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DISTRICT IV

December 4, 2014

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

2013AP1008-CRNM State of Wisconsin v. Kent D. Gritzmacher (L.C. # 2012CF169)

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

Kent Gritzmacher appeals a judgment convicting him, after a no contest plea, of possession of a controlled substance and possession of drug paraphernalia, contrary to WIS. STAT. §§ 961.41(3g)(d) and 961.573(1) (2011-12).[1] Attorney Bernardo Cueto has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of***

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

Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of the plea and sentence. Gritzmacher 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 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Gritzmacher entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Gritzmacher's plea, the State agreed to a joint sentencing recommendation of two years of probation on counts two and three of the complaint, to be served concurrently, and a fine of $750.00 plus costs. The State also agreed to dismiss count one of the complaint.

The circuit court conducted a standard plea colloquy, inquiring into Gritzmacher'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; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Gritzmacher understood that it would not be bound by any sentencing

recommendations. In addition, Gritzmacher provided the court with a signed plea questionnaire. He 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, 827-29, 416 N.W.2d 627 (Ct. App. 1987).

The facts in the complaint—namely, that Gritzmacher possessed a controlled substance and possessed drug paraphernalia—provided a sufficient factual basis for the plea. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Gritzmacher has not alleged any other facts that would give rise to a manifest injustice. Therefore, his plea was 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 Gritzmacher'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 Gritzmacher was afforded an opportunity to address the court prior to sentencing. 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. With respect to Gritzmacher's character, the court stated that he had been cooperative with the court, but also noted that one of the charges against him was a felony charge

that the court could not ignore. The court identified the primary goal of the sentencing in this case as protecting the public and concluded that probation was adequate to accomplish that goal.

The court then sentenced Gritzmacher to two years of probation on each of the two counts, to be run concurrently, consistent with the joint sentencing recommendation. The court ordered that Gritzmacher pay a fine of $750.00 as to count two and imposed standard costs and conditions of supervision. The judgment of conviction reflects that the court determined that Gritzmacher 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. *See* WIS. STAT. §§ 961.41(3g)(d) (classifying possession of certain hallucinogenic and stimulant drugs as a Class I felony); 939.50(3)(i) (providing maximum term of imprisonment not to exceed three years and six months for a Class I felony); 961.573(1) (classifying possession of drug paraphernalia as a misdemeanor with a maximum imprisonment term of thirty days). 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 it 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).

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 Bernardo Cueto is relieved of any further representation of Kent Gritzmacher in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals