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September 23, 2016

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

2015AP2524-CRNM State of Wisconsin v. Nicholas A. Dambruch (L.C. # 2014CF47)

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

Nicholas Dambruch appeals a judgment convicting him of four counts of burglary, party to a crime, as a repeater.[1] Attorney Susan Alesia has filed a no-merit report and seeks to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[2] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967), and ***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

[1] WISCONSIN STAT. §§ 939.05; 939.62(1)(c); and 943.10(1m)(a) (2013-14).

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

addresses the validity of the plea colloquy and sentencing. Dambruch was provided a copy of the report, but has not filed a response. Attorney Alesia filed a supplemental no-merit report following our request that she advise us whether there was any meritorious argument that may be made concerning the circuit court's use of a COMPAS report at sentencing. Following our request for a supplemental report, the Wisconsin Supreme Court issued its decision in ***State v Loomis***, 2016 WI 68, ___Wis. 2d ___, 881 N.W.2d 749, which establishes the procedures for and restrictions on the circuit court's use of COMPAS reports at sentencing. Upon reviewing the entire record, as well as the no-merit report and supplemental no-merit report, we conclude there are no arguably meritorious appellate issues.

Having reviewed the plea colloquy, we find no defects and conclude that Dambruch knowingly, intelligently and voluntarily entered his guilty pleas. In order to invalidate the pleas, Dambruch would be required to show that the plea colloquy was in some manner defective or that manifest injustice such as coercion, lack of a factual basis to support the charges, ineffective assistance of counsel, or the prosecutor's failure to support the negotiated plea agreement required us to invalidate the pleas. ***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). We find no such defects. Further, the circuit court appropriately considered and relied upon the information contained in Dambruch's plea questionnaire[3] in making its determination that Dambruch knowingly, voluntarily, and intelligently entered his pleas, where, as here, the circuit

[3] We note that the plea questionnaire in the record does not appear to advise Dambruch of the potential additional exposure related to the repeater allegation to which he pled. However, the circuit court properly advised Dambruch with regard to each of the four counts to which he pled that the repeater allegation exposed him to an additional six years of confinement on each of the counts. Dambruch indicated to the court that he understood the penalty for each count.

court inquired whether Dambruch went over it with his counsel, understood its contents, and had no additional questions related to its contents. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Dambruch and the State entered into a negotiated plea agreement which called for Dambruch to enter guilty pleas to four of the twelve counts of burglary of homes with which he was charged in the information[4] and left both parties free to argue sentencing. The circuit court explained to Dambruch that sentencing was completely up to the court and that the court was free to sentence Dambruch as it deemed appropriate up to and including the statutory maximums. The circuit court, which had Dambruch's signed plea questionnaire during the plea hearing, conducted a plea colloquy which reviewed Dambruch's background, informed Dambruch of the many constitutional and trial rights he was giving up, and reviewed in detail the elements of the offense, the repeater enhancement, the party to a crime provision, and the maximum penalties. The court also found a factual basis for Dambruch's pleas, and advised Dambruch of the firearm and voting restrictions, as well as potential immigration consequences. Trial counsel indicated his belief that Dambruch was voluntarily, intelligently, and knowingly entering his pleas. Finally, Dambruch affirmed he had been promised nothing in addition to the plea agreement in exchange for his pleas, had not been threatened or coerced into entering his pleas, and had had adequate time to consult with counsel.

[4] Though not discussed at the outset of the plea hearing when the basic plea agreement was put on the record, Dambruch indicated he understood that the remaining eight counts would be dismissed and read-in for sentencing purposes, and that he had discussed the concept of read-ins with counsel.

We are satisfied that the plea colloquy meets the standard for completeness and that Dambruch's pleas are valid. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72.

We also agree with appellate counsel that any challenge to the circuit court's exercise of sentencing discretion would lack arguable merit. Our review of the sentencing begins with the "presumption that the [circuit] court acted reasonably," leaving the defendant with the burden to demonstrate "some unreasonable or unjustifiable basis in the record" in order for us to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Dambruch entered guilty pleas to four burglary counts, and agreed that the circuit court would consider eight dismissed, but read-in, burglary counts at sentencing. With the felony repeater enhancement, Dambruch faced a potential seventy-four year term of imprisonment, with fifty-four years of initial confinement and twenty years of extended supervision.[5] When taking into consideration the consecutive nature of the sentences for three of the burglary counts and probation imposed on the fourth, the court imposed a sentence comprised of twelve years of initial confinement and twelve years extended supervision for a total sentence of twenty-four years, well below the statutory maximum Dambruch faced. The court also deemed Dambruch eligible for the Challenge Incarceration and Substance Abuse programs.

