OFFICE OF THE CLERK
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 III/II

June 12, 2013

To:

Hon. Lisa K. Stark
Circuit Court Judge
721 Oxford Ave.
Eau Claire, WI 54703

Gary M. King
District Attorney
721 Oxford Ave.
Eau Claire, WI 54703

Kristina Aschenbrenner
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Ave.
Eau Claire, WI 54703-5496

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

Chris A. Gramstrup
Gramstrup Law Office
1409 Hammond Ave., Ste. 322
Superior, WI 54880

Charles D. Marshall, #591535
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2013AP169-CRNM State of Wisconsin v. Charles D. Marshall (L.C. #2011CF828)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Charles D. Marshall appeals a judgment convicting him upon a plea of no contest to one count of manufacture/deliver heroin (three grams or less) contrary to WIS. STAT. § 961.41(1)(d)1.[1] Marshall's appointed appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967), Marshall filed a lengthy

[1] On April 19, 2013 Marshall moved to advance submission of his case. *See* WIS. STAT. RULE 809.20 (2011-12). His case was assigned on May 22. There was no need to advance submission.

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

response, and counsel filed a supplemental no-merit report. Upon consideration of the reports, the response, and our independent review of the record as mandated by ***Anders***, we conclude that the judgment may be summarily affirmed, as there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We relieve Attorney Chris A. Gramstrup of further representing Marshall in this matter.

Tips from confidential informants contributed to Marshall's arrest. He was charged with two counts of manufacturing or delivering heroin, three grams or less, and one count of manufacturing or delivering heroin, more than three grams but less than ten. Marshall entered a no-contest plea to one of the lesser counts; the remaining two counts and the charges from two other cases were dismissed and read in at sentencing. Marshall was sentenced to three and a half years' initial confinement plus three years' extended supervision. This appeal followed.

We first address the adequacy of the plea taking. No issue of arguable merit could arise from this point. The circuit court engaged Marshall in a thorough plea colloquy that fully conformed to the requirements set forth in WIS. STAT. § 971.08(1) and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Aware of Marshall's desire to participate in the Earned Release and/or Challenge Incarceration Programs, the court carefully ascertained his understanding that the Department of Corrections (DOC) makes the ultimate decision, even offering to schedule a status hearing before sentencing so that Marshall would not feel that his plea decision was rushed. Marshall chose to enter a no-contest plea then and there. At a hearing subsequent to his plea but before his sentencing, defense counsel advised the court that Marshall terminated her. Marshall was upset that one of the read-in charges, failure to register as a sex offender, would not be dismissed outright. The circuit court carefully explained Marshall's options. Marshall again opted to plead no contest.

Marshall now asserts that his plea was not voluntary or knowing because he felt "hopeless," "fearful" and "stressed out." If Marshall felt emotionally unready to proceed at the plea hearing, that was the time to advise the court. He also contends his plea was not made knowingly because the circuit court failed to alert him to the possibility that an attorney might discover defenses or mitigating circumstances not apparent to him. Such information is not required under WIS. STAT. § 971.08 or ***Brown*** and was unnecessary because Marshall was represented by counsel. The record relating to the plea taking is replete with evidence that the circuit court exercised great pains to ascertain that Marshall understood the proceedings and his options. Marshall acknowledges that he was afforded the opportunity to withdraw his plea before sentencing. This claim has no arguable merit.

We next consider the circuit court's exercise of sentencing discretion. Sentencing lies within the circuit court's discretion; our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must consider the primary sentencing factors of the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It also must specify on the record the sentencing objectives, including protection of the community, punishment and rehabilitation of the defendant, and deterrence to others. ***Gallion***, 270 Wis. 2d 535, ¶40. The circuit court has discretion to determine which factors are relevant to the imposition of sentence and to determine the weight to assign to each. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy" against interfering with the sentencing decision made. ***Id.***, ¶7.

The sentencing record is unassailable. The circuit court queried the DOC agent as to the source of the information Marshall disputed in the presentence investigation report (PSI), then ordered a one-day adjournment to allow itself time to review the twelve pages of comments and corrections Marshall submitted in response to the PSI. The court thoroughly considered and applied the primary sentencing factors and objectives and explained its rationale. Marshall faced a twelve-and-a-half-year sentence, a $25,000 fine and a five-year suspension of his driving privileges. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Our review of the record confirms appellate counsel's conclusion that no arguable issue could arise.

The no-merit report also considers whether a meritorious argument could be made that defense counsel rendered ineffective assistance. Our review is limited when claims of ineffective assistance of trial counsel are not first raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nothing in the record suggests an arguable basis for such a claim.

Marshall contends, however, that his counsel was ineffective for refusing to file a motion to dismiss the complaint because probable cause was not shown at the preliminary hearing. Probable cause is satisfied at a preliminary hearing when there exists a believable or plausible account of the defendant's commission of a felony. ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). Marshall argues that the confidential informants gave police false statements and that he was incarcerated during the time frame in which the crimes were alleged to have occurred. It is for the trier of fact at trial to choose between conflicting facts or

inferences and weigh the State's evidence against that favorable to the defendant. ***Id.*** Here, the evidence at the preliminary hearing established probable cause. A motion to dismiss would have been frivolous. Counsel is not ineffective for failing to raise a meritless claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 282, 647 N.W.2d 441.

Marshall's response raises numerous claims that concern the circumstances of his arrest. Marshall explicitly waived any such challenges in an addendum to his plea questionnaire and he confirmed his understanding on the record to the court.

Marshall's response also alleges judicial bias and misconduct. This claim has no arguable appellate merit. Marshall did not object to Judge Stark presiding; we therefore may assume that, by presiding, she believed she could act impartially. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31. Marshall cites no facts demonstrating actual bias and that the court actually treated him unfairly. He has not overcome the presumption that the circuit court judge is free of bias and prejudice. *See* ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298.

Marshall also claims that portions of the plea and sentencing transcripts are "totally false." He alleges that after "point[ing] out to the assistant Attorney General about how Judge Lisa Stark treated me … somehow it ended up changed in my transcripts to sabotage my appeal and protect Judge Lisa Stark's bias[ed] and prejudice[ial] conduct and allowing police corruption in Eau Claire County." He took no action to correct the transcripts, however. *See* WIS. STAT. RULE 809.15(3). The transcripts before this court each bear the reporter's certification to the effect that the transcript is a "true and accurate" transcription by the reporter of his or her own stenotype notes and a "true and correct" record of the proceedings. The claim that the transcripts

are inaccurate or otherwise defective is without arguable merit. Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the motion to advance is denied.

IT IS FURTHER ORDERED that Attorney Chris A. Gramstrup is relieved of further representing Marshall in this matter.

Diane M. Fremgen
Clerk of Court of Appeals