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

June 16, 2015

To:

Hon. Steven G. Bauer
Circuit Court Judge
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

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

Russell D. Bohach
P. O. Box 485
Butler, WI 53007

David S. Ninmann 303183
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2013AP2749-CRNM State of Wisconsin v. David S. Ninmann (L.C. # 2009CF249)
2013AP2750-CRNM State of Wisconsin v. David S. Ninmann (L.C. # 2010CF318)

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

David Ninmann appeals a judgment entered in Dodge County Circuit Court case No. 2009CF249, convicting him of delivery of a Schedule III drug on or near school property, as a second or subsequent offense, after he pled guilty. *See* WIS. STAT. §§ 961.41(1)(b), 961.49(1m)(b)6, 961.48(1)(b) (2009-10).[1] Ninmann also appeals an amended judgment of conviction entered in Dodge County Circuit Court case No. 2010CF318. Attorney Russell

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Bohach 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 discusses whether the circuit court properly amended Ninmann's conviction in case No. 2010CF318, as well as the validity of the plea and sentence in case No. 2009CF249. Ninmann 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.

On February 19, 2010, Ninmann entered a no contest plea in Dodge County Circuit Court case No. 2009CF249 to delivery of a Schedule II drug, hydrocodone. The court withheld sentence and placed Ninmann on three years of probation. The original guilty plea and sentence are not within the scope of this appeal.

Ninmann's probation was subsequently revoked in case No. 2009CF249 and another matter, case No. 2010CF318. Prior to taking any action regarding Ninmann's sentences, the parties noted two errors that had occurred with respect to these two cases. In case No. 2010CF318, there was a discrepancy between the judgment of conviction and the transcript. The transcript of the sentencing hearing showed that Ninmann had been sentenced to five years of initial confinement, stayed, and three years of "probation." The original judgment of conviction showed two years of initial confinement and three years of extended supervision. In case No. 2009CF249, Ninmann had been convicted of delivery of hydrocodone, a Schedule II drug. *See* WIS. STAT. § 961.16(2)(a)7. However, the parties brought to the court's attention the fact that the drug Ninmann actually delivered was Vicodin, a combination of hydrocodone and non-narcotic ingredients classified as a Schedule III drug. *See* WIS. STAT. § 961.18(5)(d).

As part of an overall negotiation, Ninmann withdrew his plea in case No. 2009CF249, and an amended information was filed to correct the charge in that case. Ninmann agreed to plead to the amended charge, in exchange for the State's dismissal of three other counts. The State also agreed to cap its sentencing recommendation at two years of initial confinement and three years of extended supervision, consecutive to any other sentence. The parties also agreed that Ninmann would receive all of the sentence credit he originally would have had in case No. 2009CF249.

The court held a hearing and, after arguments from both sides, ordered that the judgment of conviction in case No. 2010CF318 be amended to reflect five years of confinement and three years of extended supervision. Based on our independent review of the record in case No. 2010CF318, we are satisfied that a challenge to the amendment of the judgment would be without merit. At the sentencing hearing in case No. 2010CF318, the court stated that it was sentencing Ninmann to five years in prison, imposed and stayed, and placing him on three years of "probation." Prior to concluding the sentencing portion of the hearing, the district attorney asked if the court was imposing a term of extended supervision. The court responded that it was imposing three years of extended supervision. When there is a conflict between the court's oral pronouncement of sentence and the written judgment of conviction, the oral pronouncement controls. ***State v. Lo***, 228 Wis. 2d 531, 540, 599 N.W.2d 659 (Ct. App. 1999) (citation omitted). In addition to the court's oral statements at sentencing, the court filled out a written explanation of the determinate sentence in which it wrote that Ninmann was to receive five years of initial confinement and three years of extended supervision. We are satisfied, in light of these record facts, that the circuit court's amendment of the judgment of conviction was consistent with its

intent, at the time of sentencing, such that there would be no merit to challenging the amendment on appeal.

We are also satisfied that there would be no arguable basis for plea withdrawal in case No. 2009CF249. 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, 274-75, 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.

The court conducted a plea colloquy with Ninmann regarding his plea to the amended charge in case No. 2009CF249. The terms of the plea agreement were stated on the record. The circuit court conducted a sufficient colloquy regarding the new plea, inquiring into Ninmann's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his understanding of the nature of the amended 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; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Ninmann understood that it would not be bound by any sentencing recommendations. In addition, Ninmann provided the court with a signed plea questionnaire. Ninmann 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).

Ninmann stipulated that the facts in the criminal complaint provided a sufficient factual basis for the plea. He admitted his status as a repeat offender in open court. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Ninmann 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; WIS. STAT. § 971.31(10).

A challenge to Ninmann'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 Ninmann was afforded an opportunity to address the court prior to sentencing. The court considered appropriate 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 Ninmann's character, the court noted that it had previously given Ninmann a break and put him on probation, but that Ninmann had failed at probation. The court also acknowledged Ninmann's drug and alcohol problems, but stated that he had failed to address them. The court identified the primary goal of the sentencing in this case as the protection of the public and concluded that prison was necessary, due to the risk Ninmann posed to society. The court then sentenced Ninmann to four years of initial confinement and three years of extended supervision, consecutive to the other sentence he was serving. The court also

awarded 264 days of sentence credit. The judgment of conviction reflects that the court determined that Ninmann was eligible for the substance abuse program.

The components of the bifurcated sentence imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 961.41(1)(b) (classifying possession with intent to deliver a controlled substance on or near school grounds 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); 961.48(1)(b) (increasing maximum term of imprisonment by four years for a Class H felony under chapter 961) 961.49(1m)(b)6. (increasing maximum term of imprisonment by five years for delivery of controlled substance near a school). The court stated that it believed it was necessary to apply the repeat penalty enhancer in this case in order to protect the public.

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.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). Although the court imposed a sentence greater than what the State recommended, the sentence was still within the limits of the maximum sentence and, as discussed above, the record reflects that the court considered the appropriate sentencing factors in imposing the sentence. Accordingly, we agree with counsel's assessment that there would be no merit to challenging Ninmann's sentence 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 judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Russell Bohach is relieved of any further representation of David Ninmann in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals