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January 22, 2013

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

2011AP2977-CRNM	State of Wisconsin v. Victoria A. Niemczyk (L.C. # 2009CM25)
2011AP2978-CRNM	State of Wisconsin v. Victoria A. Niemczyk (L.C. # 2009CF187)
2011AP2979-CRNM	State of Wisconsin v. Victoria A. Niemczyk (L.C. # 2009CF191)
2011AP2980-CRNM	State of Wisconsin v. Victoria A. Niemczyk (L.C. # 2009CM196)
2011AP2981-CRNM	State of Wisconsin v. Victoria A. Niemczyk (L.C. # 2009CM202)

Before Higginbotham, Sherman and Blanchard, JJ.

Victoria Niemczyk appeals her judgments of conviction and sentences entered in five cases that were handled together in joint plea and sentencing hearings. Attorney Steven Phillips has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2009-10);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***McCoy v. Wisconsin***

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

Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987). Niemczyk was sent a copy of the report, but has not filed a response. Upon 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.

Niemczyk pled guilty to three counts, as a habitual criminal, of misdemeanor bail jumping and one count of unauthorized use of identifying information (commonly known as identity theft), a felony. At the same plea hearing, Niemczyk also pled no contest to retail theft, obstructing an officer, and two counts of encouraging violation of probation, all as a habitual criminal. Before sentencing, Niemczyk moved to withdraw her pleas. The circuit court denied the motion for plea withdrawal after a hearing. Niemczyk was sentenced to two years of initial confinement and two years of extended supervision for the felony count and to lesser concurrent terms for the misdemeanors.

The no-merit report addresses the validity of Niemczyk's pleas, whether the circuit court properly denied her motion to withdraw her plea, and the validity of the sentences imposed. Our review of the record persuades us that no issue of arguable merit could arise from any of these points.

We first consider whether there is any arguable merit to a claim that Niemczyk's pleas were not freely, voluntarily, or knowingly entered. ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, summarizes a judge's duties during a plea colloquy. With the exception of establishing that Niemczyk understood the range of punishments to which she was subjecting herself by entering her pleas, the circuit court fulfilled each of its duties during the

plea colloquy. The court addressed Niemczyk personally and ascertained her age, education, and understanding of the charges against her. The prosecutor stated the terms of the plea agreement at the beginning of the plea hearing. After initially agreeing to a plea deal in which she would have pled guilty to a charge of felony escape, Niemczyk indicated to defense counsel immediately before the plea hearing that she did not wish to plead to felony escape because she believed it would make her ineligible for the Earned Release Program in prison. The agreement was then renegotiated so that the escape charge would be dismissed, Niemczyk would plead to all of the remaining charges, and both sides would be free to argue the sentence. The court confirmed with defense counsel the new terms of the agreement, and also went through each of the counts with Niemczyk to establish that she understood the nature of the crimes charged.

The court went over with Niemczyk the constitutional rights she would be waiving upon entry of the pleas. The court also ascertained that there was a factual basis for Niemczyk's pleas, relying on testimony from the victim at the preliminary hearing on the identity theft charge and relying on the factual allegations contained in the criminal complaints, as confirmed by defense counsel, as to the other charges. The court also was presented with a plea questionnaire. Niemczyk confirmed that she reviewed the plea questionnaire with her attorney and understood the contents of the questionnaire. Niemczyk stated that she was satisfied with her counsel's representation. The court explained to Niemczyk the direct consequences of her pleas and she confirmed that she understood. Defense counsel stated at the plea hearing that he was satisfied Niemczyk was entering her pleas freely, voluntarily, and of her own will. Niemczyk confirmed this and stated that she was the one who decided to plead guilty or no contest to the charges discussed.

During the plea colloquy, the court explained that it was free to impose any sentence up to the maximum on each count, consecutively. The court did not identify on the record what the penalty range was for each count. The penalties for each offense were accurately stated in the charging documents. The penalties for all the offenses but the obstructing an officer charge also were stated accurately on the plea questionnaire. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794 (plea questionnaire may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken). In the no-merit report, Attorney Phillips states that he had discussed the defect in the plea colloquy with his client, and had concluded that Niemczyk could not make a good faith assertion that she failed to understand the range of punishments she was facing at the time she entered her pleas. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Based upon our review of the record, as well as the information provided by counsel in the no-merit report, we are satisfied that the defect in the plea colloquy does not entitle Niemczyk to withdraw her pleas.

We next consider whether there is any arguable merit to a claim that Niemczyk's motion for plea withdrawal was improperly denied. Niemczyk argued in the motion and accompanying affidavit that, after she had the opportunity to review the discovery and the elements of the charges, she "reconsider[ed]" her decision to enter the guilty and no contest pleas. Niemczyk argued that she initially had believed there to be insufficient evidence to support her innocence, but that she now believed she would be found not guilty if there were a trial. Niemczyk further argued that, since the time of the plea hearing, she had been diagnosed with personality and mood disorders for which she had since begun treatment, and that she had not been thinking clearly at the time she entered her pleas.

On a motion for plea withdrawal, the defendant has the burden of proving the existence of a "'fair and just reason'" for withdrawal by a preponderance of the evidence. ***State v. Canedy***, 161 Wis. 2d 565, 583-84, 469 N.W.2d 163 (1991) (citation omitted). Whether a defendant may withdraw a plea is a discretionary decision of the circuit court. ***State v. Nelson***, 2005 WI App 113, ¶10, 282 Wis. 2d 502, 701 N.W.2d 32. The proffered fair and just reason must be something other than the desire to have a trial or belated misgivings about the plea. ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. Additionally, the circuit court must find the reason credible. ***Id.***, ¶43. In this case, the circuit court denied the motion, and explained its reasons for doing so on the record at the motion hearing. The court concluded that the evidence in the record supported the pleas. The court further stated that, although Niemczyk claimed to have a defense that she believed would prove her innocence on the identity theft charge, she had not provided the court with any information about what that defense might be, nor had she given the court any reason to believe that her mental condition rendered her not competent to enter her plea knowingly, intelligently, and voluntarily at the time it was entered. A circuit court properly exercises its discretion when it employs a logical rationale based on the correct legal principles and the facts of record. ***Kohl v. Zeitlin***, 2005 WI App 196, ¶28, 287 Wis. 2d 289, 704 N.W.2d 586. Nothing in the record or the no-merit report supports a meritorious argument that the circuit court erroneously exercised its discretion in denying the motion for plea withdrawal.

Finally, we conclude that any challenge to the defendant's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or

unjustified 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 Niemczyk was afforded the opportunity to address the court prior to sentencing, and that Niemczyk did so. The circuit court considered the standard sentencing factors and explained their application to this case. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. At the sentencing hearing, the court considered on the record the gravity of the offenses, Niemczyk's character, her rehabilitative needs, prior criminal record, and the safety needs of the community.

The maximum sentence for the identity theft charge, including the habitual criminality enhancer, was seven years of initial confinement and three years of extended supervision. WIS. STAT. §§ 943.201(2)(b); 973.01(2)(b)8; 973.01(2)(c)1; 939.62(1)(b); and 973.01(2)(d)5. The court imposed four years, consisting of two years of initial confinement and two years of extended supervision, and ordered that term to be served consecutive to the prison term Niemczyk was already serving as a result of revocation of probation. For the remaining misdemeanors, all of which included the habitual criminality enhancer, the maximum sentence was two years in prison, including eighteen months of initial confinement. WIS. STAT. §§ 939.62(1)(a) and 973.01(2)(b)10. The court sentenced Niemczyk to concurrent prison terms of one year each. The sentences imposed were within the applicable penalty ranges. There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here were not "so excessive and unusual and so disproportionate to the offense[s] 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. Accordingly, we conclude that any challenge to Niemczyk's sentences would be without merit.

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.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Phillips is relieved of any further representation of Victoria Niemczyk in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals