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March 22, 2013

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

2011AP961-CRNM State of Wisconsin v. Derek Murray (L.C. # 2008CF6200)

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

Derek Murray appeals a judgment convicting him of being party to the crime of first-degree recklessly endangering safety by use of a dangerous weapon. Attorney Glen Kulkoski has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE

809.32 (2011-12)[1]; ***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 goes through the procedural steps of the case and addresses the validity of the plea and sentence. Murray was sent a copy of the report and has filed a response raising five potential issues: (1) whether party-to-a-crime liability can properly be applied to a charge with a reckless mental state; (2) whether the prosecutor retaliated against him by modifying a penalty enhancer in the information after Murray's trial resulted in a hung jury; (3) whether charging the penalty enhancer against Murray but not his two codefendants was selective prosecution; (4) whether there was a sufficient factual basis for the plea when counsel answered for Murray during the plea colloquy; and (5) whether a sentence constituting nearly three-quarters of the maximum penalty range with no eligibility for a reduced risk sentence or the earned release or challenge incarceration programs was unduly harsh for a first-time felon, or was in retaliation for his having exercised his right to trial before entering a plea. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, contrary to Murray's assertion, first-degree recklessly endangering safety is not a strict liability offense; it has a mens rea requirement that either the defendant or the person he aided and abetted "was aware that [his] conduct created the unreasonable and substantial risk of death or great bodily harm." WIS JI—CRIMINAL 1345. Therefore, there is no legal impediment

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

to charging the offense as party to a crime, which merely means that either the defendant or the person he assisted was aware of the risk created by the conduct at issue.

Next, 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.

After a trial resulting in a hung jury, the State agreed to dismiss a charge of attempted armed robbery and to refrain from making a sentence recommendation in exchange for Murray's plea on the first-degree recklessly endangering safety by use of a dangerous weapon count, and the State followed through on that agreement. The State explained that it was also amending the penalty enhancer because the prior information had incorrectly cited the enhanced penalties applicable to misdemeanors rather than felonies. Because the amendment to the penalty enhancer in the information did no more than correct an error, Murray has no basis for a claim of vindictive prosecution in retaliation for exercising his right to trial. Murray also has no basis for a claim of selective prosecution based on the "while armed" enhancer being charged only against Murray and not his codefendants because the information portion of the complaint included an allegation that Murray was the defendant who pulled out a gun during the incident. The State was not required to accept Murray's version of events in its charging decision.

The circuit court conducted a plea colloquy exploring Murray's understanding of the nature of the charge, the penalty range and other direct consequences of the plea, 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 noted that Murray had already been provided information about the charge during his trial, but went through the elements again, including the definition of aiding and abetting. The court made sure Murray understood that the court would not be bound by any sentencing recommendations. The court also inquired into Murray's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire with attachments. Murray 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 admitted by Murray in open court, as well as those presented at an earlier trial that resulted in a hung jury, provided a sufficient factual basis for the plea. The court asked Murray to describe his conduct in his own words, and Murray said that he had gone to the victim's place for a fight and knew that at least one of his codefendants was bringing a gun. Murray indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Murray has not alleged any other facts that would give rise to a manifest injustice. Therefore, Murray'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.

A challenge to Murray's sentence 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 Murray was afforded an opportunity to address the court and present a character witness on his behalf prior to sentencing. The court proceeded to consider the standard sentencing factors and explained their application to this case. ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court indicated that it was a mid-level felony, but particularly serious because it involved violence against a person in a three-against-one situation. With respect to Murray's character, the court noted that Murray had a lot of potential, although his future prospects for employment would be limited by his tenth grade education and criminal history, which might present him further temptation to resort to criminal activity. At no point did the court indicate that it was making any negative inferences based on Murray's decision to go to trial or any other improper factors. The court concluded that a substantial prison term was necessary to both protect the community and deter future criminal activity.

The court then sentenced Murray to ten years of initial confinement and three years of extended supervision. It also awarded 103 days of sentence credit, imposed standard costs and conditions of supervision, directed Murray to provide a DNA sample and to pay the fee, and determined that Murray was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The sentence imposed was within the applicable penalty range. *See* WIS. STAT. §§ 941.30(1) (classifying first-degree recklessly endangering safety as a Class F felony); 939.50(3)(f) (providing maximum imprisonment term of 12.5 years for Class F felonies); 939.63(1)(b) (increasing penalty by five years for use of a dangerous weapon); and 973.01 (explaining bifurcated sentence structure) (all 2007-08 statutes). The sentence imposed was not "'so excessive and unusual and so disproportionate to the offense committed'" as to be unduly

harsh, given that the victim was shot three times. *See generally* ***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 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 Attorney Glen Kulkoski is relieved of any further representation of Derek Murray in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals