



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 I/IV

January 14, 2013

To:

Hon. Glenn H. Yamahiro
Circuit Court Judge
Children's Court Center, # 2410
10201 Watertown Plank Road
Milwaukee, WI 53226-3532

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

John Richard Breffeilh
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Jeremy C. Perri
Assistant State Public Defender
735 N. Water St., #912
Milwaukee, WI 53203

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Tony Vincent Smith 463778
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2012AP470-CRNM State of Wisconsin v. Tony Vincent Smith (L.C. # 2011CF1099)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Tony Smith appeals a judgment of conviction for second-degree recklessly endangering safety, following a guilty plea. He also appeals an order denying his postconviction motion. Attorneys Jeremy Perri and John Breffeilh have filed a no-merit report seeking to withdraw as

appellate counsel. *See* WIS. STAT. RULE 809.32 (2009-10)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses the validity of Smith's guilty plea and sentencing, and whether there would be arguable merit to a challenge to the court's order denying Smith's postconviction motion to vacate the DNA surcharge. Smith 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's assessment that there are no arguably meritorious appellate issues.

The State charged Smith with one count of misdemeanor battery and one count of second-degree recklessly endangering safety. Pursuant to a plea agreement, Smith pled guilty to the recklessly endangering safety charge, and the battery charge was dismissed but read in for sentencing. The court sentenced Smith to a total of five years, with two years of initial confinement and three years of extended supervision.

First, we agree with counsel that a motion for plea withdrawal would lack arguable merit. After sentencing, a defendant may only withdraw a guilty plea to correct a manifest injustice, such as ineffective assistance of counsel, an involuntary plea, or the prosecutor's failure to follow the plea agreement. *See State v. Krieger*, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication that any such manifest injustice occurred here. The circuit court conducted a plea colloquy in compliance with the requirements set forth in WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court also reviewed the plea questionnaire and waiver of rights form that Smith had signed,

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

establishing that Smith had reviewed the form with his attorney and that Smith understood the form. *See State v. Moerderdorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The State followed the plea agreement at sentencing. We perceive no defect in the guilty plea on the record before us. Thus, 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.

Additionally, we agree with counsel that a challenge to Smith's sentence would lack 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). The court explained that it considered the standard sentencing factors and objectives, including protecting the public, the nature of the offense, and Smith's character. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the applicable penalty range. *See* WIS. STAT. §§ 941.30(2) (providing that second-degree recklessly endangering safety is a Class G felony); 939.50(3)(g) (providing that Class G felonies are punishable by up to ten years of imprisonment and a \$25,000 fine); and 973.01(2) (explaining bifurcated sentence structure). The sentence was well within the maximum Smith faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the circuit court's sentencing discretion.

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court's order denying Smith's postconviction motion to vacate the DNA surcharge. We agree with counsel's assessment that the court's order denying the postconviction motion provided an adequate explanation of the court's decision to impose the DNA surcharge based on

the cost to collect the DNA sample. *See State v. Cherry*, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. We agree with counsel's assessment that a challenge to the circuit court's order denying Smith's postconviction motion would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or the order denying postconviction relief. 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 and the order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeremy Perri and Attorney John Breffeilh are relieved of any further representation of Tony Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

A. John Voelker
Acting Clerk of Court of Appeals