged to be substantially true and correct, provided a sufficient factual basis for the plea. A witness who heard the victim screaming and saw the assault through a window called 911, and the assault was still in progress when police arrived. Grover indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Grover has not alleged any other facts that would give rise to a manifest injustice. Therefore, Grover has no grounds to withdraw his plea, which operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to the defendant's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to comment on the PSI and address the court, through counsel and by a written letter. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of

the offense, the court deemed it aggravated due to the beating that Grover inflicted upon the victim. With respect to the defendant's character and rehabilitative needs, the court acknowledged Grover's abusive and traumatic childhood, and opined that Grover needed sex offender treatment or other counseling to gain insight into appropriate norms of behavior and his deep anger issues. The court further noted that Grover's level of violence seemed to be escalating from some juvenile offenses, and concluded that a prison term was necessary to protect the community and give Grover a structured environment for his extensive treatment needs, with punishment being a secondary goal.

The court then sentenced Grover to twelve and one-half years of initial confinement and seven and one-half years of extended supervision. The court also: awarded 407 days of sentence credit; imposed standard costs and conditions of supervision; directed the defendant to provide a DNA sample and pay the fee; and determined that the defendant was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The components of the bifurcated sentence imposed were within the applicable penalty range and the total confinement period constituted fifty percent of the maximum exposure Grover faced. *See* WIS. STAT. §§ 940.225(2)(a) (classifying second-degree sexual assault with use of force as a Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and 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 (quoted sources omitted).

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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

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