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March 18, 2014

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

2012AP2579-CRNM	State of Wisconsin v. David J. Neira (L.C. #2010CF2007)
2012AP2580-CRNM	State of Wisconsin v. David J. Neira (L.C. #2010CF2008)
2012AP2581-CRNM	State of Wisconsin v. David J. Neira (L.C. #2011CF226)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

David Neira appeals three judgments convicting him of four counts of burglary and one count of theft, each as a repeat offender. Attorney Faun Moses has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of***

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

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 Neira's pleas and sentences. Neira 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. *See* ***State v. Bangert***, 131 Wis. 2d 246, 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.

Neira entered guilty pleas to four felonies and one misdemeanor pursuant to a negotiated plea agreement that was presented in open court at a joint hearing on his three cases. In exchange for Neira's pleas, the State agreed to reduce one of the charges, to dismiss five other felony charges, and to cap its joint sentencing recommendation at ten years of initial confinement, to be served consecutive to any revocation sentences. The State followed through on its agreement. The plea agreement reduced Neira's sentence exposure by more than fifty years.

The circuit court conducted a standard plea colloquy, inquiring into Neira's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring

Neira's understanding of the nature of the charges, the penalty ranges[2] and other direct consequences of the pleas, 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; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Neira understood that the court would not be bound by any sentencing recommendations, even if jointly presented, and that restitution could be ordered on read-in charges as well as on the counts of conviction. In addition, Neira provided the court with a signed plea questionnaire for each case. Neira indicated to the court that his attorney had gone over the questionnaires with him "thoroughly," and he is not now claiming to have misunderstood anything on those forms. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaints provided a sufficient factual basis for the pleas, and Neira admitted his status as a repeat offender in open court. We see nothing in the record to suggest that counsel's performance was in any way deficient, and Neira has not alleged any other facts that would give rise to a manifest injustice. Therefore, Neira's pleas were valid and 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 Neira's sentences would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably"

[2] The court mistakenly advised Neira that the penalty for misdemeanor theft as a repeater was four years and nine months. However, the plea questionnaire properly listed the penalty as two years, and Neira does not claim that he misunderstood the actual penalty. Moreover, the error was harmless, given the concurrent sentence structure imposed. *See* ***State v. Brown***, 2006 WI 100, ¶78, 293 Wis. 2d 594, 716 N.W.2d 906.

and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Neira was afforded an opportunity to comment on the PSI, to present a letter and testimony from character witnesses, and to address the court, both personally and through 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 & nn.9-12, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court acknowledged that there was no physical violence involved, but emphasized that the fear and loss of security experienced by the victims were still significant harms, particularly in the home invasion case. With respect to Neira's character, the court noted that he had demonstrated the potential to be a productive member of society with his work history, but, due largely to his addiction problems, he had accumulated thirty-six arrests over a period of thirty years. The court concluded that, since supervision had proven to be unsuccessful, a significant prison term was necessary to protect the public.

The court then sentenced Neira to six years of initial confinement and four years of extended supervision on the home invasion burglary; to four years of initial confinement and four years of extended supervision on each of the three commercial burglary counts; and to one year of initial confinement and two years of extended supervision on the theft count. The sentences were to be served concurrent to each other but consecutive to any previously imposed sentences. The court also declared Neira eligible for the earned release program, and imposed

standard costs and conditions of supervision. At a separate hearing, the circuit court limited the amount of restitution to that agreed upon by the parties, disallowing an untimely claim.

The components of the bifurcated sentences imposed on the burglary counts were well within the applicable penalty ranges. *See* WIS. STAT. §§ 943.10(2)(e) (classifying burglary to an occupied dwelling as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 939.62(1)(c) (increasing maximum term of imprisonment for offense otherwise punishable by more than ten years by six additional years for habitual criminality); 943.10(1m)(a) (classifying burglary to a dwelling as a Class F felony); 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and a half years of initial confinement and five years of extended supervision for a Class F felony); and 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) (all 2007-08 Stats.).

The two-year period of supervision imposed upon the misdemeanor theft charge exceeded the statutory maximum. *See* WIS. STAT. §§ 943.20(1)(a) and (3)(a) (classifying theft of less than $2,500 as a Class A misdemeanor); 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor); 939.62(1)(a) (increasing maximum term of imprisonment for offense otherwise punishable by less than one year to two years for habitual criminality) (all 2007-08 Stats.). We agree with counsel that the error was harmless, however, because the misdemeanor sentence was not the controlling sentence in the concurrent sentence structure imposed by the court. *See* ***State v. Sherman***, 2008 WI App 57, ¶¶8-9, 310 Wis. 2d 248,

750 N.W.2d 500. In addition, we note that the excess portion of the sentence is automatically commuted pursuant to WIS. STAT. § 973.13.

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here are not "'so excessive and unusual and so disproportionate to the offense[s] 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 source omitted). That is particularly true when taking into consideration the concurrent sentence structure and the amount of additional sentence exposure Neira avoided on the read-in offenses.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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 period of extended supervision imposed on Count 6 in Dane County Case No. 2010CF2008 is commuted from two years to one year. The clerk of the circuit court shall amend the judgment accordingly.

IT IS FURTHER ORDERED that the judgments of conviction, as amended, are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Faun Moses is relieved of any further representation of David Neira in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals