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DISTRICT IV

December 6, 2013

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

2012AP1583-CRNM State of Wisconsin v. Joseph R. Jones (L.C. # 2011CF24)

Before Lundsten, Sherman and Kloppenburg, JJ.

Joseph Jones appeals a judgment convicting him of substantial battery contrary to WIS. STAT. § 940.19(2) (2011-12),[1] after he entered a plea of no contest. Attorney Martha Askins 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***, 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 plea and sentence. Jones was sent a copy of the report,

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

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.

Jones entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Jones's plea, the State agreed not to amend the charge against him to the more serious felony of battery causing great bodily harm. The circuit court conducted a standard plea colloquy, inquiring into Jones's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Jones's 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 Jones understood that it would not be bound by any sentencing recommendations. In addition, Jones provided the court with a signed plea questionnaire. Jones 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 in the criminal complaint and preliminary hearing testimony—namely, that Jones caused substantial battery to the victim, that he intended to cause bodily harm, and that he did so without the victim's consent—provided a sufficient factual basis for the plea. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Jones has not alleged any other facts that would give rise to a manifest injustice. Therefore, Jones's plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

A challenge to Jones'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 Jones was afforded an opportunity to comment on the PSI and to address the court, which he did, both personally and through his counsel. 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 commented on the serious nature of the injuries to the victim. With respect to Jones's character, the court noted his criminal record and history of poor decisionmaking. The court identified the goals of sentencing in this case as deterrence, punishment, and protection of the public, and concluded that a prison term was necessary to accomplish those goals.

The court then sentenced Jones to eighteen months of initial confinement and two years of extended supervision. The court also awarded 119 days of sentence credit and ordered an alcohol assessment and mental health counseling. The judgment of conviction reflects that the court determined that Jones was not eligible for the challenge incarceration program or the earned release program.

The court imposed the maximum available sentence. *See* WIS. STAT. §§ 940.19(2) (classifying substantial battery as a Class I felony), 973.01(2)(b)9 and (d)6 (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony). The court reasoned that Jones was a danger to society and that the seriousness of the offense warranted the maximum sentence. An appellate court has a duty to affirm a sentence if the facts of record show it is sustainable as a proper exercise of discretion. ***McCleary v. State,*** 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). We find no basis upon which to conclude that the circuit court erroneously exercised its sentencing discretion.

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