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

July 31, 2017

To:

Hon. Joseph G. Sciascia
Circuit Court Judge
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Gilbert G. Thompson
Assistant District Attorney
Dodge Co. Justice Facility
210 W. Center St.
Juneau, WI 53039-1056

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Kara L. Mele
Asst. State Public Defender
P. O. Box 7862
Madison, WI 53707-7862

Marvin K. Smith 478078
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:

2016AP37-CRNM State of Wisconsin v. Marvin K. Smith (L.C. # 2011CF131)

Before Lundsten, 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).

Marvin Smith appeals an amended judgment convicting him of battery by a prisoner and an order denying his motion for postconviction relief. Attorney Kara Mele has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[1] *see also*

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

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 Smith's plea and sentence. Smith 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, 249-50, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

At a pretrial hearing on motions in limine, Smith withdrew a plea of not guilty by reason of mental disease or defect (NGI). The court conducted a colloquy to ensure that Smith's withdrawal of his NGI plea was knowing and voluntary. The court noted that a doctor's report filed by a court appointed expert had found no basis for an NGI plea, and that defense counsel had obtained a second opinion, which had not been filed with the court.

Smith subsequently entered a no contest plea pursuant to a negotiated plea agreement that was reduced to writing and filed in court. In exchange for Smith's plea to one count of battery by a prisoner, the State agreed to dismiss a penalty enhancer on that count and to dismiss and read-in two additional sentence-enhanced battery charges on this case as well as charges of disorderly conduct and bail jumping in another case, and to cap its sentencing recommendation

at eighteen months of initial confinement and thirty-six months of extended supervision, to be served consecutive with the sentence Smith was already serving on another case. The plea agreement reduced Smith's sentence exposure by twenty-four years on this case alone.

The circuit court conducted a plea colloquy, inquiring into the defendant's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring the defendant'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. In addition, Smith provided the court with a signed plea questionnaire. Smith indicated to the court that he had gone over the form with his attorney and he is not claiming to have misunderstood anything on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987).

Because Smith refused to admit that the State could prove the charged crime, the court treated his plea as an Alford plea, and made an explicit finding that there was sufficient evidence to convict if the matter went to trial. The facts set forth in the complaint—namely, that Smith had punched three correctional officers following a dispute about a warning card that had been issued to Smith earlier in the day—were supported by surveillance video of the incident and provided a factual basis for the plea. Although Smith indicated general dissatisfaction with how his attorney was handling his case, he did not allege any specific misconduct and there is nothing in the record to suggest that counsel's performance was in any way deficient. Smith has not alleged any other facts that would give rise to a manifest injustice. Therefore, Smith's plea was 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 Smith's sentence 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 Smith was afforded an opportunity 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 crime was serious because it involved violence causing pain and injury, with blood drawn and more than one victim. With respect to Smith's character, the court acknowledged that Smith had mental health issues and that one of the correctional officers may have made a provocative statement to Smith, and the court gave Smith credit for taking advantage of job training opportunities. However, the court was concerned that Smith had fifteen conduct reports, indicating that he was simply unable to control his behavior. The court identified the goals of the sentencing in this case as the need to protect the public—particularly noting that correctional officials must be able to do their jobs without being assaulted, and the need for punishment beyond the disciplinary penalties Smith had already received.

The court then sentenced Smith to twelve months of initial confinement and twenty-four months of extended supervision. The court awarded fourteen days of sentence credit, which was reflected in an amended judgment following a postconviction hearing on sentence credit. The court determined that the Smith was not eligible for the challenge incarceration program or the substance abuse program because the offense involved violence.

Although the court did not mention the issue at the initial sentencing hearing, the judgment of conviction included the imposition of a mandatory DNA surcharge. Smith filed a postconviction motion seeking to vacate the surcharge, arguing that its imposition constituted an ex post facto violation because: (1) the law in effect when Smith committed his offense made the imposition of a DNA surcharge for a non-sexual felony discretionary, not mandatory; and (2) Smith had previously provided a DNA sample and paid the surcharge. The circuit court erroneously rejected Smith's ex post facto argument. *See* ***State v. Williams***, 2017 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___. However, the court also stated that, if it had exercised its discretion, it would still have imposed the surcharge because Smith committed a violent offense, and the surcharge would support the public interest in building a DNA data base for violent criminals. Given that the remedy for the erroneous imposition of a mandatory DNA surcharge would have been a remand for the court to exercise its discretion, and that court has already indicated at a postconviction hearing how it would have exercised its discretion, we see no arguable basis for further relief on this issue.

The components of the bifurcated sentence were within the applicable penalty ranges and the total imprisonment period constituted half of the maximum exposure Smith faced. *See* WIS. STAT. §§ 940.20(1) (classifying battery by a prisoner 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).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here, which constituted half of the total imprisonment Smith faced, was 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

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