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November 18, 2015

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

2014AP1033-CRNM State of Wisconsin v. Brion A. Nash (L.C. #2012CF321)

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

Brion Nash appeals a judgment convicting him, based upon a guilty plea, of burglary to a dwelling. Attorney Randall Paulson has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

(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 addresses the validity of Nash's plea and sentence. Nash 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 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Nash entered his guilty plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Nash's plea, the State agreed to recommend twenty-four months of initial confinement and twenty-four months of extended supervision, and to remain silent on whether the sentence should be concurrent or consecutive to a sentence already being served.

The circuit court conducted a standard plea colloquy, inquiring into Nash's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Nash's 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 Nash understood that it would not be bound by any sentencing

recommendations, that it could "throw out" the plea deal, and that it could sentence Nash to the maximum. In addition, Nash provided the court with a signed plea questionnaire. Nash 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).

The facts acknowledged by Nash at the hearing—namely, that he burglarized a neighbor's house during the middle of an afternoon—provided a sufficient factual basis for the plea. We see nothing in the record to suggest that counsel's performance was in any way deficient, and Nash has not alleged any other facts outside the record that would give rise to a manifest injustice. Therefore, Nash's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Nash'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 Nash was afforded an opportunity to address the court, both personally and through counsel. The circuit 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 Nash had planned the burglary by casing the house in advance, and that his being a neighbor added to the victim's sense of violation. With respect to Nash's character, the court

gave him credit for obtaining an H.S.E.D., but concluded that a term of imprisonment was necessary for Nash to get his life on track, because he had continued to commit crimes while in the community.

The circuit court then sentenced Nash to three years of initial confinement and one year of extended supervision, to be served consecutive to a sentence he was already serving, with eligibility for the Substance Abuse Program after eighteen months. The court noted that no sentence credit was due because the sentence was consecutive to one already being served, ordered restitution in the amount of $335, and waived any DNA surcharge.

The components of the bifurcated sentence were within the applicable penalty ranges and the total imprisonment period constituted just under a third of the maximum exposure Nash faced. *See* WIS. STAT. §§ 943.10(1m)(a) (classifying burglary of a dwelling as a Class F felony); 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and a half years of initial confinement and five years of extended supervision for a Class F felony).

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). That is particularly true when taking into consideration that Nash committed the offense while on probation, and that the circuit court found him eligible for the substance abuse program.

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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals