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April 10, 2014

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

2013AP957-CRNM State of Wisconsin v. Michael J. Allen (L.C. #2012CF569)

Before Lundsten, Sherman and Kloppenburg, JJ.

Michael Allen appeals a judgment convicting him of possession of a firearm by a felon and an order denying his postconviction motion for sentence modification. Attorney Susan Roth has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *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

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

(1988). The no-merit report addresses the validity of Allen's plea and sentence and counsel's performance. Allen was sent a copy of the report, and has filed a response renewing his postconviction claim that his sentence was unduly harsh and based upon false information. Upon reviewing the entire record, as well as the no-merit report and response, 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.

Allen entered a plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Allen's plea, the State agreed to recommend a prison term, with the length left up to the court. The circuit court conducted a standard plea colloquy, inquiring into Allen's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Allen's understanding of the nature of the charges, the penalty ranges 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; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure that Allen understood that it would not be bound by any sentencing recommendations. In addition, Allen provided the court with a signed plea questionnaire, with an addendum and attached jury instruction. Allen 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 set forth in the complaint—namely, that Allen had taken a picture of himself with a woman's gun while she was not home, and then posted the picture on Facebook—provided a sufficient factual basis for the plea and were acknowledged by Allen to be true. Allen indicated that he had sufficient time to discuss matters with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Allen has not alleged any other facts prior to entering his plea that would give rise to a manifest injustice. Therefore, Allen's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Allen'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 Allen was afforded an opportunity to address the court, both personally and through counsel. The woman whose gun Allen had possessed without her knowledge also made a statement to the court, describing Allen's history of domestic abuse toward her. 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 acknowledged that Allen did not use the weapon against anyone and gave him credit for being forthright about his conduct,

but it considered it outrageous that Allen would not only take a woman's gun without permission, but then think nothing of taking and posting a picture of himself committing a crime. With respect to Allen's character, the court deemed Allen a "violent, dishonest man," with "no respect for the law" and "no restraint upon [him]self." The court was particularly concerned that Allen had reached the age of 32 without any sign of maturing, and that his criminal offenses were getting worse, not better, despite multiple periods of both incarceration and supervision. The court concluded that Allen simply could not be trusted and that rehabilitation was unlikely, and therefore identified the primary goal of the sentencing in this case as protection of the public. The court further explained that the only reason it was not imposing the maximum sentence was to give credit for Allen's cooperation.

The court then sentenced Allen to five years of initial confinement and four years of extended supervision. The court also awarded 152 days of sentence credit and imposed standard costs and conditions of supervision, waiving the DNA surcharge. The judgment of conviction reflects the court's determination that Allen was not eligible for the substance abuse program. The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 941.29(2) (classifying possession of a firearm by a felon as a Class G felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony).

In a postconviction motion, Allen challenged the truthfulness of the statement given by the woman at sentencing, claiming that his sentence was based upon inaccurate information and unduly harsh. In its order denying the motion, the court explicitly found the woman's statement to be credible, given Allen's record of domestic violence convictions and the injunction the woman had obtained against him. The court further noted that it did not rely upon any particular

domestic abuse incident and would have imposed the same sentence even without the woman's statement, based upon Allen's "abysmal record." We will not disturb credibility determinations on appeal, and we are satisfied that the sentence 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 circumstance," given Allen's lengthy criminal record. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

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