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

2013AP1422-CRNM State of Wisconsin v. Luis Dejesus Rios, Jr. (L.C. # 2012CF2132)

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

Luis Dejesus Rios appeals a judgment convicting him of two counts of child abuse, contrary to WIS. STAT. § 948.03(2)(b) (2011-12),[1] as well as an order denying his postconviction motion for plea withdrawal. Attorney Gabriel Houghton has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *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 whether

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

Rios's pleas were knowing and voluntary, whether the circuit court properly exercised its sentencing discretion, and whether the court erred in denying Rios's postconviction motion for plea withdrawal alleging ineffective assistance of trial counsel. Rios 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.

Rios entered pleas of guilty to two counts of child abuse, pursuant to a negotiated plea agreement that was presented in open court. In exchange for Rios's pleas, the State dismissed the penalty enhancer on both of the counts, and the parties were free to argue at sentencing. The circuit court conducted a standard plea colloquy, inquiring into Rios's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his 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 Rios understood that it would not be bound by any sentencing recommendations. In addition, Rios provided the court with a signed plea questionnaire. Rios 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). Rios, 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 Rios stated that he was satisfied with his legal representation. Rios has not alleged any other facts that would give rise to a manifest injustice and, 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.

A challenge to Rios'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 Rios was afforded an opportunity 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 the offenses were "clearly serious" and that Rios was lucky the victims were not more seriously injured. The court considered Rios's prior felony conviction and noted that he had not availed himself of prior opportunities to change his behavior. The court identified the primary goal of sentencing in this case as protecting the public, and concluded that a prison term was necessary to do so.

The court then sentenced Rios to three years of initial confinement and three years of extended supervision on each count, to run concurrent with each other, but consecutive to any

other sentence Rios was then serving. The court ordered that Rios take a parenting class, observe absolute sobriety, and not have contact with the victims or any child under the age of eighteen unless supervised. The judgment of conviction reflects that the court determined that Rios was not eligible for the challenge incarceration program or substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 948.03(2)(b) (classifying child abuse with intentional causation of bodily harm as a Class H felony); 973.01(2)(b)8 and (d)5 (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offenses 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).

Finally, there is no arguable merit to a claim that the circuit court erred by denying Rios's motion for plea withdrawal based on ineffective assistance of counsel. In his postconviction motion, Rios alleged that his trial counsel was ineffective for failing to inform him of a prior plea offer that was more favorable to him than the one he ultimately accepted. At the ***Machner***[2] hearing, trial counsel testified that, although he could not remember any specific details of a prior offer, he was "100 percent" certain he would have communicated a prior offer to Rios if he received one. Rios testified that he asked his counsel about plea negotiations on numerous

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

occasions, but that he was not informed of any offer until the day of trial. The trial court found the testimony of Rios's trial counsel to be credible and the testimony of Rios not to be credible. It is for the trial court to determine the credibility of the witnesses and the weight to be given to their testimony, and its determination will not be disturbed on appeal. ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). We are satisfied that the circuit court properly exercised its discretion in denying he postconviction motion, such that any challenge to that ruling on appeal would be without merit.

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(1).

IT IS FURTHER ORDERED that Gabriel Houghton is relieved of any further representation of Luis Dejesus Rios in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals