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DISTRICT IV

Amended January 17, 2019 as to release date
January 9, 2019

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

2017AP2508-CRNM State of Wisconsin v. Desmond M. Murphy (L.C. # 2016CF399)

Before Sherman, Blanchard, and Kloppenburg, 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).

Desmond Murphy appeals a judgment convicting him, after a guilty plea, of one count of possession with intent to deliver cocaine in an amount greater than five grams but less than

fifteen grams, contrary to WIS. STAT. § 961.41(1)(cm)2. (2015-16).¹ Attorney David Karpe has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 *see also Anders v. California*, 386 U.S. 738, 744 (1967); and *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 plea and sentence. Murphy was sent a copy of the report, and has not filed a response. Upon our independent review of 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, 274-75, 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.

Murphy entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Murphy's plea of guilty to one count of possession with intent to deliver cocaine, the State agreed to dismiss four other drug delivery counts. The parties agreed that a presentence investigation report (PSI) would not be requested, since Murphy was sentenced after revocation only three days earlier in Rock County Circuit Court case numbers

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

2010CF2744 and 2012CF736. The parties agreed that the court could consider the revocation summary prepared for those cases. The parties were free to argue as to sentence.

The circuit court conducted a standard plea colloquy, inquiring into Murphy's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his 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. The court made sure Murphy understood that it could impose the maximum penalty. In addition, Murphy provided the court with a signed plea questionnaire. Murphy 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 parties stipulated that the probable cause portion of the complaint provided a sufficient factual basis for the plea. Murphy admitted his status as a repeat offender in open court. Murphy also admitted that the offense he was pleading to took place within 1,000 feet of a school. He indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Murphy has not alleged any other facts that would give rise to a manifest injustice. Therefore, his plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Murphy'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 the court conducted a colloquy with Murphy regarding his decision to waive the right to request a PSI. The court found that Murphy was freely, voluntarily, and intelligently waiving his right to a PSI, and there is nothing in the record or the no-merit report that would support an arguably meritorious argument to the contrary. Murphy also was given the opportunity to address the court personally prior to sentencing, and did so.

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 noted that drug dealing is a dangerous activity and contributes to addiction problems within the community. With respect to Murphy's character, the court considered the fact that he had completed high school and some college and that he had children. The court considered Murphy's lengthy criminal record and the fact that he had prior drug offenses. The court also stated that Murphy had not always been completely truthful about his involvement with drugs and its effects on others. The court withheld sentence and placed Murphy on probation for ten years, to be served consecutive to the sentences he received in Rock County Circuit Court case numbers 2010CF2744 and 2012CF736.

The sentence imposed was within the applicable penalty range. WISCONSIN STAT. § 973.09(2)(b)1. provides that, for a felony, the period of probation must be "not less than one year nor more than either the maximum term of confinement in prison for the crime or 3 years, whichever is greater." Under WIS. STAT. § 961.41(1)(cm)2., intent to deliver cocaine in an amount greater than five grams but less than fifteen grams is a Class E felony. Under WIS. STAT.

§ 973.01(2)(b)5. and (d)4., the maximum term of initial confinement for a Class E felony is ten years of initial confinement and five years of extended supervision. In addition, Murphy faced an additional ten years of imprisonment under the repeater provisions of WIS. STAT. § 961.48(1)(b) and WIS. STAT. § 939.62(1)(c), as well as an additional five years of imprisonment under WIS. STAT. § 961.49(1m)(b)6. because the offense occurred within a thousand feet of a school. There is a presumption that a sentence “well within the limits of the maximum sentence” is not unduly harsh, and the sentence imposed here 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.” *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). In light of all of the above, we conclude that there would be no arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion.

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 is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that David Karpe is relieved of any further representation of Desmond Murphy in this matter pursuant to 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