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DISTRICT IV

March 31, 2016

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

2014AP2564-CRNM State of Wisconsin v. Ivan E. Calkins (L.C. #2014CF192)

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

Ivan Calkins appeals two judgments each convicting him of one count of fleeing or eluding a police officer. Attorney William Schmaal 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 (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

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

the validity of Calkins' pleas and sentences. Calkins was sent a copy of the report, but has not filed a response. Assistant State Public Defender Tristan Breedlove has since been substituted as defense counsel, and has not withdrawn the no-merit report. 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 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, 283-84, 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.

Calkins entered his pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Calkins' pleas, the State agreed to amend the information; to dismiss one count outright and to dismiss and read-in another count; and to recommend a total of eighteen months of initial confinement with four years of extended supervision on consecutive sentences, with the defense free to argue.

The circuit court conducted a standard plea colloquy, inquiring Calkins' ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Calkins' 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. In addition, Calkins provided the court with a signed plea questionnaire. Calkins indicated to the court that he had gone over the form carefully with counsel, and he is not now claiming that he misunderstood any of the information explained on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint provided a sufficient factual basis for the pleas. Calkins indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Calkins has not alleged any other facts that would give rise to a manifest injustice. Therefore, Calkins' pleas were 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 Calkins' 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 Calkins was afforded an opportunity 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 offenses, the court noted that it was the most extensive eluding case it had seen, and that it was difficult to understand how Calkins could keep going that long, knowing that he would be caught eventually. With respect to Calkins' character, the court noted that supervision had not worked very well in the past. The

court concluded that a prison term was necessary due to the length of the chase and the need to protect the public.

The court then sentenced Calkins to thirteen months of initial confinement and two years of extended supervision on the first count, and to a consecutive one-year term of probation with five months of conditional jail time on the second count. The court also awarded 113 days of sentence credit as stipulated by the parties; directed that Calkins provide a DNA sample if he had not already done so, but waived the fee; and imposed other standard costs and conditions of supervision. The court also determined that Calkins was not eligible for the challenge incarceration program or substance abuse program.

The components of the bifurcated sentence on the first count were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.04(3); 346.17(3)(a) (classifying eluding an officer as a Class I felony); 973.01(2)(b)9. and (d)6. (providing maximum terms of one and one-half years of initial confinement and two years of extended supervision for a Class I felony).

We note that the judgment of conviction for the probation count erroneously states the term as two years. Since that is a clerical error, we direct that the judgment be amended to conform to the circuit court's oral pronouncement. *See also* WIS. STAT. § 973.09(2)(b)1. (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement); 973.09(4)(a) (allowing up to one year of jail as a condition of probation).

Taken together, the sentences imposed here are not "so excessive and unusual and so disproportionate to the offenses 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 amount of additional sentence exposure Calkins avoided on the read-in offense of recklessly endangering safety. 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