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April 26, 2013

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

2011AP2933-CRNM State of Wisconsin v. Lonnie Montgomery, Jr. (L.C. #2010CF4066)
2011AP2934-CRNM State of Wisconsin v. Lonnie Montgomery, Jr. (L.C. #2010CF5515)

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

Lonnie Montgomery appeals a judgment convicting him of delivering heroin, possessing heroin with intent to deliver, and bail jumping.[1] Attorney Russell Bohach has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738, 744

[1] Although Montgomery filed notices of appeal from both Milwaukee County Case Nos. 2010CF4066 and 2010CF5515, we note that the first case was dismissed pursuant to a plea agreement in the second, and only the judgment of conviction in No. 2010CF5515 is currently before us.

(1967); WIS. STAT. RULE 809.32 (2011-12);[2] ***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 addresses the validity of Montgomery's pleas and sentences. Montgomery 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 guilty 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. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 288-89, 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 three additional counts plus another case as part of the 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; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court also inquired into the defendant's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire. Montgomery indicated to the court that he had gone over the form with counsel, and he is not now claiming

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

that he misunderstood any of the information contained in it. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The parties stipulated that the facts set forth in the complaint provided a sufficient factual basis for the pleas, and Montgomery personally acknowledged that he was pleading guilty because he was guilty. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Montgomery has not alleged any other facts that would give rise to a conclusion that there was a manifest injustice. Therefore, Montgomery's pleas were valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

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 address the court both personally and through counsel, and to have his pastor speak on his behalf. The court proceeded to consider 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. Regarding the severity of the offenses, the court observed that Montgomery had been using significant amounts of heroin for some period of time, and that the offense was aggravated by the fact that there were both guns and children in the house. With respect to the defendant's character, the court was disturbed that Montgomery had dropped out of school after eighth grade and failed to take advantage of past opportunities to turn his life around, but gave him some credit for accepting responsibility. Given the seriousness of the offenses, and the fact that Montgomery had

committed them while on bail for another drug case, the court concluded that a prison term was necessary to protect the public.

The court then sentenced Montgomery to consecutive terms of one year of initial confinement and one year of extended supervision on the delivery count and four years of initial confinement and four years of extended supervision on the possession with intent count, with a concurrent term of one year of initial confinement and one year of extended supervision on the bail jumping count. The court also awarded sixty-five days of sentence credit; imposed standard costs and conditions of supervision; directed the defendant to provide a DNA sample and pay the surcharge; and determined that the sentence would be a risk reduction sentence and that the defendant would be eligible for the challenge incarceration and earned release programs after three years.

The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 961.41(1)(d)1. (classifying delivery of less than three grams of heroin as a Class F felony); 939.50(3)(f) (providing maximum imprisonment term of twelve and one-half years for Class F felonies); 961.41(1m)(d)3. (classifying possession of ten to fifty grams of heroin with intent to deliver as a Class D felony); 939.50(3)(d) (providing maximum imprisonment term of twenty-five years for Class D felonies); 946.49(1)(b) (classifying bail jumping from a felony case as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of six years for Class H felonies); and 973.01 (explaining bifurcated sentence structure). The sentences imposed were not "so excessive and unusual and so disproportionate to the offense committed" as to be unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is all the more clear in light of the read-in offenses.

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, ¶18, 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(1).

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