[5] The maximum sentence for each of the party to a crime burglary counts is twelve and one-half years, WIS. STAT. §§ 943.10(1m)(a); 939.50(3)(f), with the felony repeater enhancement adding a potential additional six years of imprisonment for each count. WIS. STAT. § 939.62(1)(c). Thus, Dambruch's total maximum imprisonment sentence for each burglary count was eighteen and one-half years. All four counts, then, exposed him to seventy-four years of imprisonment. Each count exposed Dambruch to thirteen and one-half years of initial confinement and five years of extended supervision, WIS. STAT. §§ 939.62(1)(c); 973.01(2)(b)6m.; and 973.01(2)(d)4., for a total confinement exposure of fifty-four years and total extended supervision exposure of twenty years.

Counsel's summary of the circuit court's exercise of its sentencing discretion and the evidence in the record supporting the court's ultimate sentence demonstrates the circuit court's compliance with the requisite sentencing considerations set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court first focused on the gravity and nature of the offenses, noting the loss of security Dambruch's victims suffered as a result of Dambruch having broken into their homes. The circuit court emphasized that Dambruch had deprived his victims of the feeling of safety his victims were entitled to enjoy in their homes, and which was now lost to them. The court also noted that Dambruch had stolen irreplaceable items from some of the homes. Noting the planning that went into the many burglaries and the gravity of the offense, the court found the offenses "very high on … acts of a malicious nature" and very serious. The court noted that Dambruch, who had made a series of bad choices, was thirty-two years old and had a fairly substantial criminal record, some of which involved drugs and alcohol. Further, the court found Dambruch victimized innocent people so that he was able to continue to purchase and use drugs. The court also noted that there were mitigating factors such as Dambruch's cooperation and acceptance of responsibility for his crimes, his work record, obtaining his high school equivalency diploma, and his positive demeanor. The court stressed the importance of protecting the community and concluded that anything less than confinement would unduly depreciate the seriousness of Dambruch's offenses.

In sentencing Dambruch, the circuit court considered the gravity of the offense, the sentence given to Dambruch's co-defendant, the protection of the community, Dambruch's character, and his acceptance of responsibility. The record reflects that the circuit court fulfilled its sentencing responsibilities set forth in ***Gallion***.

As noted, we requested that appellate counsel file a supplemental report related to the circuit court's apparent consideration of the risk assessment component of the COMPAS report submitted as part of the presentence investigation. We agree with appellate counsel that the circuit court's consideration of the report fell well within the guidelines for its use that the Supreme Court established in ***Loomis***, ___ Wis. 2d at ___, ¶¶98-99, 881 N.W.2d at 769. While the court referred to the COMPAS report risk to reoffend argument that the prosecutor made in her argument, there is no indication in the record that the court viewed the COMPAS report as at all determinative with regard to the important sentencing decisions such as the need for incarceration, the severity of sentence, or whether community supervision was a safe and effective option for Dambruch. *See* ***id.***, ¶109. Thus, there is no arguably meritorious argument that the court misused the COMPAS report.

The total twelve years' confinement and twelve years' extended supervision sentence the circuit court imposed on the first three burglary counts, followed by a probationary term on the fourth, was well within the statutory ranges. While Dambruch's total imprisonment exposure was seventy-four years, the circuit court's cumulative sentence of imprisonment totaled twenty-four years. Thus, Dambruch's total bifurcated imprisonment sentence amounted to roughly 32% of the maximum statutory exposure.

A sentence well within the applicable statutory maximums is presumed not to be unduly harsh, and reviewing the record independently, as well as according the circuit court's analysis and decision due deference, we conclude that the sentence the court 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." *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

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 with 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 Attorney Susan Alesia is relieved of any further representation of Nicholas Dambruch in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals