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 Appeal from a Judgment of Conviction Entered
in the Bay County Circuit Court, 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

1. When Mr. Smith pled no contest to resisting an officer and causing substantial bodily harm, did he do so knowingly, voluntarily and intelligently, and was there a factual basis for the plea?

2. Is there any arguable claim for challenging the sentence imposed, which consists of three years' confinement and three years' extended supervision?

STATEMENT OF THE CASE AND FACTS

This appeal is taken from a judgment of conviction entered on September 23, 2011, after John Smith pled no contest to resisting an officer and causing substantial bodily harm. (22). The court imposed the maximum terms of confinement and extended supervision, three years each, and ordered the sentence be served consecutive to sentences previously imposed in three other cases. (*Id*. at 1).

The state charged Mr. Smith with five offenses, all stemming from an altercation at the Bay County Jail, as follows: (1) resisting an officer and causing substantial bodily harm to the officer; (2) felony bail jumping; (3) misdemeanor bail jumping; (4) disorderly conduct; and (5) battery by a prisoner. (5). The conduct alleged in support of the charges was set forth in the criminal complaint. (1:2-4). In addition, the officer injured in the altercation, Deputy James Friendly, testified at the preliminary hearing. (27:4-22).

On January 5, 2011, Deputy Friendly was escorting Smith from his cell to a bailiff for a court appearance when he reprimanded Smith for talking to an inmate in another cellblock. (27:6). The deputy learned that the court appearance had been canceled, and as he escorted Mr. Smith back towards his cell they exchanged words about Mr.

Smith's discipline for talking to others. (*Id*. at 7). According to the deputy, several times Mr. Smith asked what more could they do to him since he was already going back to prison. (*Id*. at 6-7). Deputy Friendly attempted to handcuff Mr. Smith, who resisted and made threats. (*Id*. at 8).

Mr. Smith raised his hand and "ended up clipping" the deputy in the forehead. (*Id*. at 9). The deputy responded with "knee strikes" and, according to him, they ended up in "a brawl." (*Id*.). Deputy Friendly thought he was hit in the head twice and again when his head hit the ground. (*Id*. at 9-11, 17). According to the deputy, Mr. Smith ignored his commands to stop resisting. (*Id*. at 10-11). Other officers intervened and were able to get Mr. Smith handcuffed. (*Id*. at 10).

As far as injuries sustained in the brawl, Deputy Friendly testified that he had a bruise on his forehead and a loose tooth that was also chipped. (*Id*. at 11-12). At the time of the preliminary hearing, the deputy was suffering from migraines, blurred vision and insomnia. (*Id*. at 12).

According to the criminal complaint, some four months before the altercation, Mr. Smith had been released on bail in two cases. (1:3). In one case, he was charged with a felony, a sex offender registry violation, and in the other case he was charged with misdemeanor battery. (*Id*.). In addition, two months before the altercation, on November 16, 2010, Mr. Smith's extended supervision was revoked in two other cases, in which he had been convicted several years earlier of third degree sexual assault and armed robbery. (18:1, 5-6). On those cases he had received a total of 15 months' reconfinement. (18:1).

Mr. Smith, who was represented by counsel, entered into a plea agreement pursuant to which he pled no contest to the first count, resisting an officer and causing substantial bodily harm, and the other four counts were dismissed.

(28:2). There was no agreement regarding sentence recommendations; both sides were free to argue. (*Id*.).

At the plea hearing on August 4, 2011, the court engaged in a colloquy with Mr. Smith regarding the nature of the offense to which he was pleading no contest, the potential penalties he faced and the constitutional rights he was giving up. (28:2-6). The court also referred to a plea questionnaire that Smith had completed with his attorney. (16; 28:3).

The parties did not request a presentence report, and the court did not order one. Defense counsel submitted a sentencing memorandum before sentencing, along with a letter written by his client. (17; 18; 29:11). Deputy Friendly spoke at sentencing. (29:3-5). The prosecutor recommended the maximum six-year term of imprisonment, consisting of three years' confinement and three years' extended supervision. (*Id*. at 5-6). Defense counsel recommended three years' probation. (18:3; 29:13). After discussing the seriousness of the offense, the defendant's character and the need to deter further criminal conduct, the court followed the state's recommendation and imposed the maximum term of imprisonment and ordered the sentence consecutive to the 15-month reconfinement term Mr. Smith was serving in two other cases and a 30-day jail sentence imposed on a misdemeanor battery conviction in another case. (22:1; 29:21-22).[1]

Mr. Smith filed a timely notice of intent to seek postconviction relief pursuant to Wis. Stat. Rule 809.30. (23). Undersigned counsel was appointed to represent Mr. Smith in postconviction proceedings. This brief is filed pursuant to Wis. Stat. Rule 809.32 and ***Anders v. California***, 386 U.S. 738 (1967).

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[1] At that same hearing, Mr. Smith was also sentenced on the conviction for sex offender registry violation and received a one-year consecutive sentence. (29:22).

ARGUMENT

I. When Mr. Smith Pled No Contest to Resisting an Officer and Causing Substantial Bodily Harm, Did He Do So Knowingly, Voluntarily and Intelligently, and Was There a Factual Basis for the Plea?

In order to withdraw a guilty or no-contest plea after sentencing, the defendant must prove by clear and convincing evidence that plea withdrawal is necessary to correct a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. In order to satisfy due process, a guilty or no contest plea must be entered knowingly, voluntarily and intelligently. ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969); ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). When a plea is not knowingly, voluntarily and intelligently entered, a manifest injustice has occurred, and the defendant is entitled to withdraw the plea as a matter of right. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997).

The question whether a plea was knowingly and intelligently entered presents a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. Although factual findings are not disturbed unless clearly erroneous, the appellate court reviews independently the question whether the plea satisfies the constitutional standard. ***Id***.

Relying upon the duties set forth in Wis. Stat. § 971.08, ***Bangert*** and other case law, the supreme court has directed courts to address the defendant personally during a plea hearing and:

> (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;

(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;

(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 (footnotes omitted).

A court may use a completed plea questionnaire form as a tool to ensure that the defendant's plea is knowingly and voluntarily entered, but the court may not rely entirely on the questionnaire as a substitute for "a substantive in-court plea colloquy." ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794. Rather, "the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in ***Brown***." ***Id***.

Here, the transcript of the plea hearing held on August 4, 2011, shows that the court engaged in a personal colloquy with Mr. Smith satisfying the duties listed in ***Brown***.

As to Mr. Smith's education and comprehension, the court established in its colloquy that Smith was age 29 and had obtained his HSED. (28:7). Mr. Smith told the court that he had gone over the plea questionnaire with his attorney, understood it and had answered the questions on the form truthfully. (*Id*.). The plea questionnaire indicated that Smith was not currently receiving mental health treatment and that he had not had any alcohol, medications or drugs within the last 24 hours. (16:1).

Because Mr. Smith was represented by counsel at the plea hearing and, in fact, throughout the case, the advisements in ***Brown*** about a defendant's right to an attorney did not pertain to Smith's plea hearing.

The court explained that he did not have to plead no contest to the charge and, if he wanted, he could exercise his constitutional right to have a jury trial. (28:3). Mr. Smith said he understood. The court directed Mr. Smith's attention to the first page of the plea questionnaire and, specifically, the section listing the constitutional rights that he was giving up by entering a no-contest plea. (28:4). Each right listed had a box in front of it that had been checked. (16:1). Mr. Smith

told the court that he had reviewed those rights with his attorney, understood the rights, and had no questions about them. The court then asked:

> THE COURT: Do you understand that when you plead no contest, as you're asking to do today, you give up all those rights?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: Is that what you want to do?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Has anyone threatened you or promised you anything to get you to give up those rights?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You understand that if I accept your plea today, you'll stand convicted of this crime?
>
> THE DEFENDANT: Yes, I understand.

(28:4). The court's personal colloquy with Mr. Smith, supplemented by the description of rights contained in the plea questionnaire, was sufficient to establish that Mr. Smith understood the constitutional rights that he was giving up. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987).

With respect to Mr. Smith's understanding of the nature of the charge, the court explained that it is alleged that he caused substantial bodily harm to an officer "by knowingly resisting the officer while that officer was doing an act in an official capacity and with lawful authority." (28:5). That description covers the elements of the crime of resisting an officer and causing substantial bodily harm set forth in Wis. Stat. § 946.41(1)(2r). *See* Wis JI-Criminal 1765 (2011). In response, Mr. Smith said he understood the charge. (28:5). Earlier in the colloquy, Mr. Smith told the court that he had

gone over the criminal complaint and information with his attorney and that his attorney explained to him each element of the crime. (28:3).

The court correctly informed Mr. Smith that the crime carried a maximum penalty of six years' prison and a $10,000 fine. (28:5). Mr. Smith said he understood. (*Id*.). The court further explained that it was not bound by any of the attorneys' recommendations and could impose the maximum penalty, satisfying its duty under ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. Mr. Smith said he understood. (*Id*.).

As to other consequences of the plea, the court explained that he would "forever lose" his right to possess a firearm and he would not be able to vote until his civil rights were restored. (28:4-5). Mr. Smith said he understood. (*Id*. at 5). The court's failure to provide the deportation warning provides no grounds for relief because Mr. Smith could not show that his plea is likely to result in deportation. Wis. Stat. § 971.08(2); ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

Mr. Smith agreed that the court could use the facts alleged in the criminal complaint in order to find a factual basis for plea. (28:5-6). Indeed, the complaint and the deputy's testimony provide a sufficient factual basis.

Deputy Friendly testified that, as he tried to handcuff Mr. Smith, Mr. Smith raised his hand and clipped him in the forehead. Ignoring the deputy's commands to stop resisting, Mr. Smith continued to fight, during which the deputy was hit at least twice in the head, once when his head hit the floor. The definition of "substantial bodily harm" includes a loss or fracture of a tooth and a concussion. Wis. Stat. § 939.22(38). Friendly testified at the preliminary hearing that he suffered a chipped tooth. (27:12). At sentencing, the prosecutor stated that Deputy Friendly was being treated for "concussion syndrome" (29:7), and Deputy Friendly testified he was

having trouble with short-term memory and speech and had experienced some vision loss. (*Id*. at 4-5). He was under the care of a neurologist who said recovery might take six months to a year. Nine months after the altercation, he was still experiencing symptoms.

Any claim that there was no factual basis for the plea or that the plea was not knowingly, voluntarily and intelligently entered would be frivolous and without arguable merit.

II. Is There Any Arguable Claim for Challenging the Sentence Imposed, Which Consists of Three Years' Confinement Followed by Three Years' Extended Supervision?

Any argument challenging the sentence imposed would be frivolous and without arguable merit. The sentence is legal and was imposed on the basis of accurate information. The sentence cannot be challenged as unduly harsh or as an erroneous exercise of discretion. Finally, there is no basis for seeking a sentence modification.

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. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. 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. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

Although the court imposed the maximum term of imprisonment, there is nothing illegal about the sentence imposed. Resisting an officer and causing substantial bodily harm in violation of Wis. Stat. § 946.41(2r) is a Class H

felony with a maximum penalty of $10,000 fine and six years' imprisonment, of which three years could be ordered as initial confinement and another three years as extended supervision. Wis. Stat. §§ 939.50(3)(h) & 973.01(2)(b)8. & (d)5. The court imposed the maximum term of imprisonment but no fine. The court also ordered the sentence be served consecutive to previously-imposed sentences in other cases. The sentencing court had broad discretion to determine whether to impose concurrent or consecutive sentences. ***State v. Paske***, 163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991). The sentence imposed is legal.

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 v. State***, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971)). 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. ***Stenzel***, 276 Wis. 2d 224, ¶9.

The court discussed all three factors – the seriousness of the offense, the character of the defendant and the need to protect the public – in its sentencing decision.

As to the offense, the court commented upon the difficult work by deputies in the jail who everyday deal with "dysfunction" and "people who have made bad decisions." (29:17). In his statement at sentencing, Deputy Friendly said that as Mr. Smith attacked him he had a smile on his face and was giggling. (*Id*. at 5). The court noted those comments, stating:

> Any pleasure that you got pounding the sheriff's deputy, that smile that you had on your face or the threats – too late for you; too late for that, bitch; you're dead – any

> kind of sadistic pleasure that you got out of that, you certainly must have known at some point along the way that you were making a really, really bad call and that there were going to be consequences for it.

(*Id*. at 20).

As to the defendant's character, the court referred to Mr. Smith's criminal record. Two months before the fight at the jail, his extended supervision was revoked in two cases, one was a 2000 conviction for third-degree sexual assault and the other was a 2002 conviction for armed robbery. The violations leading to revocation included a failure to report to his agent for five months, a fight with a woman that resulted in a misdemeanor battery conviction and failure to comply with sex offender registry. (18:5). The court commented that Mr. Smith had "a significant prior history involving such a wide variety of criminality that seems to be unchecked as a result of our best efforts to intervene here." (29:21). Given Mr. Smith's failures of supervision, the court concluded that probation was not appropriate.

In his allocution, Mr. Smith said that he was going to try to change because he wanted to be around for his two sons, who were ages two and ten. (18:3; 29:14-15). Although the court found Mr. Smith's comments about his children "compelling" (29:16), the court noted that Mr. Smith was not in the community with his sons because of the series of bad decisions that he had been making. "You've been stumbling from one disastrous situation into the next without – with very little thought in between." (*Id*. at 18). The court added that Mr. Smith had "sacrificed your right and your boys' right to have an intact family by these bad decisions." (*Id*.).

Ultimately, the court determined that its primary sentencing objective was punishment with the hope that it would ultimately have a deterrent effect.

> The best I can do is somehow get you to the point where you look around and you think, man, my freedom is

> worth more than this; to get you to value your freedom by, frankly, punishment. And the sentence that I'm imposing here is punishment. I hope ultimately it has a deterrent value for you.

(29:21).

Although the court imposed the maximum term of imprisonment, given the reasons given by the court for the sentence imposed, any claim that the court erred in its exercise of discretion would be without arguable merit.

Any claim that the sentence imposed was unduly harsh or excessive, within the meaning of the legal standard, would also be without arguable merit. To prevail on such a claim, the defendant must show that the sentence "'is 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.'" ***Stenzel***, 276 Wis. 2d 224, ¶21 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). Given the nature of the offense and Mr. Smith's prior record, he would not be able to contend that the sentence was unduly harsh or unconscionable.

A defendant also has a due process right to be sentenced on the basis of accurate information. ***United States v. Tucker***, 404 U.S. 443, 448 (1972). To establish a due process violation at sentencing, the defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied upon the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. There was no presentence report. Many of the facts before the court at sentencing were contained in a sentencing memorandum prepared by defense counsel. (18). The nature of Mr. Smith's prior record was undisputed. He could not meet his burden under ***Tiepelman*** to prove that the court relied upon inaccurate information when sentencing him.

Finally, undersigned counsel is not aware of any information qualifying as a "new factor" that could serve as grounds for a sentence modification. *See* ***State v. Crochiere***, 2004 WI 78, ¶14, 273 Wis. 2d 57, 681 N.W.2d 524 (new factor defined as a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of sentencing, either because it was not then in existence or it was unknowingly overlooked by all of the parties).

CONCLUSION

For the reasons set forth above, undersigned counsel respectfully requests, pursuant to Wis. Stat. Rule 809.32, that this court enter an order relieving her of further representation of Mr. Smith in this matter.

Dated this 7th day of June, 2012.

Respectfully submitted,

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[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 7th day of June, 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 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 7th day of June, 2012.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant