



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

April 24, 2019

To:

Hon. Nicholas McNamara
Circuit Court Judge
Branch 5
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Catherine Malchow
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Andrea Beth Raymond
Assistant District Attorney
215 S. Hamilton St., Rm. 3000
Madison, WI 53703

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

Marcus A. Thomas 500800
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2018AP949-CRNM State of Wisconsin v. Marcus A. Thomas (L.C. # 2016CF1502)

Before Lundsten, P.J., 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 Catherine Malchow, appointed counsel for Marcus Thomas, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

would be arguable merit to a challenge to Thomas's plea or sentencing. Thomas was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel that there are no issues of arguable merit. We affirm.

In July 2016, Thomas was charged with one count of attempted first-degree sexual assault and one count of obstructing an officer. Pursuant to a plea agreement, Thomas pled guilty to an amended charge of attempted second-degree sexual assault; the State moved to dismiss the obstructing charge; and the State limited its sentencing argument to seven and a half years of initial confinement. The court sentenced Thomas to seven and a half years of initial confinement and seven and a half years of extended supervision, consecutive to a sentence Thomas was currently serving.

The no-merit report addresses whether there would be arguable merit to a challenge to Thomas'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. *See State v. Krieger*, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Thomas signed, satisfied the court's mandatory duties to personally address Thomas and determine information such as Thomas's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *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 Thomas's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Thomas's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial 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 offense, Thomas's character and criminal history, 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. The sentence was within the maximum allowed by law and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is 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" (quoted source omitted)). We discern no 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Catherine Malchow is relieved of any further representation of Marcus Thomas 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