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November 24, 2015

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

2013AP1946-CRNM State of Wisconsin v. Shawn A. Strunk (L.C. #2011CF30)
2013AP1947-CRNM State of Wisconsin v. Shawn A. Strunk (L.C. #2011CF1419)

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

Shawn Strunk appeals three judgments in two companion cases convicting him of two counts of burglary to a dwelling, one count of burglary with intent to commit battery, two counts of aggravated battery to an elderly person, two counts of felony bail jumping, one count of disorderly conduct and one count of resisting an officer. Attorney Anthony Jurek has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *see*

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

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 addresses whether there is any basis to withdraw Strunk's pleas and whether his sentences were unduly harsh. Strunk was sent a copy of the report, and has filed a response with two supplements, claiming ineffective assistance of counsel, a misunderstanding of the penalties he faced, inaccurate sentencing information, and abuse of sentencing discretion. Upon reviewing the entire record, as well as the no-merit report and responses, 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, 282-84, 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.

In Dane County Case No. 2011CF30 (the first case), Strunk entered a guilty plea to one charge of burglary to a dwelling in exchange for the dismissal of a penalty enhancer and a robbery charge, with the State's agreement to order a presentence report and cap its recommendation at three years of initial confinement and four years of extended supervision.

While Strunk was awaiting sentencing on the original burglary case, the State issued a complaint in Dane County Case No. 2011CF1419 (the second case) charging Strunk with an additional nine felonies and three misdemeanors, including four more burglaries, two aggravated

batteries, two bail jumpings, criminal damage to property, false imprisonment, disorderly conduct and resisting an officer, all as a repeat offender. In the second case, Strunk entered pleas of no contest to one count of burglary to a dwelling, one count of burglary with battery and intent to commit a felony (amended from intent to commit sexual assault), two counts of aggravated battery to an elderly person as a repeater, two counts of felony bail jumping, one count of disorderly conduct, and one count of resisting an officer. In exchange for the pleas, the State dismissed and read in two of the burglaries and the criminal damage to property charge, amended one of the remaining burglaries, and dismissed the repeater allegations on the burglary to a dwelling, the two bail jumpings, the disorderly conduct and the resisting an officer, and also agreed to recommend concurrent sentences on the two bail jumping counts.

The circuit court conducted standard plea colloquies in both cases, inquiring into Strunk's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Strunk'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 Strunk understood that the court would not be bound by any sentencing recommendations. In addition, Strunk provided the court with signed plea questionnaires. Strunk indicated to the court that he understood the information explained on those forms. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Strunk also admitted his status as a repeat offender for the second case in open court, and affirmed that there was a sufficient factual basis for the pleas in both complaints.

Strunk now argues that: (1) counsel should have challenged Strunk's status as a repeat offender on the grounds that the first case "was not fully resolved" when Strunk entered his pleas

on the second case; (2) counsel should not have withdrawn a multiplicity challenge as part of the plea deal because prevailing on the multiplicity motion could have affected Strunk's bargaining position; (3) counsel should have disputed the factual basis for the State originally charging that one of the burglaries was committed with intent to commit sexual assault; (4) counsel should have discussed with Strunk whether to request a change of venue or substitution of judge; (5) counsel should have had Strunk evaluated by a mental health professional; (6) counsel should have filed a suppression motion challenging the accuracy of the custodial statements attributed to Strunk; (7) Strunk did not understand the penalties he faced because the plea questionnaire misstated how the repeater allegation applied to the burglary with battery charge; (8) Strunk did not understand the nature of the charges because the circuit court did not state the "title of the offenses" when discussing what the State would need to prove for each count; and (9) Strunk did not understand the nature of the charges because the circuit court did not state all of the elements of each offense, such as knowing that he did not have consent to enter the dwellings. None of these allegations are sufficient to demonstrate a manifest injustice.

As reflected on the final judgment, the date of conviction for Strunk's first case was the date the court accepted his plea. Accordingly, the first case could properly be used as grounds for repeater enhancers in the second case.

As to Strunk's multiplicity challenge, it was certainly within reasonable professional norms for counsel to use the motion, as he did, to leverage the dismissal of the second burglary with battery count. Moreover, Strunk has not provided any evidence to support his speculative assumption that the State would have offered a better deal if the second battery charge had been struck in response to a motion, rather than pursuant to a plea.

The statement from one of the victims that Strunk had told her he would "punch" her and "fuck" her provided a sufficient factual basis for the original charge of burglary with battery with intent to commit sexual assault. In any event, since Strunk pled to an amended burglary charge with the same applicable penalty, any dispute about his intent during that burglary is moot.

Neither the venue nor the identity of the judge affects whether Strunk understood the nature of the charges and the nature of the constitutional rights he would be waiving by entering pleas.

Strunk next claims that he does not remember the arraignment hearing or meeting his attorney "due to the drugs he was using and the debilitating stress," and contends that counsel should have had him evaluated by a mental health professional to determine his capabilities. He does not, however, allege that he ever informed counsel that he was having difficulty understanding the proceedings, and does not identify for this court any information relevant to his plea bargains that he misunderstood due to his mental status either at arraignment or thereafter. We further note that nothing in the record or in the responses Strunk has filed with this court provides any basis to question Strunk's competency.

Strunk next claims that counsel should have challenged the accuracy of the custodial statements attributed to Strunk, because "there is no proof that Strunk said any of these things." However, an officer's testimony about a defendant's statement can constitute admissible evidence, and therefore constitutes a form of "proof." Even if counsel had filed a suppression motion and Strunk had provided his own testimony in conflict with the police report or an officer's testimony at the suppression hearing, Strunk has provided no basis to conclude that the suppression motion would have been successful, much less that the suppression of Strunk's own

statements would have had a significant impact on his plea decision, given the number of victims who were apparently prepared to testify against him.

As to the plea questionnaire's statement of the penalty for burglary with battery as a repeater, we do not agree with Strunk that it was inaccurate. The plea questionnaire correctly stated that Strunk faced sixteen years of initial confinement and five years of extended supervision, which is exactly the same as facing ten years of initial incarceration and five years of extended supervision for the burglary charge, plus another six years of imprisonment in the form of initial confinement for habitual criminality. Both the complaint and information had already specified what portion of the applicable penalty was attributable to the underlying charge, and what was attributable to the penalty enhancer.

As to the court's explanation of the charges, there was no requirement that the court state the title of the offenses, or read the elements from the jury instructions. We are satisfied that the court's explanation of each of the charges was consistent with the statutory language for each offense.

We see nothing else in the record or the materials presented to the court in this no-merit proceeding that would give rise to a manifest injustice. We therefore conclude that Strunk's pleas were valid and operated to waive all nonjurisdictional defects and defenses, including any issues relating to arraignment, venue, the substitution of counsel or the judge, suppression, and waiver of the preliminary hearing. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

A challenge to Strunk's sentences 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 Strunk was afforded an opportunity to comment on the original and supplemental presentence investigations (PSI) and provided the court with an alternate PSI, that he presented testimony and letters of support from family, and that he addressed 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 offenses, the court noted that it is rare and extreme for people to commit violence against strangers, and stressed that Strunk was lucky that he had not paralyzed or killed the most severely beaten victim and that the impact on the victims went beyond their physical injuries to continuing emotional trauma. The court further noted that the crime had an impact on the entire community because Strunk had committed it while on supervision with electronic monitoring, undermining confidence in the criminal justice system. With respect to Strunk's character, the court observed that alcohol use alone did not explain Strunk's conduct—rather, the attack on the elderly couple revealed an underlying meanness and self-centeredness, as well as a profound inability or unwillingness to control himself. Given the dangerousness Strunk exhibited in his latest offenses, in conjunction with his less violent but extensive criminal history, the court identified the primary goal of the sentencing in this case as specific deterrence, and concluded that a lengthy prison term was necessary to protect the public.

Strunk contends that he was sentenced based on inaccurate information because the circuit court essentially accepted the facts set forth in the PSI without making explicit findings with regard to factual disputes raised by the alternate PSI. *See generally* ***State v. Anderson***, 222 Wis. 2d 403, 409-412, 588 N.W.2d 75 (Ct. App. 1998) (discussing the obligations of counsel and the court to resolve factual disputes before sentencing). Strunk first complains about the court's comment:

> It's extreme that there's a suggestion about alcohol being involved in this at all. Alcohol is a depressant that doesn't normally lead strangers to commit crimes of violence against strangers. If you were taking heroin and desperate for a fix, or that were on some sort of true hallucinogenic-type drug or something, some of this would make some sort of sense possibly. But alcohol, not at all.

Strunk construes the court's comment as an erroneous finding of fact that he was not intoxicated at the time of the offense. However, it is plain from the context of the court's remarks that the court was not questioning the *fact* of Strunk's intoxication; it was questioning the claimed *causation* of intoxication leading to burglary and aggravated battery upon strangers. In other words, the court refused to accept intoxication as an excuse for Strunk's conduct.

Strunk next complains that the court was relying on inaccurate information about the "brutality" of the offenses when it commented that Strunk was probably lucky that the wife had found the strength to run away from him, since Strunk was in a frame of mind to hurt her. Strunk construes this comment as accepting the PSI's assertion that the wife had fallen down the stairs, when the minimal injuries documented in the medical records were consistent with his contrary assertion. However, both the PSI and alternate PSI agreed that Strunk pushed his way into the house, punched the husband in the head during an altercation near the door, ascended the stairs and grabbed the wife by the arm to keep her from calling 9-1-1, then again punched the

husband in the head when the husband attempted to intervene to protect his wife on the stairs, upon which Strunk and the husband both fell down the stairs, and the wife was able to run outside for help while Strunk continued to beat the husband. The court's comments about the wife escaping without more serious injury were consistent with Strunk's version of events—regardless of whether she also fell down the stairs—and the court's various comments about the severity of the offense were not "factual disputes," but simply characterizations of Strunk's conduct, based on the inferences that the court was entitled to draw.

A similar analysis applies to Strunk's complaint that the court viewed him as attempting to "control" the proceedings by waffling on whether he was going to enter pleas or go to trial. The court's view represented its interpretation of Strunk's actions, not a factual dispute.

Strunk also complains that the court rejected his contention that he sat down and gave up at the request of a pastor. That factual finding, however, was based upon the contrary information provided by the victims, as well as the involvement of three passersby who were holding Strunk down when the police arrived. A fact is not "inaccurate" merely because it was disputed, and the circuit court had a reasonable basis to find the victims' accounts more credible than Strunk's.

Finally, Strunk contends that the sentences imposed were disproportionate to the offenses.

The court sentenced Strunk to three years of initial confinement and four years of extended supervision on the burglary count in the first case, to be served consecutive to any other sentences, consistent with the State's recommendation, which the State committed to make in the original plea bargain. In the second case, the court imposed three years of initial confinement

and three years of extended supervision on the burglary of a dwelling count, consecutive; two years of initial confinement and two years of extended supervision on each of the bail jumping counts, to be served concurrent to each other but consecutive to all other counts; seven years of initial confinement and five years of extended supervision on the count of burglary with a battery, as a repeater, consecutive; seven years of initial confinement and three years of extended supervision on the first aggravated battery count, to be served concurrent with the sentence for burglary with battery but consecutive to all other sentences; seven years of initial confinement and three years of extended supervision on the second aggravated battery count, consecutive; ninety days' confinement on the disorderly conduct, consecutive; and one year of initial confinement and six months of extended supervision on the count of resisting an officer as a repeater, also consecutive. Combined, and taking into account the two concurrent sentences, the total sentence structure was twenty years and ninety days of initial incarceration with thirteen and a half years of extended supervision. The court noted that any sentence credit was already being applied to a sentence Strunk was already serving, and it imposed standard costs and conditions of supervision such as completing recommended treatment programs. The court also determined that Strunk was not eligible for the challenge incarceration program or the earned release program.

The sentences imposed were each within applicable penalty ranges, and collectively represented about half of the total initial incarceration and total imprisonment time Strunk faced. *See* WIS. STAT. §§ 943.10(2)(d) (classifying burglary with the commission of a battery as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E 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); 973.01(2)(c) (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer); 943.10(1m)(a) (classifying burglary to a dwelling as a Class F felony); 973.01(2)(b)6m and (d)4. (providing maximum terms of seven and one-half years of initial confinement and five years of extended supervision for a Class F felony); 946.49(1)(b) (classifying bail jumping while on bail for a felony as a Class H felony); 940.19(6)(a) (classifying aggravated battery of an elderly person 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); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality); 946.41(1) (classifying resisting an officer as a Class A misdemeanor); 939.62(1)(a) (increasing maximum term of imprisonment for offense otherwise punishable by less than one year to two years for habitual criminality); 973.01(2)(b)10. (confinement portion cannot exceed 75% of sentence); 947.01 (classifying disorderly conduct as a Class B misdemeanor); and 939.51(3)(b) (providing maximum imprisonment of ninety days for a Class B misdemeanor).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here are 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, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true when taking into consideration the degree of violence used in the batteries, the fact that Strunk committed additional offenses while on electronic monitoring, and the amount of

additional sentence exposure Strunk avoided on the read-in offenses and having two of the sentences imposed concurrent to others.

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 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