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March 17, 2017

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

2015AP1312-CRNM State of Wisconsin v. Brian A. Schindler (L.C. # 2013CF40)

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

Brian Schindler appeals a judgment convicting him of delivery of a Schedule II narcotic, possession with intent to deliver a Schedule III non-narcotic substance, and possession of a firearm by a felon. Attorney Sara Kelton Brelie has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[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,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of Schindler's pleas and sentences. Schindler was sent a copy of the report, and has filed a response alleging a breach of the plea agreement. 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 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Schindler entered his pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Schindler's pleas, the State agreed to dismiss and read in six other felonies and several penalty enhancers, which collectively reduced Schindler's sentence exposure by seventy and one half years. The State also agreed to recommend concurrent sentences of five years of initial confinement and five years of extended supervision on the Schedule II drug count, three years of initial confinement and three years of extended supervision on the Schedule III drug count, and five years of initial confinement and five years of extended supervision on the firearm count.

Schindler asserts that the State breached the plea agreement because: (1) Sgt. Detective Jon Lacombe of the Marinette Police Department told Schindler that the judge would go easier on him if he signed release forms for the seizure of his property; (2) defense counsel told

Schindler that his sentences "would run as one" so that Schindler could get into the Earned Release Program in three and a half years if he pled no contest; but (3) the judge "broke it all up 5 + 1 + 1." We understand Schindler's complaint to be that the judge imposed a consecutive sentence structure resulting in seven years of initial confinement, rather than the concurrent sentences recommended by the State that would have resulted in only five years of initial confinement. However—as Schindler was advised both in his plea questionnaire and during his plea colloquy—the circuit court was not a party to the plea agreement, and was not bound by it. The record shows that the prosecutor followed through on the dismissal of charges and made the promised sentence recommendations. Therefore, the record does not support Schindler's claim that the State breached the plea agreement.

The circuit court conducted a standard plea colloquy, inquiring into Schindler's ability to understand the proceedings; the voluntariness of his plea decisions; and further exploring Schindler'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; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Schindler understood that it would not be bound by any sentencing recommendations and could impose the maximum penalties, which totaled thirty-one years of imprisonment and fines of $85,000, in spite of any agreement. The court also obtained Schindler's acknowledgement that the court could consider the read-in offenses at sentencing. In addition, Schindler provided the court with a signed plea questionnaire. Schindler 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 provided a sufficient factual basis for the pleas. Schindler indicated that he had enough time to talk to his attorney and was satisfied with his representation, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Schindler has not alleged any other facts that would give rise to a manifest injustice. Therefore, Schindler'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 Schindler'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 Schindler was afforded an opportunity to comment on the PSI and to address the circuit 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 noted that all of the substances involved in the drug charges, including the read-ins, were heroin-based opioids, and that Schindler was feeding the addictions of community members. With respect to Schindler's character, the court emphasized that Schindler was fifty-four years old and showed no sign of discontinuing his criminal conduct; he continued to commit the same types of offenses over a number of years to earn easy money, despite having employment skills. The court identified protection of the public as the paramount goal of the sentencing in this case, with a secondary goal of punishment, and concluded that a prison term was necessary.

The circuit court then sentenced Schindler to consecutive terms of five years of initial confinement and five years of extended supervision on the Schedule II count; one year of initial confinement and one year of extended supervision on the Schedule III count; and one year of initial confinement and one year of extended supervision on the firearm count, but found him eligible for the Earned Release Program, which could shorten his initial incarceration time. The court also awarded 166 days of sentence credit; ordered restitution in the amount of $300 for a Crime Stoppers tip; and imposed standard costs and conditions of supervision to be paid out of prison wages or on probation.

The components of the bifurcated sentences were within the applicable penalty ranges and the total imprisonment period constituted less than half of the maximum exposure Schindler faced. *See* WIS. STAT. §§ 961.41(1)(a) (classifying delivery of a Schedule II narcotic as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 961.41(1m)(b) (classifying possession with intent to deliver non-narcotics as a Class H 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); 941.29(2)(a) (2013-14) (classifying possession of a firearm by a felon as a Class G felony); and 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).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here were not "so excessive and unusual and so disproportionate to the offense[s] 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 (quoted

source omitted). That is particularly true when taking into consideration the amount of additional sentence exposure Schindler 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. 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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals