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DISTRICT IV

April 26, 2013

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

2011AP2797-CRNM State of Wisconsin v. Frank R. Blumberg (L.C. # 2010CF159)
2011AP2798-CRNM State of Wisconsin v. Frank R. Blumberg (L.C. # 2010CF292)

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

Frank Blumberg appeals his judgments of conviction and sentence, which were entered after he pled guilty to two counts of robbery by use of force as a party to the crimes, one count of possession of a narcotic drug, and one count of possession of drug paraphernalia, contrary to WIS. STAT. §§ 943.32(1)(a), 939.05, 961.41(3g)(am), and 961.573(1) (2011-12).[1] Attorney William Schmaal has filed a no-merit report seeking to withdraw as appellate counsel. *See*

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

Anders v. California, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32; ***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). Counsel's no-merit report addresses the validity of the plea and sentence. In his response, Blumberg argues that his trial counsel rendered ineffective assistance of counsel. Upon our review of the record, no-merit report, and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

First, Blumberg does not have an arguable basis for withdrawing his plea. A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice,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 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

At the plea hearing, the prosecutor recited the terms of the plea agreement. The prosecutor explained that both sides were free to argue any sentence, as no agreement had been made as to sentencing recommendations other than that the State would request a pre-sentence investigation (PSI) report. A PSI was ordered and prepared.

The circuit court conducted a colloquy during the plea hearing in which the court explored with Blumberg his understanding of the charges against him. The court confirmed directly with Blumberg that he acknowledged and understood the constitutional rights he would be waiving. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court also

stated the maximum penalties Blumberg was facing for each of the offenses, including a habitual offender enhancer pursuant to WIS. STAT. § 939.62(1)(c) and a read-in charge from another case. Blumberg admitted that he had been convicted of three separate misdemeanor offenses within the past five years and confirmed that he understood the penalties he was facing. The court inquired into Blumberg's ability to understand the proceedings and the voluntariness of his decision. Additionally, the court was presented with a plea questionnaire signed by Blumberg. The court ascertained on the record that Blumberg had gone over the plea questionnaire with his counsel and understood it. Finally, the court explained to Blumberg the direct consequences of his plea, and defense counsel acknowledged that the criminal complaint established a factual basis for the plea. *See* § 971.08(1)(b).

Blumberg argues in his response to counsel's no-merit report that his trial counsel rendered ineffective assistance of counsel. Blumberg alleges, among other deficiencies, that his counsel improperly convinced him to plead guilty and failed to explain that a charge dismissed and read in could be used at sentencing. Blumberg argues that, as a result of counsel's ineffectiveness, his pleas were not knowing, voluntary, and intelligent. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Upon our independent review of the record, we conclude that Blumberg's ineffective assistance arguments are without merit.

Convincing a client that the client should accept a plea is not the same as coercion. The record does not reveal any facts, and Blumberg does not allege any facts, that would constitute coercion by his trial counsel. When the court asked Blumberg during the plea colloquy if there were any promises or threats that induced him to plead guilty, Blumberg answered, "No, your

Honor." With respect to Blumberg's allegation that his counsel failed to explain that a charge dismissed and read in could be used at sentencing, the plea hearing transcript reveals that the court explained this point to Blumberg and he confirmed that he understood. Blumberg does not allege any facts that would indicate he did not understand, despite what he told the court. He therefore fails to establish that he was prejudiced by any failure of his counsel to inform him of the effect of the read-in charge.

Turning next to the issue of the defendant's sentence, we note that our review of a sentence determination begins "with the presumption that the trial 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). The record shows that the trial court considered the standard sentencing factors and explained their application to this case. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. At the sentencing hearing, the court considered the gravity of the offenses, Blumberg's character, his rehabilitative needs, his prior criminal record, and the safety needs of the community. Blumberg was afforded the opportunity to address the court prior to sentencing, and he did so.

On the two robbery offenses as a habitual criminal alone, Blumberg faced a maximum potential penalty of twelve years of initial confinement plus five years of extended supervision. *See* WIS. STAT. §§ 943.32(1)(a) and (b), 939.50(3)(e), and 939.62(1). The court imposed an overall concurrent sentence of ten years of initial confinement plus five years of extended supervision. The sentences imposed were within the applicable penalty ranges. There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507

(quoted source omitted). Accordingly, any challenge to the defendant's sentences would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney William Schmaal is relieved of any further representation of Frank Blumberg in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals