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 III/IV

January 22, 2018

To:

Hon. Steven P. Anderson
Circuit Court Judge
311 Miner Avenue East
Ladysmith, WI 54848

Lori Gorsegner
Clerk of Circuit Court
Rusk County Courthouse
311 Miner Avenue East
Ladysmith, WI 54848

Annette M. Barna
District Attorney
311 Miner Avenue East, Ste. L327
Ladysmith, WI 54848

Melissa M. Petersen
Petersen Law Firm, L.L.C.
P.O. Box 100
Hager City, WI 54014

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

Chad M. Griffith 370790
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2016AP283-CRNM State of Wisconsin v. Chad M. Griffith (L.C. # 2013CF2)

Before Blanchard, Kloppenburg and Fitzpatrick, 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).

Chad Griffith appeals judgments convicting him of arson of property other than a building and burglary of a motor home. Attorney Melissa Petersen has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[1] *see also* ***Anders***

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

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 a suppression motion, counsel's performance, Griffith's pleas and his sentences. Griffith was sent a copy of the report and has filed several responses alleging over a dozen additional issues, many of which overlap, including claims of incompetency and judicial bias, as well as multiple challenges to his pleas and sentences. For clarity, we have rearranged Griffith's proposed issues and integrated those also addressed by counsel into counsel's framework for our discussion below. Upon reviewing the entire record, as well as the no-merit report, Griffith's responses and a supplemental no-merit report that counsel filed to address Griffith's additional claims, we conclude that there are no arguably meritorious appellate issues.

Competence to Proceed

One of Griffith's primary assertions—that the prison where he is currently housed has determined that he has severe mental health problems—could be interpreted as an argument that Griffith was not competent to proceed. Twice during the pendency of the case, the circuit court directed the Department of Health Services to conduct a mental examination of Griffith to evaluate his competence to proceed. Dr. Donna Minter, a licensed psychologist of the Wisconsin Forensic Unit, performed both examinations.

In her initial report, Minter observed that Griffith presented as "fully oriented" and that he demonstrated the "capacity to engage in sustained coherent dialog regarding his legal situation." Minter also noted that Griffith's scores on an administered Test of Memory Malingering (TOMM) suggested that Griffith was attempting to feign cognitive and memory deficits during the evaluation, and Minter was further persuaded that Griffith was malingering

during the evaluation because he demonstrated no difficulty remembering facts related to his personal or health history, in contrast to his purported inability to remember information related to the offenses or legal proceedings. Minter concluded that Griffith was competent to assist with his defense.

Minter's second evaluation confirmed her earlier determination that Griffith was competent to proceed. Just prior to entering his pleas, Griffith advised the circuit court that he accepted Minter's reports and believed himself to be competent. In addition, the circuit court noted that Griffith had sent multiple pro se letters to the court demonstrating his grasp of various legal issues and the proceedings.

The circuit court was entitled to rely on Minter's evaluations and its own observations of Griffith's abilities, and Griffith has presented no subsequent evaluation or report from defense counsel, a mental health professional, a prison official or anyone else that would contradict Minter's conclusion that Griffith was able to assist with his defense. Therefore, there is no arguably meritorious basis for Griffith to challenge his competence to proceed.

Conflict of Interest or Judicial Bias

Griffith asserts that the circuit court judge had a conflict of interest because he had served as the D.A. on some of Griffith's prior cases, and that he exhibited bias by telling Griffith to get out of the county or he would "burn him bad," raising a potential issue as to whether the judge should have disqualified or recused himself. *See generally* WIS. STAT. § 757.19 (judicial disqualification); ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385 (due process requires an impartial tribunal).

As to the conflict of interest claim, the Wisconsin Statutes set forth a number of objective criteria according to which a judge is required to disqualify himself or herself from hearing a matter, including when the judge is related to a party or counsel or their spouse; when the judge is a party or material witness in the case (unless the pleading purporting to establish that connection is a sham); when the judge previously acted as counsel to any party in the same action or proceeding; when the judge prepared as counsel any legal instrument or paper whose validity or construction is at issue; when the judge previously handled the same action or proceeding while a member of an inferior court; or when a judge has a significant financial or personal interest in the outcome of the matter (beyond being a member of a political or taxing body). WIS. STAT. § 757.19(2)(a)-(f). Having served as a D.A. on a *prior* case involving one of the parties is not a statutory ground for disqualification.

Under another subsection of the statue, a judge also shall disqualify himself or herself from any civil or criminal action or proceeding when the judge "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." WIS. STAT. § 757.19(2)(g). However, a judge's determination as to whether he or she can, or believes it appears that he or she can, act impartially can only be determined subjectively by the judge. ***State v. American TV Appliance of Madison, Inc.***, 151 Wis. 2d 175, 182-83, 443 N.W.2d 662 (1989). Since the judge here made no such determination, that subsection of the statute has no application here.

As to Griffith's claim that the circuit court judge made a comment reflecting bias, we note that "[a] challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter." ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). The record before us does not

show any point in the proceedings where Griffith filed a motion for the judge to disqualify or recuse himself, or even asserted that the judge had made the comment Griffith is now asserting that the judge made. Therefore, the issue is not preserved for an appeal.

Suppression Issues

Griffith gave a statement admitting that he had set fire to a neighbor's mobile home and a shed containing an ATV. Griffith now makes a series of assertions relating to a motion that he filed to suppress that statement, alleging: that he was coerced into saying that he burned the trailer down; that he was intoxicated when the police read him his rights and he did not understand them; and that an investigator used emotional tactics about abuse Griffith had suffered at the hands of his parents to break him down. However, the circuit court rejected each of these assertions following a suppression hearing and after viewing a DVD of Griffith's interview. The circuit court determined that Griffith was not confused during the interview and had no problem understanding his rights as provided; that there was nothing about the length of the interview, the conditions under which it took place, or the demeanor or tactics of the interviewer that was improper, coercive, or unduly suggestive; and that Griffith's ADHD did not prevent him either from understanding the questions he was being asked or from being able to resist law enforcement efforts to induce him to make a statement. Because the circuit court's determination that Griffith's statement was voluntary was based upon a determination of his credibility at the suppression hearing, as well as upon factual findings that were supported by the DVD and are not clearly erroneous, Griffith has no arguably meritorious basis to challenge the circuit court's ruling that Griffith's statement was admissible.

In this appeal, Griffith makes an additional assertion that the police had no warrant to search his father's property. In addition to the fact that it does not appear that Griffith preserved this issue in the circuit court, Griffith has not provided any explanation as to where or when his father's property was searched, whether his father gave consent, what was found on the property, and what privacy interest Griffith had in his father's property. Therefore, Griffith's assertion about the lack of a search warrant is conclusory and does not provide an arguably meritorious ground for appeal.

Assistance of Counsel

Griffith was represented by a succession of four different trial attorneys.

Griffith's first attorney, Erika Bahnson, withdrew early on after Griffith complained about her failure to return his mother's calls and to keep him updated about his case. Griffith does not assert that Bahnson's alleged lack of communication in the first few weeks of the case while Griffith was undergoing his first competency examination had any impact on the ultimate disposition of the case, and we see no such impact. Therefore, any alleged errors that Bahnson might have made would be harmless.

Griffith's second attorney, Stephen Willett, withdrew after Griffith purportedly lost confidence in him because he refused to file motions that Griffith wanted to pursue and because the State filed a preemptory ***Ludwig*** motion that caused Griffith to question whether Willett had informed him of all plea negotiations. *See* ***State v. Ludwig***, 124 Wis. 2d 600, 369 N.W.2d 722 (1985) (decision whether to accept a plea or go to trial belongs to the defendant). Although Griffith does not explicitly renew his complaints against Willett on this appeal, it appears from

the record that the main disagreement between Griffin and Willett may have been over whether to pursue a defense that Griffith was not guilty by reason of mental disease or defect (NGI).

Griffith asserts in one of his responses that he had been found NGI on a prior case. However, licensed psychologist Harlan Heinz examined Griffith pursuant to a court order and determined that Griffith was able to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law at the time the offenses in this case were committed. The fact that Griffith may have been unable to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law during a different time period related to a different case does not provide a defense in this case. Since Griffith did not have an expert opinion or other factual basis to assert an NGI claim at the time the offenses in this case were committed, Willett did not provide ineffective assistance by failing to pursue an NGI defense on Griffith's behalf.

Because the circuit court allowed Willett to withdraw, it never held an evidentiary hearing on whether Willett had properly advised Griffith about all plea offers. However, since the State merely wanted to make a record that all plea offers had been conveyed, there is no actual allegation in the record that Willet failed to convey any plea offer.

Griffith's third attorney, John Bachman, withdrew after Griffith accused him of coercing him into entering pleas. We will address that claim in our discussion below of Griffith's plea withdrawal motion.

Griffith's fourth attorney, Terry Nussberger, represented him at sentencing. Griffith alleges that Nussberger never told him about his COMPAS report. However, Griffith does not allege (much less provide documentation to show) that any material in the COMPAS report was

inaccurate. Again, even assuming for the sake of argument that counsel did not fully explain the COMPAS report to Griffith, we see no prejudice from counsel's alleged failure.

Finally, Griffith alleges that his postconviction and appellate attorney, Melissa Petersen, should have had a boot print recovered from the crime scene that state investigators linked to Griffith's boot tested against the boots of his brother, Chris Schellenberger. This claim lacks arguable merit for several reasons. To begin with, Griffith had already waived any defense to the charges by entering his pleas before Peterson was representing Griffith. Furthermore, in order to support a claim of ineffective assistance, Griffith would need to prove prejudice by showing that the results of testing Schellenberger's boots would have been advantageous to the defense. Griffith has not alleged that any testing of Schellenberger's boots has been performed. Additionally, we note that Griffith told the PSI author that Schellenberger had borrowed Griffith's boots, which would not have provided postconviction counsel with any reason to seek testing of Schellenberger's boots.

Plea Withdrawal

Griffith entered his pleas pursuant to a negotiated plea agreement that was reduced to writing on a case settlement form and also presented in open court. In exchange for Griffith entering no contest or ***Alford*** [2] pleas on one count of arson of property other than a building and one count of burglary of a motor home or trailer, the State agreed to enter into a deferred prosecution agreement on a more serious felony charge of arson to a building, to dismiss outright

[2] In ***North Carolina v. Alford***, 400 U.S. 25, 26-27 (1970), the United States authorized a defendant to enter a plea even while maintaining actual innocence.

a charge of criminal damage to property, and to make a joint recommendation for five years of initial incarceration and five years of extended supervision.

The circuit court conducted a thorough plea colloquy, inquiring into Griffith'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; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court made sure Griffith understood that it would not be bound by any sentencing recommendations. In addition, Griffith provided the court with a signed plea questionnaire, and Griffith indicated to the court that he had gone over the form with counsel and understood the information on it. *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 and in the transcript of Griffith's statement to the arson investigator provided a sufficient factual basis for both counts of conviction. Thus, the record demonstrates that the circuit court fulfilled all of its duties before accepting Griffith's pleas.

Griffith submitted a hand-written letter to the circuit court the same day he entered his ***Alford*** pleas, asking to dismiss the charge of burglary to a building that was the subject of the deferred prosecution agreement for a lack of a factual basis and to enter "a second NGI plea" on the other counts. One week later, Attorney John Bachman moved to withdraw, asserting that he had a conflict of interest because Griffith was also seeking to withdraw his pleas based upon alleged ineffective assistance of counsel.

At a hearing on counsel's withdrawal motion, Griffith alleged that Bachman had coerced him into entering the pleas, and further complained that he did not understand (and did not have the ability to comply with) a requirement in the deferred prosecution agreement that he pay a minimum of $250 per month toward restitution. However, Griffith also stated that he did not really want to withdraw his plea, but rather to reduce his restitution payments. The circuit court denied Griffith's request to modify the deferred prosecution agreement, but advised Griffith that an inability to pay the required amount of restitution would be a defense to an alleged violation of the deferred prosecution agreement, and that Griffith could challenge the amount of restitution owed at a restitution hearing. The court took Bachman's withdrawal motion under advisement, expressing reluctance to allow counsel to withdraw if the State Public Defender would not appoint successor counsel.

Bachman subsequently filed a plea withdrawal motion on Griffith's behalf, alleging that Griffith had entered his pleas due to pressure from Bachman; Griffith did not understand the legal rights he was forfeiting; he was insane at the time of the offenses and could not have formed criminal intent; and he had changed his mind about the settlement agreement.

A defendant may withdraw a plea prior to sentencing upon showing any fair and just reason for his change of heart beyond the simple desire to have a trial, so long as the prosecution has not been substantially prejudiced by reliance on the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995); ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264 (Ct. App. 1989). In deciding whether to allow a defendant to withdraw a plea, the circuit court may assess the credibility of the proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or

patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

Griffith's challenge to the factual basis for the arson to a building plea was based upon an assertion that "the trailer that burned down was on wheels." This issue is not technically before us because no final judgment has been entered on that charge (and will not be if the deferred prosecution agreement is fulfilled).

We could construe Griffith's challenge to the arson to a building charge as a claim that the entire plea deal was unfair or that counsel provided ineffective assistance by failing to have the charge dismissed. Any such claim would depend upon the proposition that a mobile home is not a "building" within the meaning of WIS. STAT. § 943.02. However, although the statute does not expressly define the term "building," the Wisconsin Supreme Court has previously determined that it was harmless error for a circuit court to advise a jury that a mobile home is a building, because no rational jury could conclude otherwise. ***State v. Kuntz***, 160 Wis. 2d 722, 740, 467 N.W.2d 531 (1991). In light of ***Kuntz***, the fact that the trailer at issue here was on wheels did not constitute a defense to a charge of arson to a building; counsel did not provide deficient performance by failing to challenge the charge on that basis; and the plea deal was not unfair because it included a deferred prosecution agreement for that charge.

As to whether the pleas on the counts of conviction were knowing and voluntary, Griffith testified at a plea withdrawal hearing that Bachman had coerced him into entering his pleas by telling him that the judge was going to "stick a big dick up [Griffith's] ass" if Griffith didn't accept the plea deal; that Bachman had never told him that the initial incarceration would be in

prison rather than jail; that Bachman never told him he would need to pay $250 a month in restitution under the deferred prosecution agreement; and that Bachman never told him that the purpose of a preliminary hearing was to present evidence. Bachman testified that he had gone over the charges, Griffith's rights, and the deferred prosecution agreement with Griffith, and he denied having made the statement Griffith attributed to him about what the judge would do if Griffith did not accept the plea. Bachman said he advised Griffith to take the deal because, in counsel's opinion, Griffith did not have a very good case if the matter went to trial.

The circuit court determined Bachman to be more credible than Griffith and made factual findings that Attorney Bachman never made the statement Griffith attributed to him or otherwise coerced Griffith into entering the pleas, and that Griffith fully understood what he was doing when he entered his pleas. The court concluded that the actual motivation for the plea withdrawal request was buyer's remorse about the terms of the deferred prosecution agreement and dissatisfaction that Griffith could not get a better deal.

Given the circuit court's credibility determinations and factual findings, Griffith has no arguable basis to challenge his pleas on appeal. Therefore, Griffith's pleas were valid and operated to waive all nonjurisdictional defects and defenses, aside from the suppression ruling discussed above. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10). In particular, this means that Griffith is barred from raising any issues he mentions in his responses related to his waiver of a preliminary hearing; a substantial delay in the arraignment and filing of the information; or any potential defenses to the charges, including NGI and actual innocence.

Sentences

A challenge to Griffith'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 Griffith was afforded an opportunity to comment on the PSI and to present witnesses if he wished to do so, and that he addressed 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 noted that fire fighters were placed at risk in responding to the fire, and that the victims lost a sense of security as well as sentimental items that could not be replaced. With respect to Griffith's character, the court noted that Griffith had a lengthy criminal history and had been revoked five of the six times he had been placed on probation. The court acknowledged that Griffith had significant mental health issues, but also emphasized that he was utterly incapable of taking responsibility for his actions.

The court then adopted the joint recommendation of the parties and sentenced Griffith to five years of initial confinement and five years of extended supervision on the burglary count, and to a concurrent sentence of one and a half years of initial confinement and two years of extended supervision on the arson count. The court also awarded 806 days of sentence credit; ordered restitution in the amount of $40,000; imposed an AODA assessment and mental health

treatment as conditions of supervision; directed Griffith to provide a DNA sample and pay a DNA surcharge; and determined that Griffith was eligible for the challenge incarceration program and the earned release program.

We note that the judgments of conviction fail to conform to the circuit court's pronouncement of sentence in two regards. First, each judgment includes a repeater allegation in the description of the offense, when the circuit court acknowledged at the sentencing hearing that no repeater allegations had been filed. Second, the circuit court referred to a DNA sample and surcharge in the singular. It did not state that it was imposing multiple surcharges. Therefore, the judgements of conviction should be amended to correct the clerical errors. As amended, there is no potential issue arising from the imposition of multiple DNA surcharges without having advised Griffith of that penalty.

Griffith contends that his sentence was "wrong." However, the components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.03 (classifying arson of property other than a building as a Class I felony); 973.01(2)(b)9. and (d)6. (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony); 943.10(1m)(e) (classifying burglary of a motor home as a Class F felony); and 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). Furthermore, the court imposed a sentence in accordance with the defendant's own recommendation. *See* ***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).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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 both judgments of conviction shall be amended to remove the repeater allegations, and the DNA surcharge shall be removed from the conviction for arson of property other than a building.

IT IS FURTHER ORDERED that, as amended, 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 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
Acting Clerk of Court of Appeals