STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT X

Case No. XXXXAPXXXX CRNM

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JOHN SMITH,
Defendant-Appellant.

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

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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

STATEMENT OF ISSUES THAT MIGHT ARGUABLY SUPPORT AN APPEAL

1. Was the defendant's guilty plea made knowingly and voluntarily?

   Not raised in the trial court.

2. Did the court erroneously exercise its discretion in imposing sentence or was the sentence otherwise illegal?

   Not raised in the trial court.

STATEMENT OF THE CASE

The state charged defendant John Smith with one count of first-degree reckless endangerment, with a use-of-a-dangerous-weapon sentencing enhancer, for stabbing his brother. (1:1-3).

Pursuant to a negotiated plea agreement, Mr. Smith pleaded guilty to the sole count, without the sentencing enhancer. (21:2-3). The parties agreed to a joint sentencing recommendation of 8 years in prison, broken down into 3 years of initial confinement and 5 years of extended supervision. (21:2-3).

After the court accepted Mr. Smith's plea, it proceeded directly to sentencing, and accepted the joint recommendation. (21:16-18).

After sentencing, Mr. Smith filed a timely notice of intent to seek postconviction relief and a timely notice of no-merit appeal. (14; 17).

ISSUES THAT MIGHT BE RAISED ON APPEAL AND WHY THEY ARE WITHOUT MERIT

I. Was the Defendant's Guilty Plea Made Knowingly and Voluntarily?

It might be claimed on appeal or in a postconviction motion that Mr. Smith should be allowed to withdraw his plea because it was not knowingly, intelligently and voluntarily made. Such a claim would have no arguable merit.

Under the Due Process Clauses of the Federal and State Constitutions, a plea of guilty or no contest is valid only if it was entered knowingly and voluntarily.

Wisconsin Statutes § 971.08 and state case law require the trial court to address the defendant personally to determine whether the plea is knowing and voluntary. Specifically, the court must:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
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> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;

> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
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> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) 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) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (citing ***State v. Bangert***, 131 Wis. 2d 246, 261-62 389 N.W.2d 12 (1986)).

Here, the plea colloquy established that Mr. Smith's plea was knowing and voluntary under ***Bangert*** and its progeny. The circuit court asked Mr. Smith about his age and educational level, and his general comprehension. (21:6, 10-11). The court asked

Mr. Smith whether anyone had promised him anything, or threatened him regarding the plea and Mr. Smith answered "No, Your Honor." (21:8). The court explained to Mr. Smith that it was not bound by the terms of the plea agreement and Mr. Smith said that he understood that. (21:8).

As to the elements of the crime, Mr. Smith told the court that his attorney had explained the elements and the court read the essential elements to him, after which Mr. Smith said that he understood the charge. (21:7, 10). Mr. Smith expressed some concern that the criminal complaint had alleged that he originally went to his brother's house because he wanted to go drinking with him, when that was not true, but, when defense counsel explained on the record that Mr. Smith was pleading guilty to stabbing his brother, not to wanting to go drinking with him, Mr. Smith said that he understood that. (21:10).

The court described the range of punishments, and Mr. Smith told the court that he understood that. (21:8). The court explained to Mr. Smith that he was waiving his constitutional right to a jury trial, and referred to the other rights listed on the plea questionnaire, and Mr. Smith said that he understood that he was giving up those rights. (21:7). The record indicates that Mr. Smith is a United States citizen, and therefore there is no issue regarding the lack of an immigration warning. (17:5).

Finally, the court relied on the criminal complaint and the preliminary hearing testimony to find that there was a factual basis for the plea. (21:8-9).

A knowing and voluntary no-contest plea waives all non-jurisdictional defects and defenses. ***Belcher v.***

State, 42 Wis. 2d 299, 308-09, 166 N.W.2d 211 (1969). The record in this case reveals no jurisdictional defects, and undersigned counsel is not aware of any jurisdictional grounds for challenging Mr. Smith's conviction.

In sum, there is no arguable merit to any claim seeking to withdraw Mr. Smith's guilty plea or otherwise challenging his conviction.

II. Did the Court Erroneously Exercise Its Discretion in Imposing Sentence or Was the Sentence Otherwise Illegal?

Any claim challenging the sentence in this case would also be without arguable merit.

First-degree reckless endangerment is a Class F Felony, which carries a maximum sentence of 12.5 years in prison. Wis. Stat. § 941.30(1). This could include 7.5 years of initial confinement and 5 years of extended supervision. Wis. Stat. § 973.01(2)(b)6m. & (2)(d)4.

Here, as to count one, the circuit court sentenced Mr. Smith to 8 years of imprisonment, broken into 3 years of initial confinement and 5 years of extended supervision. (13). This is within the maximum allowed by law. *See* § 973.01(2)(b)6m. & (2)(d)4.

Before imposing sentence, the court gave Mr. Smith an opportunity for allocation. (21:16).

As to the circuit court's exercise of sentencing discretion, there is a strong public policy against interfering with the court's discretion and a strong presumption that the sentencing court acted reasonably. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535,

678 N.W.2d 197. Generally, the sentencing court must state its reasons for imposing the sentence chosen. ***Id.***, ¶¶ 2, 40. However, where the court has accepted the defendant's sentencing recommendation, the defendant cannot attack that sentence on appeal. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Here, there is no arguable claim that the circuit court erroneously exercised its discretion. It considered the ***Gallion*** factors. (21:15-17). It did not impose a sentence "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Taylor***, 2006 WI 22, ¶31, 289 Wis. 2d 34, 710 N.W.2d 466. And, furthermore, the court gave Mr. Smith the sentence that he had approved of and asked for, so Mr. Smith cannot challenge that sentence now. *See* ***Scherreiks***, 153 Wis. 2d at 518.

In sum, there would be no arguable merit to any claim challenging Mr. Smith's sentence.

CONCLUSION

For all of the reasons stated above, undersigned counsel has concluded that any grounds which might arguably support an appeal or postconviction motion in this matter 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 Mr. Smith in this matter.

Dated this 6th day of January, 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 6th day of January, 2012.

Signed:

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[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 no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit 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 no-merit brief filed with the court and served on all opposing parties.

Dated this 6th day of January, 2012.

Signed:

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[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

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