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 29, 2016

To:

Hon. Julie Genovese
Circuit Court Judge
Br. 13, Rm. 8103
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Andrew Hinkel
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Ismael R. Ozanne
District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

Frederick L. Jones 520373
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2015AP759-CRNM State of Wisconsin v. Frederick L. Jones (L.C. # 2013CF383)

Before Lundsten, Sherman and Blanchard, JJ.

Frederick Jones appeals a judgment convicting him of being a party to the crime of attempted armed robbery. Attorney Andrew Hinkel has filed a no-merit report seeking to withdraw as appellate counsel. *See* 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 references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the validity of the plea and sentence. Jones was sent a copy of the report, and has filed a response seeking a plea withdrawal hearing on the grounds of ineffective assistance of counsel. Upon reviewing the entire record, as well as the no-merit report and response, 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. *See* ***State v. Bangert***, 131 Wis. 2d 246, 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.

Jones entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Jones's plea, the State agreed to recommend a sentence of two years of initial incarceration followed by five years of extended supervision, to be served consecutive to a revocation sentence on another case.

The circuit court conducted a plea colloquy, inquiring into Jones's ability to understand the proceedings and the voluntariness of his plea decision, and further exploring Jones's understanding of the nature of the charges, the penalty ranges and other direct consequences of the plea, 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 made sure Jones understood that the court would not be bound by any sentencing recommendations. In addition, Jones provided the court with a signed plea questionnaire. Jones

indicated to the court that he had gone over the form with counsel, and counsel indicated that he was satisfied that Jones understood his rights and was knowingly and voluntarily entering his plea. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Jones now asserts that counsel never informed him that the State would need to prove all of the elements of the offense at trial beyond a reasonable doubt. Jones then argues that the State's evidence was insufficient to provide probable cause, much less establish his guilt beyond a reasonable doubt, because the victim was unable to pick his picture out of a photo array, and the description that the victim gave of the robber did not match Jones in several respects. This argument ignores several key points.

First, even if it were true that counsel failed to advise Jones of the burden of proof at trial, the circuit court itself informed Jones about the burden of proof during the plea colloquy.

Second, neither probable cause nor guilt beyond a reasonable doubt are the standards necessary to support the acceptance of a plea. Rather, the standard is merely whether the circuit court is satisfied that there is some factual basis for the charge—which does not require the court to weigh conflicting evidence. Here, although the victim was unable to pick Jones out of the photo array, the victim subsequently identified Jones at the revocation hearing as having been at the crime scene.

Third, the State was not required to put all of its evidence into the complaint. Therefore, even if we were to assume that the evidence outlined in the complaint fell short of proving Jones's guilt beyond a reasonable doubt, it does not follow that the State would have been unable to produce sufficient evidence at trial.

Fourth, because Jones was charged as a party to the crime, in order to convict him it was not necessary to establish that Jones was the one who actually held a gun to the victim. Rather, the State's theory of the case was that, if Jones was not the actual robber, then he aided and abetted the robber by luring the victim to the place of the robbery. The complaint alleged that call logs and texts recovered in a forensic examination of a phone in Jones's possession had been used to set up the robbery. Those facts alone were adequate to provide a factual basis for Jones's plea, and counsel would not have misled Jones or provided ineffective assistance by advising Jones that he could be convicted at trial.

Finally, the circuit court asked Jones directly whether he admitted that he was "involved in this attempt to take property from [the victim] with use or threatening use of a dangerous weapon as described in the criminal complaint," and Jones answered, "Yes."

We conclude that Jones's plea was valid and operated to waive all nonjurisdictional defects and defenses, including any challenge to the preliminary hearing. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Jones's sentence would also lack arguable merit because the circuit court followed the joint recommendation of the parties in sentencing Jones to two years of initial confinement and five years of extended supervision. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved). The components of the bifurcated sentence were within the applicable penalty ranges, and the total imprisonment period constituted only 35% of the maximum exposure Jones faced. *See* WIS. STAT. §§ 943.32(2) (classifying armed robbery as a Class C felony); § 973.01(2)(b)3. and (d)2. (providing maximum terms of 25 years of initial

confinement and 15 years of extended supervision for a Class C felony); § 939.32(1m) (limiting the maximum terms of confinement and extended supervision for attempted crime to one-half the maximum available if the crime had been completed) (all 2011-12 Stats.).

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 judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew Hinkel is relieved of any further representation of Frederick Jones in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals