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DISTRICT IV

March 11, 2013

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

2012AP2541-CRNM State of Wisconsin v. Devore O. Bell (L.C. #2011CF1372)

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

Devore Bell appeals related judgments convicting him of armed robbery and misdemeanor battery while armed and as a repeat offender. Attorney Gina Bosben 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-

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

merit report addresses the validity of the pleas, counsel's performance, and a number of potential sentencing issues. Bell 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 conclude that there are no arguably meritorious appellate issues.

First, 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. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & 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 charge of felon in possession of a firearm and a sentence enhancer on the armed robbery charge in exchange for the pleas and to cap its recommendation for initial confinement at ten years, and the State followed through on that agreement. The circuit court conducted a brief plea colloquy exploring Bell's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, 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. In addition, the record includes a signed plea questionnaire, which the court used to supplement its colloquy. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Bell indicated to the court that he had no questions about the information explained on that form, and is not now claiming that he misunderstood anything on it.

The facts set forth in the complaint provided a sufficient factual basis for the pleas, and Bell admitted his status as a repeat offender in open court. Bell indicated that he had sufficient time to consult with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Bell has not alleged any other facts that would give rise to a manifest injustice. Therefore, Bell's pleas were 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.

A challenge to Bell's sentences would also lack arguable merit. Our review of a sentence determination begins with the "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable 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). Here, the record shows that Bell was afforded an opportunity to comment on the PSI and to present an alternate PSI, to present three character witnesses, and to address the court both personally and by counsel. The court also explicitly stated that it would not consider a factor suggested by the prosecutor regarding whether Bell's consideration of an alibi defense indicated a failure to accept responsibility, out of concern that it would penalize him for asserting his constitutional rights.

The court proceeded to consider the standard sentencing factors and explained their application to this case.[2] ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court acknowledged that Bell was motivated

[2] Counsel notes that the circuit court did not consider the sentencing guidelines. However, in ***State v. Barfell***, 2010 WI App 61, ¶¶4, 14, 324 Wis. 2d 374, 782 N.W.2d 437, this court held that the abolition of the sentencing guideline commission by 2009 Wis. Act 28 § 3386m (eff. July 1, 2009) rendered any failure to consider the guidelines moot.

more by anger at a false accusation the victim had made against him than a desire to steal, but was concerned that there were other people present in the hotel room when Bell confronted the victim with a gun. With respect to Bell's character, the court noted that Bell had two parts to him: a basically decent side that was reflected in the way he raised his younger brother, and "this ugly part that comes out from time to time." The court also noted that past rehabilitation attempts had failed. The court concluded that a prison term was necessary to protect the public and to help Bell pass the threshold of wanting to make changes in his life and actually making those changes.

The court then sentenced Bell to nine years of initial confinement and eight years of extended supervision on the armed robbery count, with a concurrent one-year term on the battery charge. It also ordered restitution in an amount to be determined, imposed standard costs and conditions of supervision, directed Bell to provide a DNA sample but waived the fee, and determined that Bell was eligible for the substance abuse treatment and earned release programs.

The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.32(2) (classifying armed robbery as a Class C felony); 939.50(3)(c) (providing maximum imprisonment term of 40 years for Class C felonies); 940.19(1) (classifying battery as a Class A misdemeanor); 939.51(3)(a) (providing maximum jail term of 9 months for Class A misdemeanors); 939.63(1)(a) (increasing penalty by six months for use of a dangerous weapon); and 973.01 (explaining bifurcated sentence structure) (all 2009-10 statutes). The sentences were not "'so excessive and unusual and so disproportionate to the offense committed'" as to be unduly harsh—particularly since they were less than that requested by the State and the court did not even invoke the enhancer for habitual criminality. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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 judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gina Frances Bosben is relieved of any further representation of Devore Bell in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals