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January 4, 2019

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

2017AP2150-CRNM State of Wisconsin v. James C. Misleveck (L.C. # 2012CF138)

Before Sherman, 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).

Attorney Suzanne Edwards, appointed counsel for James C. Misleveck, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether

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

there would be arguable merit to a challenge to Misleveck's plea or sentencing. Misleveck was sent a copy of the report, and has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel that there are no issues of arguable merit. We affirm.

In August 2012, Misleveck was charged with kidnapping, operating a motor vehicle without the owner's consent, theft of a firearm, armed carjacking, and armed robbery, all as a party to a crime and as a repeater, and escape and second-degree recklessly endangering safety, both as a repeater. Pursuant to a plea agreement, Misleveck pled no contest to kidnapping and theft of a firearm, both as a party to a crime, and escape, all as a repeater; the remaining charges were dismissed and read in for restitution purposes; the State agreed not to pursue uncharged offenses from another county; and the parties agreed to jointly recommend a total sentence of twenty-five years, concurrent to Misleveck's federal sentence. The court sentenced Misleveck to a total of fifty-six years of imprisonment, with thirty-five years of initial confinement and twenty-one years of extended supervision. The court imposed the sentence concurrent with Misleveck's fifteen-year federal sentence, resulting in twenty years of initial confinement beyond his federal sentence.

Misleveck successfully sought resentencing due to the prosecutor's breach of the plea agreement at sentencing. He was then resentenced before a different judge. The resentencing court imposed a total of fifty-eight years of imprisonment, with thirty-seven years of initial confinement and twenty-one years of extended supervision. The court imposed Misleveck's two sentences for theft and escape concurrent with each other and concurrent with Misleveck's federal sentence. However, it imposed Misleveck's sentence for kidnapping—twenty-five years of initial confinement and fifteen years of extended supervision—consecutive to Misleveck's

federal sentence. Thus, under the resentencing, Misleveck received twenty-five years of initial confinement beyond his federal sentence.

The no-merit report addresses whether there would be arguable merit to a challenge to Misleveck's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice such as ineffective assistance of counsel, a plea that was not knowing, intelligent, and voluntary, or lack of a factual basis to support the plea. *State v. Krieger*, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Here, nothing before us would support a non-frivolous claim that plea withdrawal is necessary to correct a manifest injustice. There is nothing before us indicating that Misleveck received ineffective assistance of counsel. The circuit court conducted a plea colloquy that, together with the plea questionnaire that Misleveck signed, satisfied the court's mandatory duties to personally address Misleveck and determine information such as Misleveck's understanding of the nature of the charge and the range of punishments he faced,² the constitutional rights he waived by

² The court mistakenly stated that the two class H felonies, theft and escape, could be increased by six years based on the repeater allegation. In fact, the class H felonies could be increased by four years, as stated in the information and indicated on the plea questionnaire. See WIS. STAT. §§ 943.20(1)(a) and (3)(d), 946.42(3)(a), 939.50(3)(h), and 939.62(1)(b). If the circuit court fails to ensure the defendant understands the potential punishment to which he is subjecting himself by entering a plea, the defendant may move to withdraw his plea. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). However, our supreme court has concluded that where, as here, the sentence communicated to the defendant is higher, but not substantially higher, than that authorized by law, the incorrectly communicated sentence does not constitute a *Bangert* violation and will not, as a matter of law, be sufficient to show that the defendant was deprived of his constitutional right to due process of law. *State v. Cross*, 2010 WI 70, ¶40, 326 Wis. 2d 492, 786 N.W.2d 64.

entering a plea, and the direct consequences of the plea.³ See *State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. The criminal complaint provided a factual basis for the plea. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel’s assessment that a challenge to Misleveck’s plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Misleveck’s sentence on resentencing. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins “with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offenses, Misleveck’s character, and the need to protect the public. See *State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197.

Misleveck argues that the resentencing court punished him for challenging his original sentence by imposing his sentence consecutive to his federal sentence, when the original sentence had been imposed concurrent with his federal sentence. However, there is no presumption of vindictiveness at resentencing when, as here, “the defendant was resentenced by a different judicial authority at his request due to a non-judicial defect at the original sentence

³ The court did not give Misleveck the deportation warning required by WIS. STAT. § 971.08(1)(c), but the court confirmed that Misleveck is a United States citizen. A challenge to the validity of the plea on this basis would be wholly frivolous. See *State v. Fuerte*, 2017 WI 104, ¶41, 378 Wis. 2d 504, 904 N.W.2d 773 (circuit court’s failure to give deportation warning during plea colloquy subject to harmless error analysis).

hearing, and the resentencing was granted by the original court in which the defect occurred.” See *State v. Naydihor*, 2004 WI 43, ¶56, 270 Wis. 2d 585, 678 N.W.2d 220. “[W]here the presumption does not apply, the defendant must affirmatively prove actual vindictiveness.” *Wasman v. United States*, 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984); *Naydihor*, 270 Wis. 2d 585, ¶33, 678 N.W.2d 220. Nothing from the resentencing hearing would support a non-frivolous claim that the resentencing was based on actual vindictiveness. We discern no other basis to challenge the sentence imposed by the circuit court.

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.

IT IS ORDERED that the judgment of conviction is summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Suzanne Edwards is relieved of any further representation of James Misleveck in this matter. See WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals