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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

July 1, 2014

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
215 South Hamilton, Br.15, Rm. 7107
Madison, WI 53703

Michael P. Finley
Assistant District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Gina Frances Bosben
Frances Bosben Law Office
520 University Ave #355
Madison, WI 53703-1982

Berry A. Carr 07035-090
FCI Yazoo City Medium
P.O. Box 5888
Yazoo City, MS 39194

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

2013AP457-CRNM State of Wisconsin v. Berry A. Carr (L.C. # 2011CF184)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Berry Carr appeals a judgment convicting him, after a plea of no contest, of felony murder as a party to a crime. Attorney Gina Bosben 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 Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses

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

the validity of the plea, whether Carr received ineffective assistance of counsel, and whether the circuit court erroneously exercised its sentencing discretion. Carr 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.

Carr entered a no contest plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Carr's plea, the State agreed to order a presentence investigation report (PSI) and to recommend that the sentence in this case run concurrent to a federal sentence Carr was serving.

The circuit court conducted a standard plea colloquy, inquiring into Carr's ability to understand the proceedings and the voluntariness of his plea decision, and further exploring Carr's understanding of the nature of the charge, 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; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Carr understood that the court would not be bound by any sentencing recommendations. In addition, Carr provided the court with a signed plea

questionnaire. Carr 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 information and complaint—namely, that as a party to a crime, Carr caused the death of the victim while attempting to commit a robbery while armed with a dangerous weapon—provided a sufficient factual basis for the plea. Carr indicated that he had sufficient time to discuss the matter with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Therefore, any claim of ineffective assistance of trial counsel would be without merit. We are not aware of any other facts that would give rise to a manifest injustice. Thus, Carr'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.

A challenge to Carr'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. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record shows that Carr was afforded an opportunity to comment on the PSI 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 offense, the court noted that the crime was a serious one and that the victim's death was a tragedy. With respect to Carr's character, the court noted that Carr had had a difficult upbringing, but that it did not negate his responsibility for his involvement in the crime.

The court identified the primary goal of sentencing in this case as the gravity of the offense, and concluded that a prison term was a necessary punishment, given the seriousness of the offense. The court then sentenced Carr to twenty years of initial confinement and five years of extended supervision, to be served concurrently with his federal sentence. The court imposed standard costs and conditions of supervision, and determined that Carr was not eligible for the challenge incarceration program or the earned release program.

The components of the bifurcated sentence imposed were within the applicable penalty ranges. 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

We note that the judgment of conviction incorrectly references the attempt statute, WIS. STAT. § 939.32. However, the record makes clear that the crime to which Carr pled and was convicted of was felony murder as a party to a crime, pursuant to WIS. STAT. §§ 940.03 and 939.05. Under ***State v. Prihoda***, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857, this court may correct the judgment of conviction as a clerical error, if the circuit court's pronouncement of the sentence was unambiguous. *See* ***id.***, ¶¶15, 17. In this case, the circuit court stated unambiguously that Carr was being sentenced for his cooperation in a felony murder. Therefore, we modify the judgment to reflect that his conviction is for felony murder as a party to a crime, under §§ 940.03 and 939.05, and to conform the judgment to the actual determination of the trial court. All that remains is a mere defect in the judgment of conviction that may be corrected at

any time at the direction of the circuit court, and no remand by this court is necessary. *See* ***Prihoda***, 239 Wis. 2d 244, ¶¶17, 51.

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 modified and, as modified, summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gina Bosben is relieved of any further representation of Berry Carr in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals