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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

April 16, 2013

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
215 South Hamilton, Br.15, Rm. 7107
Madison, WI 53703

Mary Ellen Karst
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

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

Suzanne L. Hagopian
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Qwashi R. Morgan, Sr. 454461
Black River Corr. Cntr.
W6898 E. Staffon Rd.
Black River Falls, WI 54615-0433

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

2012AP2145-CRNM State of Wisconsin v. Qwashi R. Morgan, Sr. (L.C. #2011CF997)

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

Qwashi Morgan, Sr., appeals two related judgments convicting him of misappropriation of identifying information as a repeater, burglary, and theft as a repeater. Attorney Suzanne Hagopian 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.

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

429 (1988). The no merit report addresses Morgan's pleas, a suppression ruling, and the sentences imposed. Morgan 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, the convictions were based upon the entry of no-contest pleas, 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, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to dismiss six other charges and to cap its recommendation for initial confinement to seven years in exchange for the pleas, and it followed through on that agreement. The circuit court conducted a plea colloquy exploring the defendant'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. The court made sure the defendant understood that it would not be bound by any sentencing recommendations. In addition, the record includes a signed plea questionnaire. Morgan 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 and at the preliminary hearing provided a sufficient factual basis for the pleas and Morgan admitted his status as a repeat offender in open court. We see nothing in the record to suggest that counsel's performance was in any way deficient, and Morgan has not alleged any other facts that would give rise to a manifest injustice. Therefore, Morgan's pleas were valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

Morgan filed a motion seeking to suppress statements he made to police after invoking his right to counsel. The State agreed not to use any statements made after that point in the interrogation. Morgan then expanded his motion to request that statements he made prior to the invocation of counsel also be suppressed on the grounds that their probative value was substantially outweighed by the danger of unfair prejudice. The circuit court rejected that argument. Because the circuit court's weighing of potential prejudice was well within its discretion, and did not involve a constitutional violation, we agree with counsel that there is no arguable basis to challenge the suppression ruling on appeal.

Finally, a 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 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 the defendant was afforded an opportunity to comment on the PSI and address the court. 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. The court explained that probation was not appropriate because

there were children present and scared during the home invasion, but it imposed less time than requested by the State due to the effect of a traumatic brain injury on Morgan's judgment.

The court then sentenced Morgan to two years of initial confinement and five years of extended supervision on the burglary count, with concurrent terms of two years of initial confinement and two years of extended supervision on the identity theft count and nine months on the theft count. There was no sentence credit because Morgan was already serving another sentence following revocation. The court also imposed standard costs and conditions of supervision; directed the defendant to provide a DNA sample but waived the fee; determined that the defendant was eligible for the challenge incarceration program and the earned release program; and made the sentence a risk reduction sentence.

The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.10(1m)(a) (classifying burglary as a Class F felony); 939.50(3)(f) (providing maximum imprisonment term of 12.5 years for Class F felonies); 943.201(2)(a) (classifying identity theft as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of 6 years for Class H felonies); 943.20(3)(a) (classifying theft of less than $2500 as a Class A misdemeanor); 939.51(3)(a) (providing maximum imprisonment term of nine months for Class A misdemeanors); and 973.01 (explaining bifurcated sentence). The sentences were not "so excessive and unusual and so disproportionate to the offense committed" as to be unduly harsh—particularly given that the court did not even use the sentence enhancers. ***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 judgments of conviction are 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