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December 16, 2015

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

2014AP1572-CRNM State of Wisconsin v. Antonio B. Gonzales (L.C. #2012CF165)

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

Antonio Gonzales appeals his judgments of conviction and sentence, which were entered after he pled no contest to one count of substantial battery as a repeater, contrary to WIS. STAT. §§ 940.19(2), 939.62(1)(b), and 939.62(2) (2011-12).[1] Attorney Donna L. Hintze[2] has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738,

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

[2] Attorney Suzanne Hagopian has been substituted for Attorney Hintze as counsel for defendant.

744 (1967); WIS. STAT. RULE 809.32; ***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). Counsel's no-merit report addresses the validity of the plea and sentence. In his response, Gonzales argues that he should be able to withdraw his no-contest plea because he falsely stated "to the doctor" that he understood the information he was given, but in fact he "really didn't understand."

Upon our review of the record, no-merit report, and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. First, Gonzales does not have an arguable basis for withdrawing his plea. A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as evidence that the plea was coerced, uninformed, or unsupported by a factual basis, that counsel provided ineffective assistance, or that the prosecutor failed to fulfill the plea agreement. ***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. Under the plea agreement, both sides were free to argue any sentence because no agreement had been made as to sentencing recommendations. A presentence investigation report was ordered and prepared. The circuit court conducted a plea colloquy in which the court explored with Gonzales his understanding of the charges against him. The court confirmed directly with Gonzales that he acknowledged and understood the constitutional rights he would be waiving. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court also stated the maximum penalties Gonzales was facing for each of the offenses, including a repeater enhancer pursuant to WIS. STAT. § 939.62(1)(b). The PSI report confirmed that Gonzales had been convicted of three separate misdemeanor offenses within the past five years. Gonzales confirmed that he

understood the penalties he was facing. The court inquired into Gonzales' ability to understand the proceedings and the voluntariness of his decision. Additionally, the court was presented with a plea questionnaire signed by Gonzales. The court ascertained on the record that Gonzales had gone over the plea questionnaire with his counsel and understood it. Finally, the court explained to Gonzales the direct consequences of his plea, and defense counsel acknowledged that the criminal complaint established a factual basis for the plea. *See* § 971.08(1)(b).

Gonzales argues that his statement to the doctor that he understood was false and that he "really didn't understand" when he "spoke to the doctor." That is not supported by the record. A licensed psychologist examined Gonzales to determine his competency to proceed and in his October 11, 2012 report, the psychologist concluded that Gonzales possessed "the substantial capacity to understand court proceedings and to be able to assist in his own defense." A second psychologist examined Gonzales to determine whether there was sufficient support for an NGI plea; she submitted a report on January 7, 2013, concluding that there was not. Though Gonzales does not specify which of these two psychologists he is referring to, both reports detail Gonzales' responses to open-ended questions as evidence that he understood, and both stated that they based their conclusions on that evidence. The first psychologist based his conclusion, in part, on the fact that Gonzales could explain what he was being charged with and why, could give a "generally accurate explanation of the benefits of legal representation," and knew his plea options, and on the fact that "his reasoning about his options was logical and did not appear to be unduly influenced by any symptoms of mental illness." Likewise, the second psychologist's conclusion that there was insufficient support for an NGI plea was based on Gonzales' detailed account of the battery and his thoughts about it, as well as other documentation of his medical history.

Turning next to the issue of Gonzales' sentence, we note that our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record shows that the trial court considered the standard sentencing factors and explained their application to this case. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. At the sentencing hearing, the court considered the gravity of the offenses, Gonzales' character, his rehabilitative needs, his extensive prior criminal record, and the safety needs of the community. Gonzales was afforded the opportunity to address the court prior to sentencing, and he did so.

On the substantial battery as a repeater, Gonzales faced a maximum potential penalty of three years and six months of initial confinement plus two years of extended supervision. *See* WIS. STAT. §§ 940.19(2), 939.62(1)(a), 939.50, 973.01(2)(b)9. The court imposed an overall sentence of three years and six months of initial confinement plus two years of extended supervision. The sentence imposed was within the applicable penalty ranges. The circuit court noted the aggravating factors of the severity of the battery, Gonzales' extensive criminal history, and the failure of repeated attempts to use lesser punishment to deter the violent behavior. "There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably." ***State v. Kuechler***, 2003 WI App 245, ¶7, 268 Wis. 2d 192, 673 N.W.2d 335. We will affirm if the record shows that the court examined the facts and stated its reasons for the sentence imposed, using a demonstrated rational process. ***Id.***, ¶8. To overturn a sentence, a defendant must show some unreasonable or unjustifiable basis for the sentence in the record. ***Id.*** Based on these standards, any challenge to Gonzales' sentence would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Suzanne Hagopian is relieved of any further representation of Antonio Gonzales in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals