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October 6, 2014

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

2013AP795-CRNM State of Wisconsin v. Henry Perez-Pica (L.C. # 2011CF5926)

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

Henry Perez-Pica appeals a judgment convicting him of armed robbery with use of force, as a party to a crime. Attorney Scott Obernberger 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 (1988). The no-merit report

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

addresses the validity of Perez-Pica's guilty pleas and sentence, as well as the issue of sentence modification. Perez-Pica 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. ***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.

Perez-Pica entered pleas of guilty to three counts of armed robbery with use of force as a party to a crime, pursuant to a negotiated plea agreement that was presented in open court. In exchange for Perez-Pica's pleas, the State made a global sentencing recommendation of a prison term of ten years, consisting of four years of confinement followed by six years of extended supervision. Perez-Pica faced a maximum term of imprisonment of forty years on each count. The circuit court conducted a standard plea colloquy, inquiring into Perez-Pica's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Perez-Pica'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 confirmed that Perez-Pica understood that the court would not be bound by any sentencing recommendations.

Perez-Pica, both on his own behalf and through his counsel, stipulated that the complaint provided a sufficient factual basis for the pleas. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Perez-Pica has not alleged any other facts that would give rise to a manifest injustice. Therefore, his pleas were 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 Perez-Pica'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 Perez-Pica was afforded an opportunity to comment on the PSI, to present 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, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court noted that these were serious, brutal robberies with multiple victims involved. The court considered Perez-Pica's education, lack of a past criminal record, history of drug and alcohol abuse, and lack of employment history. The court identified the primary goal of the sentencing in this case as accountability and concluded that a prison term was necessary to protect the public from further criminal activity.

The court then sentenced Perez-Pica to four years of initial confinement and four years of extended supervision on each count, to run consecutively. The court also awarded 232 days of

sentence credit; ordered restitution in the amount of $7,925, to be allocated among the victims of the robberies; and imposed standard costs and conditions of supervision. The judgment of conviction reflects that the court determined that Perez-Pica was eligible for the challenge incarceration program and substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.32(2) (classifying armed robbery as a Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). Here, even though the court did not follow the State's sentencing recommendation, the sentences were 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.'" ***Id.*** (quoted source omitted).

The no-merit report also addresses whether there would be any arguable merit to a postconviction motion for sentence modification. A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The no-merit report states that counsel is not aware of any new factors, and there is nothing in the record that would lead us to conclude that sentence modification may be warranted.

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 Scott Obernberger is relieved of any further representation of Henry Perez-Pica in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals