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November 20, 2013

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

2012AP1740-CRNM State of Wisconsin v. Taronzo L. Payne (L.C. # 2010CF703)

Before Higginbotham, Sherman, and Kloppenburg, JJ.

Taronzo Payne appeals a judgment convicting him of taking and driving a vehicle without the owner's consent, as a repeater, after he entered a guilty plea. *See* WIS. STAT. §§ 943.23(2) and 939.62(1)(b) (2011-12)[1]. Attorney Scott McClune has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967) and ***State ex rel. McCoy v. Wisconsin Court of Appeals***,

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

137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of the sentence imposed. Payne 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.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other 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, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Payne entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Payne's plea, the State agreed to dismiss, but read in, the three other charges in the case. The circuit court conducted a standard plea colloquy, inquiring into Payne's ability to understand the proceedings and the voluntariness of his plea, and further exploring his understanding of the nature of the charges, the penalty ranges 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 and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure that Payne understood that the court would not be bound by any sentencing recommendations. In addition, Payne provided the court with a signed plea questionnaire. Payne indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts—namely, that Payne stole a car in exchange for money—provided a sufficient factual basis for the plea. Payne admitted his status as a repeat offender in open court. There is nothing in the record to suggest that counsel's performance was in any way deficient, and we are not aware of any other facts that would give rise to a manifest injustice. Therefore, Payne's plea was valid and operated to waive 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; WIS. STAT. § 971.31(10).

A challenge to Payne's sentence would also lack arguable merit. Our review of a sentencing 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). The record shows that Payne was afforded an opportunity to comment on the presentence investigation report, and that Payne filed an alternative presentence investigation report. Payne was given the opportunity to address the court personally prior to sentencing and did so. 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. The court then sentenced Payne to three years and six months of initial confinement and two years of extended supervision. The court also awarded twenty-seven days of sentence credit and imposed standard costs and conditions of supervision. The judgment of conviction reflects that the court determined that Payne was eligible for the challenge incarceration program.

The components of the bifurcated sentence imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.23(2) (classifying taking and driving a vehicle without the owner's consent as a Class H felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of

three years of initial confinement and three years of extended supervision for a Class H felony); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality). Regarding the issue of sentence credit, we agree with counsel's analysis in the no-merit report that Payne was not entitled to additional sentence credit beyond the twenty-seven days he was awarded, due to the fact that the sentence imposed in this case was consecutive, as opposed to concurrent, to Payne's previously-imposed sentence in Milwaukee County Case No. 02CF5040. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) ("dual credit is not permitted—that the time in custody is to be credited to the first sentence imposed").

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.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). That is particularly true when taking into consideration the additional sentence exposure that Payne avoided on the three charges that were dismissed but read-in.

Counsel points out in the no-merit report that, when the court entered the judgment of conviction following Payne's sentencing hearing, the judgment made no reference to the repeater statute, WIS. STAT. § 939.62. Payne filed a postconviction motion, arguing that the sentence of three years and six months of initial confinement exceeded the maximum sentence for a Class H felony. The circuit court denied the motion after a hearing, on the basis that where there is a dispute as to what happened at sentencing, the sentence pronounced orally and recorded in the

sentencing transcript controls. *See* ***State v. Prihoda,*** 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857. The court then entered an amended judgment that reflected the fact that the offense was a repeater. We are satisfied that this was the correct approach. The sentencing transcript clearly indicates that the court found Payne guilty of taking and driving a vehicle without the owner's consent as a repeater. Because the oral pronouncement of the sentence is clear, we agree with counsel's assessment that there would be no merit to challenging the circuit court's denial of the postconviction motion.

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.

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).

Diane M. Fremgen
Clerk of Court of Appeals