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November 1, 2016

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

2015AP746-CRNM	State of Wisconsin v. Dean P. Shibilski (L.C. # 2012CF216)
2015AP747-CRNM	State of Wisconsin v. Dean P. Shibilski (L.C. # 2013CF224)
2015AP748-CRNM	State of Wisconsin v. Dean P. Shibilski (L.C. # 2013CF473)

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

Dean Shibilski appeals three judgments convicting him of multiple felonies in a series of criminal cases that were handled together in the circuit court. Attorney Dennis Schertz 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***

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

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 the validity of Shibilski's pleas and sentences and counsel's performance. Shibilski was sent a copy of the report, but has not filed a response. 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 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, 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). There is no indication of any such defect here.

Shibilski entered pleas in Portage County Case Nos. 2012CF216 and 2013CF224 and Adams County Case No. 2013CF67 pursuant to a negotiated global plea agreement that was presented in open court. In exchange for Shibilski's plea in 2012CF216 to one count of burglary to a building, his pleas in 2013CF224 to three counts of burglary to a building and two counts of theft, and his pleas in 2013CF67 to one count of burglary and one count of bail jumping, the State agreed to dismiss and read in an additional four felonies and eight misdemeanors from those three cases, as well as five counts from another two cases. The State also agreed to make a joint sentencing recommendation in which the controlling sentences would be consecutive terms of two-and-a-half years of initial confinement and four years of extended supervision on the first count in 2012CF216 and two years of initial confinement and four years of supervision on the

first count in 2013CF224, with all other sentences, including those in 2013CF67, being concurrent terms of one-and-a-half or two-and-a-half years of initial incarceration and two or four years of extended supervision.

Prior to his sentencing on 2012CF216, 2013CF224 and 2013CF67, Shibilski came before the court again to resolve an additional four cases in accordance with a second global plea agreement. In exchange for Shibilski's pleas in Portage County Case No. 2013CF473 to one count of burglary, one count of theft, one count of a second or subsequent offense of possession of THC, and two counts of bail jumping—all as a habitual offender, the State agreed to dismiss and read in all of the counts in three other cases. The State also agreed to cap its sentencing recommendations to a controlling sentence of thirteen years of initial confinement and five years of extended supervision on the burglary count to be served consecutive to other cases, with concurrent terms of nine years of initial confinement and five years of extended supervision on the theft count, five and one-half years of initial confinement and two years of extended supervision on the THC count, and seven years of initial incarceration and three years of extended supervision on each of the bail jumping counts.

At each of the two plea hearings, the circuit court conducted a plea colloquy inquiring into Shibilski's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his 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; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Shibilski understood that the court would not be bound by any sentencing recommendations. In addition, Shibilski provided the court with signed

plea questionnaires, to which were attached sheets setting forth the elements of offenses to which Shibilski would be entering pleas. Shibilski indicated to the court that he had gone over the forms with counsel and understood the information on them, 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 parties stipulated that the facts set forth in the complaints provided a sufficient factual basis for the pleas, and Shibilski did not have any additional comments to make about the facts of the cases when invited to do so by the court. Shibilski also admitted his prior convictions in open court to establish his status as a habitual offender on the charges in 2013CF452. Shibilski affirmed that he had sufficient time to talk to his attorney with respect to the first set of charges, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Shibilski has not alleged any other facts that would give rise to a manifest injustice. We therefore conclude that it would be frivolous to challenge Shibilski's pleas, and that the pleas 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 Shibilski'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 Shibilski was afforded an opportunity to comment on the PSI 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 emphasized that these cases involved residential burglaries which leave victims feeling abused and helpless. The court also took into account the sheer number of offenses Shibilski had committed, including all of the read-in charges. With respect to character, the court acknowledged that Shibilski had substantial rehabilitative needs for alcohol and drug abuse. However, the court also went through Shibilski's lengthy criminal history, and observed that Shibilski had been "irresponsible for almost his entire life in consuming and then committing crimes in the community." The court identified the primary goal of sentencing in this case as protection of the public, taking into account the number and seriousness of the crimes and Shibilski's inability to address his substance abuse problems or otherwise control his criminal behavior on his own. The court concluded that a lengthy prison sentence was called for.

The court then sentenced Shibilski to two and one-half years of initial confinement and four years of extended supervision on each of the five burglary counts and one of the theft counts in 2012CF216, 2013CF224 and 2013CF67; to one and one-half years of initial confinement and two years of extended supervision on the other theft count in 2013CF224 and the THC count in 2013CF473; to three years of initial confinement and three years of extended supervision on each of the three bail jumping counts in 2013CF67 and 2013CF473; to seven and one-half years of initial confinement and five years of extended supervision on the count of burglary as a repeater in 2013CF473; and to five years of initial confinement and five years of extended supervision on the count of theft as a repeater in 2013CF473. The controlling sentences were consecutive terms imposed on the burglary in 2012CF216, the bail jumping in 2013CF67, and the burglary as a

repeater in 2013CF473, with all other sentences being concurrent, effectively resulting in a total sentence of thirteen years of initial confinement and twelve years of extended supervision.

The court also ordered restitution as set forth in the restitution summaries provided by the witness coordinator, which amounted to $1,707 on 2012CF216, $62,358.03 on 2013CF224 and 2013CF67, and $19,017.63 on 2013CF473; and it imposed standard costs and conditions of supervision as set forth in the PSI, without objection from Shibilski. The judgments of conviction state that Shibilski is eligible for the Challenge Incarceration Program and the Substance Abuse Program, although the court noted Shibilski may have aged out and that it would be up to DOC whether to place him in either program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges and the total imprisonment period constituted about 18% of the maximum exposure Shibilski faced. *See* WIS. STAT. §§ 943.10(1m)(a) (classifying burglary to a dwelling as a Class F felony); 943.20(1)(a), (3)(bf), and (3)(c) (classifying theft of moveable property worth more than $10,000 as a Class G felony and theft of moveable property worth between $2,500 and $5,000 as a Class I felony); 946.49(1)(b) (classifying bail jumping as a Class H felony); 961.41(3g)(e) (classifying a second or subsequent offense of possession of THC as a Class I felony); 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and one-half years of initial confinement and five years of extended supervision for a Class F felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 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); 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); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality); 939.62(1)(c) (increasing maximum term of imprisonment for offense otherwise punishable by more than ten years by six additional years for habitual criminality); 973.01(2)(b)10 (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here are 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." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true when taking into account the amount of additional sentence exposure Shibilski avoided on the read-in offenses, and the fact that the court did not enhance any of the sentences in 2013CF473 for habitual criminality.

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 these matters pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals