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 III/IV

September 16, 2016

To:

Hon. Jeffery Anderson
Circuit Court Judge
1005 W. Main St., Suite 800
Balsam Lake, WI 54810

Daniel P. Steffen
District Attorney
Polk County District Attorneys Ofc
1005 W. Main St., #700
Balsam Lake, WI 54810-4407

Jobie Bainbridge
Clerk of Circuit Court
Polk County Justice Center
1005 W. Main St., Suite 300
Balsam Lake, WI 54810

Michael David Borowick 615216
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

2014AP2573-CRNM	State of Wisconsin v. Michael David Borowick (L.C. # 2012CF124)
2014AP2574-CRNM	State of Wisconsin v. Michael David Borowick (L.C. # 2012CF443)
2014AP2575-CRNM	State of Wisconsin v. Michael David Borowick (L.C. # 2013CF120)
2014AP2576-CRNM	State of Wisconsin v. Michael David Borowick (L.C. # 2014CF50)

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

Attorney Dennis Schertz, appointed counsel for Michael Borowick, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Borowick's plea or sentencing. Borowick was sent a

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

copy of the report, and has filed a response. Attorney Schertz has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit reports and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Between March 2012 and February 2014, Borowick was charged in four separate cases with multiple counts of burglary, misdemeanor theft, criminal damage to property, and bail jumping, and one count each of theft, receiving stolen property, and obstructing an officer. Pursuant to a global plea agreement, Borowick pled guilty to three counts of burglary and one count of felony bail jumping, and the remaining charges, as well as several out-of-county charges, were dismissed and read-in for sentencing purposes. The circuit court sentenced Borowick to a total of twelve years of initial confinement and ten years of extended supervision, plus five years of probation with an imposed and stayed sentence of six years of initial confinement and six years of extended supervision.

The no-merit report addresses whether there would be arguable merit to a challenge to the validity of Borowick's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Borowick and determine information such as Borowick's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea

withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Borowick's plea would lack arguable merit.

Borowick has filed a no-merit response contending that his trial counsel was ineffective at the preliminary hearing by failing to challenge the State's use of hearsay evidence and failing to call the alleged victims as witnesses. However, as no-merit counsel explains in his supplemental no-merit report, hearsay is allowed at preliminary hearings, *see* ***State v. O'Brien***, 2014 WI 54, ¶¶29-30, 354 Wis. 2d 753, 850 N.W.2d 8, and therefore trial counsel was not ineffective by failing to object. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense). Additionally, Borowick has not explained why his counsel should have called the alleged victims as witnesses or what their testimony would have been. *See* ***id.*** We discern no basis for a non-frivolous claim that defense counsel was ineffective at the preliminary hearing.

Borowick also contends that there was no factual basis for his guilty plea to burglary as party to the crime because the circuit court did not inform Borowick when or where the burglaries occurred, who the victims and co-conspirators were, or what was taken. In support, Borowick cites the portion of the plea hearing in which the court explained the elements of burglary as party to a crime. However, as no-merit counsel explains, defense counsel then set forth the factual basis to support the elements of the charged crimes on the record. Defense counsel stated that those facts, together with the facts set forth in the criminal complaints, provided the factual basis for the pleas, and Borowick stated that he understood that those facts supported his pleas. We discern no arguable merit to this issue.

The no-merit report also addresses whether a challenge to Borowick's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Borowick was afforded the opportunity to address the circuit court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offenses, Borowick's character and criminal history, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Borowick to twelve years of initial confinement and ten years of extended supervision, plus five years of probation with an imposed and stayed sentence of six years of initial confinement and six years of extended supervision. The sentence was within the maximum Borowick faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is 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" (quoted source omitted)). We discern no arguable merit to a challenge to the court's sentencing.

We note that we previously placed these appeals on hold because the supreme court accepted certification in ***State v. Loomis***, appeal number 2015AP157-CR, to address whether due process prohibits circuit courts from relying on COMPAS assessments at sentencing. We

questioned whether, following the supreme court's decision in ***Loomis***, there would be arguable merit to a claim that the circuit court improperly relied on COMPAS assessments in sentencing Borowick. The supreme court has now issued a decision in ***Loomis***, holding that:

> [A] sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.
>
> Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.

State v. Loomis, 2016 WI 68, ¶¶98-99, __ Wis. 2d __, __ N.W.2d __.

No-merit counsel has informed us that, in light of ***Loomis***, he has determined that further proceedings on this issue would lack arguable merit. We agree. The circuit court identified several factors contributing to the sentence imposed, including the seriousness of the offenses, which included multiple premeditated residential burglaries; Borowick's long criminal history; the impact on the victims; the multiple read-in offenses; Borowick's poor performance on supervision; and his need for rehabilitative treatment in a confined setting. With respect to COMPAS specifically, the circuit court noted that COMPAS indicated that Borowick's "probability of violent recidivism risk, general recidivism risk, and pretrial release risk is high. 10 out of 10." The court also stated that, as to the need to protect the public:

> [The prosecutor] tells me Judge, for that, turn to the COMPAS. And what do we have? We've got a 10. By the way, that's not good. That's the highest number that you can get. A 10 and a 10. And I spent a lot of time during my almost two-hour break

> reviewing all the aspects of the COMPAS evaluation …. COMPAS evaluation is kind of the wave of where things are going. It's not the end of being a decision maker but evidence-based practices to try to understand risk dosage, need for treatment, ability to accept treatment. It's a tool.

The court stated further: "So ultimately with regard to the need to protect the public, COMPAS tells me really with regard to overall, I need to protect the public." The court went on to state: "With regard to almost two years of activity, somehow I need to protect the public. Your history going from petty theft up to premeditated residential burglaries, I need to protect the public."

While the circuit court referenced COMPAS at sentencing, it was not "determinative" of the sentence imposed. It merely reinforced the circuit court's assessment of other, independent factors. Accordingly, we conclude that further proceedings on this issue 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.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Michael Borowick in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals