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

2012AP1406-CRNM State of Wisconsin v. Tony Dewayne Perkins (L.C. #2010CF4433)

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

Tony Perkins appeals a judgment convicting him of first-degree reckless homicide by use of a dangerous weapon, after he entered a guilty plea. Attorney Dustin Haskell has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *see*

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

also ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 97, 403 N.W.2d 449 (1987). The no-merit report addresses the validity of the plea and sentence. Perkins was sent a copy of the report and has filed a response. Attorney Haskell then filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, the conviction was based upon the entry of a guilty plea, and we see no arguable basis for plea withdrawal. In order for plea withdrawal to be warranted after sentencing, there must be a plea colloquy defect that affects whether the defendant knowingly entered his or her plea or there must be some other manifest injustice, such as coercion, the lack of a factual basis to support the charge, failure by the prosecutor to fulfill the plea agreement, or an unknowing plea despite an adequate plea colloquy. *See* ***State v. Bangert***, 131 Wis. 2d 246, 256-74, 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.

The State agreed to recommend a sentence of twenty to twenty-two years of confinement and ten years of extended supervision 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; ***Bangert***, 131 Wis. 2d at 266-72. 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. In addition, the record includes a signed plea questionnaire. Perkins 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 complaint—namely, that Perkins recklessly caused the death of the victim while using a dangerous weapon—provided a sufficient factual basis for the plea.

Perkins asserts in his response to counsel's no-merit report that his trial counsel was ineffective for failing to file a suppression motion on the basis that his statements made to police during interrogation were involuntary, and for failing to pursue an alibi defense. A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Our review of the record, the no-merit report and supplemental report, as well as Perkins' response, discloses no basis for challenging trial counsel's performances and no grounds to request a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

In the affidavit submitted with the supplemental no-merit report, Attorney Haskell avers that he listened to recordings of the interrogations of Perkins and concluded that there was no reason to believe that any unduly coercive tactics were employed. During the first of three custodial interrogations, Perkins waived his ***Miranda***[2] rights initially, but subsequently told the interviewing detectives that he was "done talking." The interrogation ceased immediately. A second interrogation was initiated by police two days later, and Perkins waived his ***Miranda*** rights at that interrogation. We conclude that, under the standards set forth in ***State v. Badker***,

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

2001 WI App 27, ¶12, 240 Wis. 2d 460, 623 N.W.2d 142, there is no arguable merit to an argument that police improperly reinitiated interrogation. During a third and final interrogation, Perkins waived his ***Miranda*** rights before making a statement detailing his involvement in the shooting incident at issue in this case.

Attorney Haskell contacted Perkins' trial counsel and asked whether trial counsel had retained an expert to assess the voluntariness of Perkins' confession. Trial counsel informed Haskell that he had retained a psychologist to review the interrogations and meet with Perkins. The psychologist concluded that she would not be able to write a report supporting a claim that Perkins' confession was involuntary and, therefore, trial counsel decided not to pursue a voluntariness challenge. Although the record does not demonstrate specifically how the psychologist's opinion related to the voluntariness issue, we are satisfied that counsel investigated the issue of whether Perkins' statement was voluntary, such that there would be no merit to an ineffective assistance of counsel claim on that basis.

Perkins also asserts that his trial counsel was ineffective for failing to investigate a potential alibi defense. In this case, trial counsel retained a private investigator to interview the two witnesses identified by Perkins as having information about a potential alibi. The versions of the events given by the potential alibi witnesses in their interviews were inconsistent with Perkins' version of events and, thus, trial counsel did not pursue the alibi witnesses further.

"[A] defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms" and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Swinson***, 261 Wis. 2d 633, ¶58. Nothing

in the record, no-merit reports, or response indicates that trial counsel did not act reasonably within professional norms or that Perkins was prejudiced by counsel's performance. Thus, we conclude that there is no arguable basis for an ineffective assistance of counsel claim.

Perkins has not alleged any other facts that would give rise to a manifest injustice. Perkins' plea was, therefore, 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 Perkins' 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 Perkins was afforded an opportunity to comment on the PSI and address the court. 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 noted that the offense was extremely serious and aggravated. With respect to Perkins' character, the court stated that Perkins had been "raised right" and should have known better. The court concluded that a prison term was necessary to protect the public.

The court then sentenced Perkins to twenty-one years of initial confinement and ten years of extended supervision. It also awarded 329 days of sentence credit; ordered restitution in the amount of $135; imposed standard costs and conditions of supervision; directed Perkins to

provide a DNA sample but waived the fee; and determined that Perkins 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 ranges and the total confinement period constituted less than half of the maximum exposure Perkins faced. *See* WIS. STAT. §§ 940.02(1) (classifying reckless homicide as a Class B felony); 973.01(2)(b)1. and (d)1. (providing maximum terms of forty years of initial confinement and twenty years of extended supervision for a Class B felony); 939.63(1)(b) (use of a dangerous weapon increases maximum term of imprisonment by not more than five years).

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 (quoting other sources).

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