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July 26, 2017

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

2015AP2186-CRNM State of Wisconsin v. Nathan J. Jones (L.C. # 2014CF229)

Before Kloppenburg, P.J., Sherman, 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).

Nathan Jones appeals a judgment convicting him of arson and burglary, each as a repeater, and an order denying his motion for postconviction relief. Attorney Andrew Hinkel 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, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of Jones's pleas and sentences. Jones was sent a copy of the report, and has filed a response challenging the use of a COMPAS report at his sentencing. 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. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Jones entered his pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Jones's pleas, the State agreed to dismiss additional charges of theft and criminal damage to property. Taking into account penalty enhancers on those counts, the plea agreement reduced Jones's sentence exposure by twelve years.

The circuit court conducted a plea colloquy, inquiring into Jones's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Jones's understanding of the nature of the charges, the penalty ranges and other direct consequences of

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

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 Jones understood that it would not be bound by any sentencing recommendations, and could sentence Jones up to the maximum penalties of 46 years on the arson count and 18.5 years on the burglary count, plus fines. In addition, Jones provided the court with a signed plea questionnaire. Jones 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).

The facts acknowledged by Jones at the plea hearing, in addition to those set forth in the complaint, provided a sufficient factual basis for the pleas. Jones admitted his status as a repeat offender in open court. We see nothing in the record to suggest that counsel's performance was in any way deficient, and Jones has not alleged any other facts that would give rise to a manifest injustice. Therefore, Jones's pleas were valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Jones'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 Jones was afforded an opportunity to comment on the PSI, to present an alternative 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 offense, the court observed that the loss of irreplaceable items and meeting space for church-run groups far exceeded the mere financial loss caused by the arson. With respect to Jones's character, the court emphasized that Jones had committed the current offense while on supervision for his most recent burglary conviction, and that four prior prison terms for burglary had not deterred Jones's criminal conduct. The court viewed Jones as a poor candidate for rehabilitation "[u]nless and until [he could get to] a point in the process where [he could] understand that life is about more than getting drunk tonight or high tomorrow, that there is something beyond tomorrow that's worth planning for."

Although the PSI included information from a COMPAS report, neither the parties nor the court made any reference to the report or its actuarial risk predictions at sentencing. Moreover, the Wisconsin Supreme Court has recently rejected arguments such as Jones raises, that use of a COMPAS report automatically violates a defendant's rights to be sentenced based upon accurate information, to have an individualized sentence, and to be sentenced without consideration of gender. ***State v. Loomis***, 2016 WI 68, ¶¶34-35, 65-66, 72-74, 86, 371 Wis. 2d 235, 881 N.W.2d 749.

The court then sentenced Jones to ten years of initial confinement and seven years of extended supervision on the arson count, and to five years of initial confinement and four years of extended supervision on the burglary count. The court determined that no sentence credit was due because the sentences were being imposed consecutive to a revocation sentence already being served; it ordered restitution in the amount of $6,498 to be taken out of 25% of Jones's prison wages, after he finished paying on prior cases; and it imposed standard costs and

conditions of supervision. The judgment of conviction reflects that the court determined that Jones was eligible for the challenge incarceration program and the substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges and the total imprisonment period constituted about 40% of the maximum exposure Jones faced. *See* WIS. STAT. §§ 943.02(1)(a) (classifying arson of a building as a Class C felony); 943.10(1m)(a) (classifying burglary of a building as a Class F); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony); 973.01(2)(b)6m and (d)4. (providing maximum terms of seven-and-a-half years of initial confinement and five years of extended supervision for a Class F felony); 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)(c)1. (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 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). That is particularly true when taking into consideration the amount of additional sentence exposure Jones avoided on the read-in offenses, and the fact that the court did not utilize the penalty enhancers.

Jones filed a postconviction motion alleging that he was sentenced based upon inaccurate information because the court's comments at sentencing that Jones had failed "five for five" times could be interpreted to mean that Jones had been previously revoked on five separate occasions, when in actuality he had been revoked on five counts, but on only two separate occasions. The court clarified that the gist of its statements was that every time Jones had been given an opportunity on supervision, it was taken away based upon his own behavior. Moreover, the court noted that the context for its statement was to observe that the court could be justified in imposing a longer sentence than it actually did. Based upon the court's comments, it is clear that Jones's sentence was not based upon inaccurate information.

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 and postconviction order 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 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