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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

March 5, 2013

To:

Hon. Sarah B. O'Brien
Circuit Court Judge
215 South Hamilton, Br. 16, Rm. 6105
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Jonathon G. Kaiser
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Jefren E. Olsen
Asst. State Public Defender
P. O. Box 7862
Madison, WI 53707-7862

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

Stanley B. McCoy
1211 Spaight Street
Madison, WI 53703

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

2012AP1900-CRNM State of Wisconsin v. Stanley B. McCoy (L.C. #2011CM2069)

Before Kloppenburg, J.

Stanley McCoy appeals a judgment convicting him of disorderly conduct. Attorney Jefren Olsen has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *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 validity of McCoy's plea and sentence.

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

McCoy was sent a copy of the report, and has filed a response complaining that it was unfair for him to be both fired and charged criminally when the woman with whom he had sexual contact at work was neither fired nor charged. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, the conviction was based upon the entry of a no-contest plea, and 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, 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, 283, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to dismiss a fourth-degree sexual assault charge and to make a joint recommendation for thirty days in jail in exchange for the plea on the disorderly conduct charge. The circuit court conducted a brief plea colloquy exploring the defendant's understanding of the nature of the charge, the penalty, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The court made sure the defendant understood that it would not be bound by any sentencing recommendations. The court also inquired into the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire. McCoy 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 facts set forth in the complaint provided a sufficient factual basis for the plea. The State also explained that there was a Walmart surveillance video showing McCoy having sexual contact with another employee under his supervision. The State acknowledged that the video left room for interpretation as to whether the contact was consensual, but maintained that it plainly established disorderly conduct in that the incident occurred during working hours.

McCoy argues that the charging decision unfairly treated him differently from the woman involved. However, as we have explained, the prosecutor did not believe that the woman had consented to the sexual contact; he merely acknowledged that if the matter went to trial the video could be open to interpretation. More to the point, McCoy's belief that the woman should also have been charged or fired does not provide a legal defense to the disorderly conduct charge against him. In sum, we agree with counsel that the record reveals no basis for a plea withdrawal motion.

A challenge to the defendant's sentence would also lack arguable merit. The sentence was not illegal because the court sentenced McCoy to thirty days in jail on a charge that carried a potential penalty of ninety days in jail. *See* WIS. STAT. §§ 947.01 (classifying disorderly conduct as a Class B misdemeanor); 939.51(3)(b) (providing maximum jail term of ninety days for Class B misdemeanors). Nor can McCoy challenge the circuit court's exercise of discretion because the court followed the parties' joint recommendation. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals