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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 II/IV

March 5, 2013

To:

Hon. John R. Race
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

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

Adam K. Day
N69 W13556 Harding Dr.
Menomonee Falls, WI 53051

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

2011AP2872-CRNM State of Wisconsin v. Adam K. Day (L.C. # 2010CF198)

Before Higginbotham, Sherman and Blanchard, JJ.

Adam Day appeals a judgment of conviction entered after he pled guilty to one felony and two misdemeanors. Attorney Jefren Olsen has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32 (2011-12).[1] The no-merit report discusses whether there would be arguable merit to challenging the plea, the circuit court's denial of Day's suppression motion, or the sentence imposed. Day

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

was sent a copy of the no-merit 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.

GUILTY PLEAS

First, Day has no arguable basis for withdrawing his pleas. A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as evidence that the plea was coerced, uninformed, or unsupported by a factual basis, that counsel provided ineffective assistance, or that the prosecutor failed to fulfill the plea agreement. ***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.

Under the plea agreement, Day agreed to plead guilty to possession of THC, possession of drug paraphernalia, and disorderly conduct, contrary to WIS. STAT. §§ 961.41(3g)(e), 961.573(1), and 947.01 (2009-10). The State agreed to dismiss and read in charges from two separate criminal cases. The parties agreed to make a joint recommendation that the court withhold sentence, place Day on probation for two years, and impose a fine of $500.00. The State followed through on its portion of the plea agreement, and the court followed the joint recommendation. The circuit court conducted a plea colloquy that explored Day's understanding of the charges against him, the constitutional rights he would be waiving, and the maximum terms of imprisonment for each of the offenses. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The parties stipulated to a factual basis for the charges.

In the no-merit report, counsel points out two areas of potential deficiency in the plea colloquy. Counsel correctly notes that the court did not mention the maximum fines available for each offense. However, that information was included in the plea questionnaire that Day signed. *See* ***Hoppe***, 317 Wis. 2d 161, ¶30 (court may use plea questionnaire when discharging its plea colloquy duties). The second potential deficiency is that the court failed to inform Day that it was not bound by the recommendations of any party at sentencing. *See* ***State v. Hampton***, 2004 WI 107, ¶50, 274 Wis. 2d 379, 683 N.W.2d 14. However, the circuit court followed the parties' joint recommendation. Accordingly, any failure to provide the warning under ***Hampton*** would not be grounds for plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶14, 339 Wis. 2d 421, 811 N.W.2d 441. In addition, Day indicated to the court that he understood the information explained on the plea questionnaire, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). There is nothing in the record to suggest counsel's performance was in any way deficient. Thus, Day's pleas were valid and operated to waive all nonjurisdictional defects and defenses, with the statutory exception of a suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

SUPPRESSION MOTION

The second issue addressed in counsel's no-merit report is whether a challenge to the circuit court's denial of Day's suppression motion would have arguable merit on appeal. The suppression motion sought to suppress evidence seized from Day's home on the grounds that the search warrant was invalid and improper. Day alleged that Jeffrey Price, the police officer who prepared the warrant, relied solely on the statements of a single witness, Marlene Markestad, who was not sufficiently reliable. The suppression motion alleged that, on September 26, 2009,

Markestad had made "continual mistaken" calls to the police department, that she had given a "convoluted" witness statement to police on August 30, 2009, and that she had called police when she locked herself out of her trailer on December 28, 2009 and "could not figure out how to get in."

At the time of the incident relevant to this case, Markestad was seventy-nine years old. She is a former neighbor of Day. In the affidavit accompanying the search warrant, Officer Price stated that Markestad called the police department on May 26, 2010, to report that someone had stolen her Oxycodone pills. Markestad called and spoke with Price again the next day to say that she had found her pills. Markestad told police that her friend, Adam Day, had taken the pills and placed them in another container so that nobody would know she had been prescribed pain medication. She stated that Day had filled the original prescription bottle with vitamin C tablets. Based upon this information, Officer Price went to Markestad's home and spoke with her. Markestad stated that Day had possession of her prescriptions, including the Oxycodone, and that he would bring them to her when she needed them.

At an evidentiary hearing on the suppression motion, Day produced testimony that Markestad was sometimes forgetful and, in the past, had called the police over minor things. Day's attorney argued that the warrant was not supported by probable cause because Officer Price knew, or should have known, that Markestad was not reliable and, thus, he should not have relied solely on her statements to seek the warrant. The circuit court denied the suppression motion. The court concluded that Markestad's complaint was from a citizen informant, that Officer Price was entitled to take her complaint at face value, and that her story was corroborated when Officer Price went to Markestad's home.

When challenging a search warrant, the burden is on the defendant to prove insufficient probable cause. ***State v. Schaefer***, 2003 WI App 164, ¶5, 266 Wis. 2d 719, 668 N.W.2d 760. We agree with Day's counsel that Day failed to meet that burden. There was no evidence of Markestad's "[c]ontinual mistaken calling" of the police department in September 2009. At most, a neighbor testified that Markestad made frequent calls to the police for an ambulance, but there was no evidence to support a conclusion that those calls were "mistaken" as opposed to possibly unwarranted under the circumstances. The record also does not contain any evidence that Markestad made "convoluted witness statements" to the police in August 2009. Rather, the evidence showed that Markestad had made a prior complaint against Day, in August 2009, but ultimately "retracted" the complaint by asking police not to pursue it, as she and Day had worked the matter out. Finally, while there was some evidence that Markestad locked herself out of her trailer on one occasion, there was no evidence that she "could not figure out how to get in." Because the record does not contain sufficient evidence to support the allegations of Markestad's incredibility and unreliability in Day's suppression motion, we agree with his counsel that a challenge to the court's ruling on the motion would be without arguable merit.

SENTENCE

Finally, we conclude that any challenge to Day's sentence likewise would be without arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record does not contain the circuit court's reasoning for its sentence. Rather, the court simply accepted the joint sentencing recommendation of the parties. When a defendant affirmatively joins or approves a sentence recommendation, the defendant cannot

attack the sentence on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

In any event, it cannot be argued that Day's sentence was harsh or excessive. For the two misdemeanors, the circuit court withheld sentence and ordered two years of probation, to be served concurrently. Ordinarily, probation for the misdemeanors of disorderly conduct and possession of drug paraphernalia is not to exceed one year, but the fact that Day was convicted of two misdemeanors at the same time allowed the court to impose up to two years of probation, pursuant to WIS. STAT. § 973.09(2)(a)1r. and 2. (2009-10). Therefore, the sentence for the misdemeanors was within the statutory limits.

The sentence imposed for the felony charge of possession of marijuana was also well within the statutory limits. The court imposed two years of probation, concurrent with the two years imposed for the misdemeanors. The court also imposed ninety days of jail time with eighty-five days of credit, and a fine of $500.00. Possession of THC is a Class I felony when the conviction is a second or subsequent offense. *See* WIS. STAT. §§ 961.41(3g)(e) and 939.50(3)(i) (2009-10). Day admitted prior convictions of possession of THC and cocaine. Accordingly, he faced a maximum initial confinement period of one year and six months, and maximum extended supervision period of two years. *See* WIS. STAT. § 973.01(2)(b)9. and (2)(d)6. (2009-10). 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 offenses committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See generally* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

CONCLUSION

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***, 386 U.S. at 744, and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Jefren Olsen is relieved of any further representation of Adam Day in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals