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 IV

September 28, 2016

To:

Hon. Thomas B. Eagon
Circuit Court Judge
1516 Church St
Stevens Point, WI 54481

Cass Cousins
Asst. District Attorney
1516 Church Street
Stevens Point, WI 54481-3501

Patricia Baker
Clerk of Circuit Court
Portage Co. Courthouse
1516 Church Street
Stevens Point, WI 54481-3598

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Richard Breffeilh
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

William J. Bennett 422862
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2015AP719-CRNM State of Wisconsin v. William J. Bennett (L.C. # 2013CF110)

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

William Bennett appeals two related judgments convicting him of one count of possession of heroin on or near public housing with intent to deliver, one count of bail jumping, and one count of possession of drug paraphernalia. He also challenges an order denying his postconviction motion to vacate a DNA surcharge. Attorney John Breffeilh 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***

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

Appeals, 137 Wis. 2d 90, 103, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Bennett's pleas and sentences, including the DNA surcharge. Bennett was sent a copy of the report, but he has not filed a response. At our request, counsel also submitted a supplemental no-merit report addressing whether there had been a breach of the plea agreement. Upon reviewing the entire record, as well as the no-merit report and supplement, 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, 262, 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.

Bennett entered his pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Bennett's pleas, the State agreed to dismiss and read in two other charges and to recommend that the sentences imposed in this case be concurrent. Although the State did not specify in its recitation of the parties' agreement whether its recommendation that the sentences in this case were to be concurrent meant concurrent with other sentences being served in Waukesha County, or only with each other, counsel informs us that, after having spoken with both Bennett and trial counsel, the plea questionnaire form accurately represents the parties' agreement that the State's recommendation was to be that the Portage County sentences be served concurrently with one another. The State followed through on making that recommendation.

The circuit court advised Bennett of the constitutional rights he would be waiving and other consequences of entering pleas. It then conducted a plea colloquy, inquiring into Bennett's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Bennett'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 ensured that Bennett understood that it would not be bound by any sentencing recommendations. In addition, Bennett provided the court with a signed plea questionnaire. Bennett indicated to the court that he understood the information explained on that form, and he is not now claiming otherwise. *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—namely, that police executed a search warrant and found drugs and paraphernalia in Bennett's apartment, while Bennett was out on bond on other drug charges—provided a sufficient factual basis for the pleas. Bennett indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Bennett has not alleged any other facts that would give rise to a manifest injustice. We therefore conclude that Bennett's 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 Bennett'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 Bennett was afforded an opportunity to comment on the presentence investigation report, and 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 viewed the heroin charge as particularly serious because heroin is highly addictive and dangerous. The court noted several aggravating factors: Bennett continued selling and using heroin while receiving methadone treatment, he provided heroin to his girlfriend, and he was storing and preparing the heroin for sale in a residence that included a minor child. With respect to Bennett's character, the court noted that Bennett had a ten-year history of drug crimes, including committing additional crimes while out on bond; that despite his intelligence and having obtained an associate degree in civil engineering, Bennett had a minimal employment history; and that his willingness to use heroin while on methadone and to share heroin with his girlfriend demonstrated a faulty thought process. The court gave Bennett credit for cooperating with police and viewed him as genuinely remorseful, but it determined that Bennett's inability to address his treatment needs in the community indicated the need for a structured custodial setting. The court identified the primary goals of the sentencing in this case as protection of the public and deterrence, and it concluded that a substantial prison term was necessary to achieve those goals.

The court then sentenced Bennett to seven years of initial confinement and five years of extended supervision on the heroin count; to two years of initial confinement and three years of extended supervision on the bail jumping count; and to thirty days on the drug paraphernalia

count. The sentences were to be served concurrently both with one another and with any previously imposed sentences. The court also awarded 264 days of sentence credit (which resulted in time served on the misdemeanor), imposed standard costs and conditions of supervision, and determined that Bennett would be eligible for the challenge incarceration program and the earned release program after serving five years. The judgment of conviction further directed that Bennett submit a DNA sample and pay a single surcharge, if he had not already done so. Although the court did not initially provide any reason for imposing the DNA surcharge, it rectified that omission at a postconviction hearing, explaining that DNA can be used to help trace who provided the heroin in overdose cases, that a person with multiple felony convictions should pay his or her fair share of the upkeep of the data bank, and that Bennett should have the ability to pay the surcharge while on supervision, given his education level.

The components of the bifurcated sentences imposed on the felonies were within the applicable penalty ranges. *See* WIS. STAT. §§ 961.41(1m)(d)1. and 961.49(1m)(b)3. (classifying the distribution of less than three grams of heroin on or near public housing as a Class F felony); 973.01(2)(b)6m. and (d)4. (providing maximum terms of twelve years and six month of initial confinement and five years of extended supervision for a Class F felony); 946.49(1)(b) (classifying bail jumping as a Class H felony); and 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).

The sentences imposed, while near the maximums on each individual charge, amounted to considerably less than the total exposure Bennett faced when taking into account their concurrent structure, and were 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 (quoted source omitted). That is particularly true given the amount of additional sentence exposure Bennett avoided on the read-in offenses.

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 Bennett in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals