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

2013AP1102-CRNM State of Wisconsin v. Demoyne J. Davis (L.C. # 2011CF4962)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Demoyne Davis appeals a judgment convicting him, after entry of a guilty plea, of one count of armed robbery with threat of force as a party to a crime and one count of second-degree reckless endangerment of safety. *See* WIS. STAT. §§ 943.32(2), 939.05, 941.30(2) (2011-12).[1]

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

Davis also appeals the circuit court's denial of his pretrial suppression motion. Attorney Scott Obernberger filed a no-merit report as well as a motion to withdraw as appellate counsel for medical reasons. *See* WIS. STAT. RULE 809.32; ***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 state public defender's office then appointed Melinda Swartz as successor counsel. The no-merit report addresses the circuit court's ruling on the suppression motion, the validity of Davis's plea and sentence, and whether there would be any merit to a postconviction motion for sentence modification. Davis was sent a copy of the report, but has not filed a response. Upon review of the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Any challenge to the circuit court's denial of Davis's suppression motion would lack arguable merit. A ***Miranda-Goodchild*** hearing was held to address Davis's claim that police officers obtained statements from him in violation of his ***Miranda*** rights.[2] The issues raised in the motion involve questions of constitutional fact, which we review by first examining the circuit court's findings of fact under the clearly erroneous standard and then examining the constitutional impact of those findings under a de novo standard of review. *See* ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781. After hearing testimony from Davis and the investigating officer, the circuit court found that there was no evidence indicating that any of Davis's statements was coerced or involuntary. The court found that Davis was advised of his ***Miranda*** rights and that the record reflected that he understood those rights. The court

[2] A circuit court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and, also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

concluded that there was no basis for barring use of the statements. We agree with counsel's assessment that the circuit court's findings of fact are supported by the record and, therefore, are not clearly erroneous. Additionally, given the facts in the record, we agree that there would be no merit to challenging the court's legal conclusion that Davis's statements to police were not obtained in violation of his constitutional rights.

Next, 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.

Davis entered guilty pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Davis's guilty pleas with respect to counts one and three, the State agreed to dismiss count two and to amend count three from first-degree recklessly endangering safety to second-degree recklessly endangering safety. The circuit court conducted a standard plea colloquy, inquiring into Davis'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 Davis understood that it was not bound by any sentencing recommendations. In addition, Davis provided the court with a signed plea questionnaire. Davis indicated to the court that he understood the information

explained on that form, and is not now claiming otherwise. *See generally* ***State v. Moederndorfer***, 141 Wis. 2d 823, 828, 416 N.W.2d 627 (Ct. App. 1987) ("[A] defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere ....").

Davis stipulated, both personally and through his counsel, that there was 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 Davis has not alleged any other facts that would give rise to a manifest injustice. Therefore, Davis's pleas were valid and operated to waive all nonjurisdictional defects and defenses, aside from the suppression ruling, which has already been discussed. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Davis'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 Davis was afforded an opportunity to address the court prior to sentencing, and that he did so. 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 ("[J]udges are to explain the reasons for the particular sentence they imposed.").

Regarding the severity of the offense, the court stated that Davis was charged with three major felonies. With respect to Davis's character, the court noted that Davis had no prior record, but yet had committed serious crimes. The court identified the primary goal of the sentencing in

this case as protecting the public, and concluded that a prison term was necessary to do so. The court then sentenced Davis to three years of initial confinement and three years of extended supervision on the armed robbery count and to two years of initial confinement and two years of extended supervision on the second-degree reckless endangerment of safety count, to be served consecutively. The court also awarded 361 days of sentence credit; ordered restitution in the amount of $337.00; and imposed standard costs and conditions of supervision. The judgment of conviction reflects that the court determined that Davis was eligible for the challenge incarceration program.

The components of the bifurcated sentences imposed were well within the applicable penalty ranges. *See* WIS. STAT. §§ 943.32(2) (classifying armed robbery as a Class C felony); 941.30(2) (classifying second-degree reckless endangerment as a Class G 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); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G 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 offense[s] 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).

Finally, counsel asserts that he is not aware of any new factors that would warrant sentence modification. We also are not aware of any such factors. Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction.

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 and Melinda Swartz are relieved of any further representation of Demoyne Davis in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals