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DISTRICT IV

July 17, 2017

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

2015AP1926-CRNM State of Wisconsin v. Jeffery M. Scruton
(L.C. #2014CF57)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jeffrey Scruton appeals two related criminal judgments convicting him of five counts of possession of a firearm by a felon and one count of receiving stolen property.[1] [23:1, 4; 29] Assistant State Public Defender Ellen Krahn has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[2] *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 Scruton's pleas and sentences. Scruton 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, 383-84, 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.

Scruton agreed to a negotiated plea agreement that was presented in open court, under which he would plead no contest and be found guilty on five "possession of a firearm by a felon"

[1] Although the notice of appeal refers to a single judgment, we note that separate judgments were signed and entered for the prison terms imposed on the firearm counts and the probation imposed on the receiving-stolen-property count. Because the notice of appeal explicitly mentions all six counts, we construe it as applying to both judgments.

[2] All further references in this order to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

counts. In exchange for Scruton's pleas to the five firearm charges and an amended charge of receiving more than $10,000 worth of stolen property as party to a crime, the State agreed to dismiss and read-in five additional firearm counts and a separate misdemeanor case, and to order a PSI, with both parties free to argue at sentencing, including on the amount of restitution. The plea agreement reduced Scruton's sentence exposure on the felonies by fifty years.

The circuit court conducted a plea colloquy, inquiring into Scruton's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Scruton'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 made sure Scruton understood that it would not be bound by any sentencing recommendations. In addition, Scruton provided the court with a signed plea questionnaire. Scruton indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a circuit court may use a plea questionnaire to assess a defendant's understanding of the rights waived in a plea deal).

The facts set forth in the complaint—namely, that Scruton had participated in opening and disposing of a safe taken during a burglary and that police recovered multiple weapons from Scruton's residence when they executed a search warrant—provided a sufficient factual basis for the pleas. We see nothing in the record to suggest that counsel's performance was in any way deficient, and Scruton has not alleged any other facts that would give rise to a manifest injustice. There was no suppression motion filed. Therefore, Scruton'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; WIS. STAT. § 971.31(10).

A challenge to Scruton'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 Scruton 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. With respect to Scruton's character, the court gave Scruton credit for getting his HSED, for working for most of his life after some early trouble with the law, until serious health problems impeded his ability to work, and for cooperating with authorities. The court also rejected a COMPAS assessment that Scruton presented a high risk for violence, concluding that Scruton was not dangerous in that respect. Regarding the severity of the offenses, the court noted that the value of property stolen by others in the series of property crimes underlying Scruton's offenses was "well north of five figures," which the court viewed as very significant, and that Scruton had been involved with providing a market for stolen goods on multiple occasions, not merely in a single incident. The court also observed that Scruton had to know that the guns he bought for far less than market value and the safe containing over $20,000 that he helped open were "hot" or stolen items, and that Scruton's actions facilitated the burglars' criminal activity. The court concluded that a

prison term was necessary to address the seriousness of participating in a "high-level criminal enterprise," even though Scruton was not the most culpable actor.

The court then sentenced Scruton to concurrent terms of eighteen months of initial confinement and forty-two months of extended supervision on each of the firearm counts, and imposed a two-year term of probation on the count of receiving stolen property. The court also imposed a single DNA surcharge and standard costs, ordered standard conditions of supervision, and determined that Scruton was eligible for the substance abuse program. The parties left the issue of restitution open at the sentencing hearing, anticipating that it could be addressed in companion cases, and the State ultimately withdrew its restitution request.

The components of the bifurcated sentences imposed on the firearm counts were within the applicable penalty ranges and the total imprisonment period structured as concurrent sentences constituted only ten percent of the maximum exposure Scruton faced on those counts. *See* WIS. STAT. §§ 941.29(2)(a) (classifying possession of a firearm by a felon as a Class G 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). The term of probation on the count of receiving stolen property was also within the statutory range, and was also in accordance with Scruton's own request. *See* WIS. STAT. § 973.09(2)(b)1. (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement); ***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).

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 (quoting another source).

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals