

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT X
Case No. XXXXAPXXXX-CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN SMITH,

Defendant-Appellant.

On a No-Merit Notice of Appeal from the Judgment of
Conviction Entered in the Circuit Court for Bay County, the
Honorable Grover Cleveland Presiding.

NO-MERIT BRIEF OF DEFENDANT-APPELLANT
PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**ISSUES PRESENTED THAT MIGHT ARGUABLY
FORM THE BASIS FOR AN APPEAL**

1. Were Mr. Smith's pleas entered knowingly and voluntarily?

Not raised in the trial court.

2. Did the trial court impose an illegal sentence, or did it otherwise err in the exercise of its discretion when it sentenced Mr. Smith?

Not raised in the trial court.

STATEMENT OF THE CASE AND THE FACTS

On July 25, 2009, the state filed a criminal complaint in Bay County Case Number XX-CF-XX charging John Smith with substantial battery, in violation of Wis. Stat. §§ 940.19(2) and 939.50(3)i. (1).

According to the criminal complaint, on July 7, 2011, an officer with the Bay City Police Department met with a Mr. Johnson regarding a battery complaint. (1). The officer noticed that Johnson's right eye was cut and bruised. Johnson stated that on July 5, 2011, he and a friend had left a bar, and that Smith had followed them out. Johnson told the officer that he left the bar after Smith said he wanted to fight him. (*Id.* at 1).

Outside the bar, Johnson told Smith that he did not want to fight. Johnson turned to walk away, and Smith hit him one time in the right eye. Johnson fell to the ground, and his friend helped him get up and go back into the bar. (*Id.* at 1-2). Johnson went to the hospital, where he received an X-

ray and CAT scan, both of which indicated that Johnson had sustained a fractured orbital bone under this right eye. (*Id.* at 2). Johnson was referred to a specialist for further treatment and learned that his injury would require surgery. (*Id.*).

Smith's attorney requested that Smith be evaluated to ensure that he was competent to proceed; the court ordered a competency evaluation. (14, 15). The evaluator concluded that Smith was competent to proceed. (16). Smith waived his right to obtain a second evaluation or to challenge the findings of the evaluation. (35:4).

Smith entered into a plea agreement with the state, which was formalized in a "Statement of Negotiated Plea." (17). The plea agreement called for Smith to enter a plea to the charge in exchange for the state to refrain from amending the charge to aggravated battery with intent to cause bodily harm, pursuant to Wis. Stat. § 940.10(4). (35:5).

At the plea hearing on October 5, 2011, the court confirmed with Smith that he intended to plead no contest to the substantial battery charge. (35:6). Before accepting Smith's plea, the court confirmed that no one had threatened or promised Smith anything to induce his plea. (*Id.* at 3). The court explained that Smith would be giving up certain constitutional rights, including the right to a jury trial, the right to remain silent at trial, and the right to testify and present evidence on his own behalf. (*Id.* at 6). The court also explained that if Smith had a jury trial, the jury would need to be unanimous. Smith would have the right to confront and cross-examine witnesses, and the state would need to prove each element beyond a reasonable doubt. (*Id.* at 6-7).

The court explained that the state would need to prove that on July 5, 2011, Smith caused substantial battery to Johnson, that he intended to cause bodily harm, and that he

did so without Johnson's consent. (*Id.* at 7). Smith stated that he understood, and entered a plea of no contest. (*Id.*). The state offered the criminal complaint and preliminary hearing testimony as the factual basis. (*Id.* at 8). The court explained to Smith that the state had agreed not to amend the charge to battery causing great bodily harm, but that if the court accepted Smith's no contest plea to substantial battery, the court could impose the maximum penalty of three years and six months imprisonment or a \$10,000 fine or both. (*Id.* at 8). Smith indicated that he understood. (*Id.*).

The court asked Smith whether the facts in the criminal complaint were correct; Smith stated they were. (*Id.* at 9). The court recalled the preliminary hearing testimony and, given Smith's admission regarding the facts in the complaint and the testimony at the preliminary hearing, the court found a factual basis for the charge. (*Id.*).

The court then reviewed Smith's educational background and ability to read and write. (*Id.* at 10). Smith indicated he had no problems reading the plea questionnaire or the statement of negotiated plea. (*Id.*). The court reviewed the fact that Smith was receiving treatment for bipolar disorder, depression, and suicidal ideation. (*Id.*). Smith stated he understood the proceedings. (*Id.*). Smith explained that he had consumed no alcohol, medications or drugs within the previous 24 hours except for his medication. (*Id.* at 11). Smith stated the medication did not prevent him from understanding the proceedings. (*Id.*).

The court concluded that Smith understood the proceedings, and found that Smith's plea was freely, voluntarily and intelligently made. The court accepted Smith's plea and found him guilty. (*Id.*). The court ordered a

presentence investigation and set the matter for sentencing. (*Id.* at 12).

The court sentenced Smith on November 23, 2011. The court heard testimony from Johnson's mother and Smith's father. (36:5-13; 16). Smith's brother also testified. He testified that Smith lost "everything" to alcohol and drugs, but that when Smith took his prescribed medications and followed his treatment, he did well. (*Id.* at 26).

The prosecutor reviewed Smith's criminal history, arguing that Smith had failed to take responsibility for his actions. (*Id.* at 34-38). The state argued for the maximum penalty, which it described as "two years of incarceration followed by eighteen months of extended supervision at the max." (*Id.* at 39). The state acknowledged that Smith was due 119 days of sentence credit. (*Id.*). The state then argued that the maximum sentence was required to punish Smith. (*Id.*). Smith's attorney argued that his well-established psychological conditions and alcohol problem should make the court consider more than just punishment. (*Id.* at 44). Smith's attorney also argued that Smith did well when he was taking his medications, and that he was a good candidate for rehabilitation. (*Id.* at 45-46). As a result, Smith's attorney argued for probation. (*Id.* at 48-89).

Smith exercised his right to allocution. (36:50-52).

The court began its sentencing remarks by noting it had spent hours reviewing the file. (*Id.* at 52). The court explained the objectives of its sentence. The court considered the fact that Johnson had suffered significantly. (*Id.* at 53). The court reviewed Smith's criminal history, noting the importance of protecting the public "from a person who has consistently engaged in violent behavior." (*Id.* at 53). The court noted that Smith had been placed on probation three

times but that he had been revoked twice. (*Id.* at 53-54). The court acknowledged that Smith was currently on his medications and was not drinking, but expressed concern that he had not done that in the past. (*Id.* at 54). The court recalled that Smith had gone into a rage at a previous bond hearing. (*Id.*). The court also identified punishment as an objective. (*Id.* at 55). The court explained that individuals who have a long criminal record must be punished severely, noting that Smith was in that category. (*Id.* at 55). The court also mentioned deterrence as a sentencing objective. (*Id.*). The court also discussed the seriousness of the crime, noting that this was a “severe crime.” (*Id.*). The court noted that the victim had incurred \$62,000 in medical costs in addition to surgeries and significant emotional and physical pain. (*Id.* at 56).

The court explained its conclusion that Smith was a danger to society based on his past criminal history, the severity of the injury, and Smith’s history of bad decisions. (*Id.* at 56-57). The court stated it could not comprehend the senseless violence that had occurred here. (*Id.* at 57).

The court explained it wanted to impose the maximum punishment for the offense. (*Id.*). The court then imposed the maximum penalty of three years and six months in prison, which it ordered as two years of initial confinement and one year and six months of extended supervision. (*Id.* at 57-58). The court entered a judgment of conviction reflecting that sentence. (26). Five days later, the court entered an amended judgment of conviction, amending the initial confinement to one year and six months, and amending the extended supervision to two years. (28).

A no-merit notice of appeal was filed on July 13, 2012. This is a no-merit brief filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and Wis. Stat. Rule 809.32.

ARGUMENT

I. Was Mr. Smith's Plea Entered Knowingly and Voluntarily?

Counsel has concluded that an argument that Mr. Smith's plea was not knowing and voluntary would be frivolous and without arguable merit in light of the record made at the plea hearing.

A guilty plea, voluntarily and understandingly made, waives all non-jurisdictional defects and defenses. *Belcher v. State*, 42 Wis. 2d 299, 308-09, 166 N.W.2d 211, 216 (1969). This record discloses no jurisdictional defects, and undersigned counsel is not aware of any jurisdictional grounds for challenging the plea in this case.

Wisconsin Statutes § 971.08 requires the court, before accepting a guilty or no contest plea, to do all of the following: address the defendant personally and to determine that the plea is made voluntarily, that the defendant understands the nature of the charge and the potential punishment if convicted; make such inquiry as satisfies it that there is a factual basis to support the plea; address the defendant personally and advise him of the potential for deportation, exclusion from admission, or denial of naturalization consequences of his plea; and ensure that the state has complied with the victims' rights laws under Wis. Stat. § 971.095(2).

The court also has these responsibilities described in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986),

and restated and supplemented in *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906: (1) to determine the defendant's education and level of comprehension; (2) to determine whether any promises or threats have been made to the defendant; (3) to alert the defendant to the possibility that an attorney could discover defenses or mitigating circumstances that might not be apparent to the defendant; (4) to make sure the defendant knows that counsel would be appointed to him or her if the person is indigent; (5) to establish the defendant's understanding of the nature of the crime charged and the range of punishments the crime carries; (6) to ascertain personally whether a factual basis exists to support the plea; (7) to inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights; (8) to establish personally that the defendant understands that the court is not bound by the terms of any plea agreement; (9) to notify the defendant of the direct consequences of his plea; and (10) to advise the defendant about the risks of deportation, exclusion from admission, or denial of naturalization if he is not a citizen, as provided in Wis. Stat. § 971.08(1)(c). *Brown*, 293 Wis. 2d 594, ¶35.

A review of the record made at the plea hearing shows that the court met these responsibilities, with one exception detailed below.

At the plea hearing on October 5, 2011, the court confirmed with Smith that he intended to plead no contest to the substantial battery charge. (35:6). Before accepting Smith's plea, the court confirmed that no one had threatened or promised Smith anything to induce his plea. (*Id.* at 3). The court explained that Smith would be giving up certain constitutional rights. (*Id.* at 6-7).

The court explained the elements of the offense. (*Id.* at 7). The state offered the criminal complaint and preliminary hearing testimony as the factual basis. (*Id.* at 8). The court explained to Smith that the state had agreed not to amend the charge to battery causing great bodily harm, but that if the court accepted Smith's no contest plea to substantial battery, the court could impose the maximum penalty of three years and six months imprisonment or a \$10,000 fine or both. (*Id.* at 8). Smith said he understood. (*Id.*).

The court asked Smith whether the facts in the criminal complaint were correct; Smith stated they were. (*Id.* at 9). The court recalled the preliminary hearing testimony and, given Smith's admission regarding the facts in the complaint and the testimony at the preliminary hearing, found a factual basis for the charge. (*Id.*).

The court then reviewed Smith's educational background and ability to read and write. (*Id.* at 10). Smith said he had no problems reading the plea questionnaire or the statement of negotiated plea. (*Id.*). The court reviewed the fact that Smith was receiving treatment for bipolar disorder, depression, and suicidal ideation. (*Id.*). Smith said he understood the proceedings. (*Id.*). Smith said that he had consumed no alcohol, medications or drugs within the previous 24 hours except for his medication. (*Id.* at 11). Smith said that the medication did not prevent him from understanding the proceedings. (*Id.*).

In addition to the in-court colloquy, the court drew Smith's attention to a plea questionnaire and waiver of rights form signed by Smith. (*Id.* at 3). The use of such a form was approved by the court in *State v. Moederndorfer*, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987).

The court did not advise Smith of the potential immigration consequences of his plea as required by Wis. Stat. § 971.08(1)(c). However, there is no indication that Smith is subject to deportation, exclusion from admission to this country, or denial of naturalization. As a result, such an omission is harmless. See *State v. Douangmala*, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1 (holding that a defendant is entitled to withdraw his plea if he can show that the court failed to fulfill its duties under Wis. Stat. § 971.08(1)(c) and that the plea is likely to result in his deportation, exclusion from admission to this country, or denial of naturalization).

Given that the court's colloquy was thorough, and that it was supplemented by a written plea questionnaire, any claim that Smith's plea was not knowing and voluntary would be without merit.

II. Is There Any Arguable Claim for Challenging the Sentence Imposed?

The second issue presented is whether the court imposed an illegal sentence or otherwise erred in the exercise of its sentencing discretion. Based upon a review of the court's sentencing remarks and ultimate sentence, counsel has concluded that a challenge to Smith's sentence would be without merit. The sentence is legal and cannot be challenged as an erroneous exercise of discretion.

It is well settled that a circuit court exercises discretion at sentencing. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (citing *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971)). To properly exercise its discretion at sentencing, the court must explain the reasons for the sentence imposed. *Gallion*, 270 Wis. 2d 535, ¶¶ 38-39 (citing *McCleary*, 49 Wis. 2d at 280-81). A sentencing decision should be based primarily on the

following factors: the gravity of the offense, the character of the defendant, and the need for protection of the public. *State v. Klubertanz*, 2006 WI App 71, ¶18, 291 Wis. 2d 751, 713 N.W.2d 116. However, the sentencing court may determine the amount of weight to give a particular factor in the case before it. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

There is a strong public policy against interfering with the sentencing decision of a court and an equally strong presumption that the sentencing court acted reasonably. *Gallion*, 270 Wis. 2d at 549, ¶18. The defendant bears the burden of showing that there was some unreasonable or unjustifiable basis for the sentence imposed. *State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). An appellate court has a duty to affirm a sentence if facts of record show it is sustainable as a proper exercise of discretion. *Stenzel*, 276 Wis. 2d 224, ¶9.

At sentencing, the court heard from the mother of the victim as well as Smith's father. The court also heard from both parties and from Smith. The court began its sentencing remarks by noting that it had spent hours reviewing the file. (36:52). The court then explained the objectives of its sentence. The court considered the fact that Johnson had suffered significantly. (*Id.* at 53). The court reviewed Smith's criminal history, noting the importance of protecting the public "from a person who has consistently engaged in violent behavior." (*Id.* at 53). The court noted that Smith had been placed on probation three times but that he had been revoked twice. (*Id.* at 53-54). The court acknowledged that Smith was currently on his medications and was not drinking, but expressed concern that he had not done that in the past. (*Id.* at 54). The court recalled that Smith had gone into a rage at a previous bond hearing. (*Id.*). The court also identified

punishment as an objective. (*Id.* at 55). The court explained that individuals who have a long criminal record must be punished severely, noting that Smith was in that category. (*Id.* at 55). The court also mentioned deterrence as a sentencing objective. (*Id.*). The court also discussed the seriousness of the crime, noting that this was a “severe crime.” (*Id.*). The court noted that the victim had incurred \$62,000 in medical costs in addition to surgeries and significant emotional and physical pain. (*Id.* at 56).

The court explained its conclusion that Smith was a danger to society based on his past criminal history, the severity of the injury, and Smith’s history of bad decisions. (*Id.* at 56-57). The court stated that it could not comprehend the senseless violence of the offense. (*Id.* at 57).

The court imposed the maximum penalty of three years and six months in prison, which it ordered as two years of initial confinement and one year and six months of extended supervision. (*Id.* at 57-58).

The maximum penalty for substantial battery is three years and six months, with one year and six months of initial confinement and two years of extended supervision. *See* Wis. Stat. §§ 940.19(2) and 973.01(2). The court imposed a legal overall sentence of three years and six months, but initially bifurcated the sentence incorrectly, transposing the maximum possible periods of initial confinement and extended supervision. However, the court subsequently amended the judgment of conviction, and corrected the sentence to 18 months of initial confinement and two years of extended supervision. (28).

The court’s original sentence of two years of initial confinement was clearly illegal, since the maximum period of confinement for a Class I felony conviction is one year and

six months. *See* Wis. Stat. § 973.01(2). The court corrected that error by amending the sentence. Counsel considered and ultimately rejected a challenge to the legality of the court's correction of its sentencing error.

When a sentence is commuted pursuant to Wis. Stat. § 973.13, a sentencing court may resentence a defendant if the new sentence is authorized by law. *State v. Holloway*, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996). The court's correction of the judgment of conviction arguably amounted to a resentencing. *See State v. Stenseth*, 2003 WI App 198, 266 Wis. 2d 959, 669 N.W.2d 776. In this case, the court amended the judgment of conviction without any hearing. In *Stenseth*, this court considered whether a court's correction of an illegal sentence without the defendant's presence violated the defendant's right to be present at sentencing under Wis. Stat. § 971.04(1). This court noted that the violation of that right was subject to a harmless error analysis. *Stenseth*, 266 Wis. 2d 959, ¶17. In analyzing the issue, this court observed that Stenseth had already had a full sentencing hearing with witnesses, allocution, and argument. *Id.*, ¶19. This court deemed important the fact that the sentencing court had wanted the public to be protected for the total maximum sentence. *Id.*, ¶20. In concluding that the error was harmless, this court concluded that there was no contribution that Stenseth could have made at the resentencing, and that he had not shown any way in which he was prejudiced by not being present at a resentencing. *Id.*

Like in *Stenseth*, the sentencing court in this case clearly stated it wanted Smith to receive the maximum possible penalty. (36:57-58). The court gave clear reasons why it felt the maximum penalty was necessary, including the importance of protecting the public "from a person who has consistently engaged in violent behavior." (*Id.* at 53). The

court also explained that individuals who have a long criminal record must be punished severely, noting that Smith was in that category. (*Id.* at 55).

Given the similarity of the facts in this case to those in *Stenseth*, and given the thoroughness of the sentencing court's remarks, which included the court's clear intent to impose the maximum sentence, counsel has concluded that challenging the court's amendment of the judgment of conviction from an unlawfully bifurcated maximum sentence to a lawfully bifurcated maximum sentence would be frivolous and without merit.

In light of the court's discussion of the seriousness of the offense, the character of the defendant and the need to protect the public, as well as its identification of the primary purpose of the sentence, any claim that the court erred in its exercise of discretion would also be without arguable merit.

The record in this case shows that the court considered the appropriate sentencing factors and ultimately imposed a legal sentence. As a result, any argument that Smith's sentence was improper would be frivolous and without arguable merit.

CONCLUSION

For all the reasons set forth, counsel has concluded that any grounds that might arguably support an appeal or postconviction motion in this case would be frivolous and without arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967) and Wis. Stat. Rule 809.32. Therefore, counsel respectfully requests that the court release her from further representation of the defendant in this matter.

Dated this 9th day of October, 2012.

Respectfully submitted,

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**CERTIFICATION IN COMPLIANCE
WITH 809.32(1)(b)**

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 9th day of October, 2012.

Signed:

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of October, 2012.

Signed:

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant