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DISTRICT IV

January 7, 2015

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

2013AP1078-CRNM State of Wisconsin v. Eshawn Michael Reed (L.C. #2010CF2045)

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

Eshawn Reed appeals a judgment convicting him of a second or subsequent offense of possession with intent to deliver between 15 and 40 grams of cocaine near a park. Attorney Katie York 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.

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

429 (1988). The no-merit report addresses a suppression ruling and the validity of Reed's plea and sentence. Reed was sent a copy of the report, and has filed a response claiming: (1) the arresting officer lied at Reed's suppression hearing; (2) Reed is entitled to sentence credit for his pretrial detention; (3) the PSI contained an inaccurate account of Reed's prior convictions; and (4) the circuit court erred in making the sentence in this case consecutive to a sentence imposed following the revocation of Reed's probation on another case. Upon reviewing the entire record, as well as the no-merit report and response, 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.

In exchange for Reed's plea, the State dismissed two other drug charges, and agreed to make no sentencing recommendation. The circuit court conducted a standard plea colloquy, inquiring into Reed's ability to understand the proceedings and the voluntariness of his plea decision, and further exploring Reed's understanding of the nature of the charge, the penalty range 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 Reed understood that the court would not be bound by any sentencing recommendations. In addition, Reed provided the court with a

signed plea questionnaire. Reed 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).

Reed acknowledged that the facts set forth in the complaint, including the prior drug offense, provided a sufficient factual basis for the plea. Reed also indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Reed has not alleged any other facts regarding the plea that would give rise to a manifest injustice. Therefore, Reed's plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from the suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

As to his suppression motion, Reed claimed that the police lacked grounds to initiate the traffic stop during which they discovered cocaine in Reed's vehicle. However, a police officer testified that he pulled Reed over after receiving a radio transmission that another officer had observed Reed driving a vehicle with heavily tinted windows and recognized Reed as someone involved in prior drug activity. Before making the transmission, the first officer also observed Reed turning without using a turn signal and crossing the double yellow line to pass another car.

Reed contends that the first officer lied when he claimed to have observed traffic violations before the stop (because the police report did not mention any discussion of traffic violations with dispatch and no traffic citations were issued), and when the officer denied having let Reed off with a warning about his tinted windows on a prior occasion (as Reed and his girlfriend testified). Reed also questions how the officer could have identified him through the tinted windows and alleges that the stop was really the result of racial profiling. However, the

circuit court found both officers to be credible, and found both Reed and his girlfriend to be "less than credible." Since credibility determinations lie within the sole discretion of the circuit court, and the facts found by the circuit court establish reasonable suspicion for the stop, Reed's arguments do not present an issue for appeal.

A challenge to Reed'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). Here, Reed filed a successful postconviction motion establishing that the circuit court had relied on inaccurate information regarding the amount of cocaine involved in the offense and the number of Reed's prior OAR convictions. The circuit court remedied the error by vacating the original judgment of conviction and granting Reed a new sentencing hearing.

At the resentencing, Reed was afforded a new opportunity to address the court, both personally and through counsel, and was able to comment on the PSI and to present the court with an alternate PSI. 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. The court considered the offense relatively serious, even though it did not involve violence, given the impact of drugs on society and the fact that Reed was using as well as distributing drugs. As to character, the court viewed Reed's extensive history of prior offenses and revocations as a course of conduct revealing antisocial character traits. The court acknowledged that Reed had, to his credit, completed his GED and some other programming in prison. However, the court found it particularly significant to the current offense that Reed had been involved with drugs and drug trafficking since he was a teenager, and

had neither been deterred by prior sentences or periods of probation nor taken advantage of treatment opportunities while on supervision, resulting in a moderate risk assessment for violent recidivism. The court concluded that a prison term was necessary to punish Reed for his conduct, to protect the public since Reed had not performed well on prior supervision, and to afford treatment for cognitive thinking and AODA issues in a confined setting.

The court sentenced Reed to five years of initial confinement and five years of extended supervision, to be served consecutive to any prior sentences. The court also imposed standard costs and conditions of supervision, and determined that the drug money recovered from Reed was contraband subject to forfeiture. The court properly declined to award sentence credit because the sentence was consecutive, but it did determine that Reed was eligible for the Challenge Incarceration Program and the Earned Release Program. The components of the bifurcated sentence were within the applicable penalty ranges, and the total imprisonment period constituted about 28% of the maximum exposure Reed faced. *See* WIS. STAT. §§ 961.41(1m)(cm)3. (classifying possession of 15-40 grams of cocaine with intent to deliver as a Class D felony); 973.01(2)(b)4. and (d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony); 961.48(1)(a) (increasing maximum imprisonment term by six years for a second or subsequent drug offense); and 961.49(1m)(b)1. (increasing maximum imprisonment term by five years when offense was committed within 1,000 feet of a park) (all 2009-10 Stats.).

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). That is particularly true when taking into consideration the sentence enhancers and the amount of additional sentence exposure Reed avoided on the read-in offenses.

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 Attorney Katie York is relieved of any further representation of Eshawn Reed in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals