OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 9, 2015

To:

Hon. James P. Daley
Circuit Court Judge
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Eldred Mielke
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Timothy T. O'Connell
O'Connell Law Office
P.O. Box 1625
Green Bay, WI 54305-1625

Gerald A. Urbik
Asst. District Attorney
51 S. Main St.
Janesville, WI 53545

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Curtis Tavan Walker 00432209
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2013AP1338-CRNM State of Wisconsin v. Curtis Tavan Walker (L.C. # 2009CF2459)

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

Curtis Walker appeals a judgment convicting him, after entry of a guilty plea, of armed robbery as a party to a crime, as a repeat offense, as well as an order denying his postconviction motion for plea withdrawal. *See* WIS. STAT. §§ 943.32(2), 939.05, 939.62(1)(c) (2011-12).[1] Attorney Timothy O'Connell 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),

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

aff'd, 486 U.S. 429 (1988). Walker was sent a copy of the report and has filed a response. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

The no-merit report and response both address whether the plea was entered knowingly and voluntarily. We agree with counsel's assessment that there would be no merit to challenging the circuit court's denial, after an evidentiary hearing, of Walker's postconviction motion for plea withdrawal. A plea withdrawal motion that is filed after sentencing should be granted only if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Walker has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980). Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

Walker argued in his motion for plea withdrawal that the circuit court's plea colloquy was defective because the court did not go over the elements of armed robbery with him but, instead, relied on the plea questionnaire. Walker claimed that he did not understand the elements of armed robbery and that his trial counsel was ineffective because he did not adequately explain the plea questionnaire to him. Walker argued that he was entitled to an evidentiary hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶¶56-65, 274 Wis. 2d 379, 683 N.W.2d 14.

The circuit court granted Walker an evidentiary hearing. At the hearing, trial counsel testified that, although he could not recall going over the plea questionnaire in Walker's specific case, he has a routine of going through each of the questions on the plea questionnaire with his clients to ascertain that they understand the rights they are giving up, the maximum penalties, the

concessions the State is making in exchange for the plea, and the things the State would have to prove if the case went to trial. Walker also testified at the hearing. He testified that he lied when he answered affirmatively to the court's questions during the plea colloquy about whether his trial counsel went over all the materials on the plea questionnaire with him and whether Walker answered the questions on the plea questionnaire truthfully. Walker also testified that he lied during the plea colloquy when the court asked him if he understood that, if his case went to trial, a jury would have to agree unanimously on its verdict.

The circuit court found the testimony of Walker's trial counsel to be credible. The court found Walker's claim that he did not understand the plea questionnaire not to be credible. We accept a circuit court's findings of fact if not clearly erroneous. WIS. STAT. § 805.17(2). Moreover, the circuit court, as fact finder, "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Walker fails to offer any information in his response that would tend to show that the circuit court's factual findings were clearly erroneous. Therefore, we are satisfied that there would be no merit to an argument on appeal that Walker's trial counsel's performance constituted a manifest injustice necessitating plea withdrawal.

The no-merit report also addresses the validity of the sentence imposed, but Walker's response does not address the sentencing issue. Upon our independent review of the record, we agree with counsel that a challenge to Walker's sentence would 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 Walker was afforded an opportunity to comment on the PSI 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 offense, the court noted that armed robbery is one of the most severe offenses a person can commit under Wisconsin law. With respect to Walker's character, the court noted that he has been involved in the drug subculture and has never worked for more than six months. The court identified a primary goal of the sentencing in this case as rehabilitation and concluded that a prison term was necessary, but that Walker should be eligible for earned release. The court then sentenced Walker to ten years of initial confinement and fifteen years of extended supervision.

The components of the bifurcated sentence 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); 939.62(1)(c) (increasing maximum term of imprisonment for offense otherwise punishable by more than ten years by six additional years for habitual criminality). 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). Furthermore, the court imposed a

sentence in accordance with the defendant's own recommendation, made jointly with the State. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he approved).

The no-merit report and response also address the issue of whether the circuit court improperly held the preliminary hearing outside the time frame permitted by law and whether the circuit court violated the confrontation clause when it granted the State's pretrial motion to use at trial an unavailable witness's testimony from the preliminary hearing. *See* U.S. CONST. amend. VI. However, it is well established that a valid guilty plea constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights, except challenges to an order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984); WIS. STAT. § 971.31(10). The arguments regarding the timing of the preliminary hearing and the confrontation clause do not fall under the exception to the waiver rule. Thus, we agree with counsel that those arguments would be without merit on appeal.

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 and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Timothy O'Connell is relieved of any further representation of Curtis Walker in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals