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December 1, 2015

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

2014AP1747-CRNM State of Wisconsin v. Malik D. Iseini (L.C. # 2012CF140)
2014AP1748-CRNM State of Wisconsin v. Malik D. Iseini (L.C. # 2012CF313)

Before Lundsten, Sherman and Blanchard, JJ.

Attorney Eileen Hirsch has filed a no-merit report seeking to withdraw as appellate counsel for appellant Malik Iseini. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Iseini was sent a copy of the report and has filed a response, and Attorney Hirsch has filed a supplemental no-merit report. Upon our independent review of the entire record, as well as the no-merit report, response, and supplemental no-merit

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

report, we conclude that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and RULE 809.32.

Iseini was charged with three counts of delivering heroin as a second or subsequent offense, possession of heroin with intent to deliver as a second or subsequent offense, possession of a firearm by a felon, possession of improvised explosives, resisting an officer, possession of drug paraphernalia, and possession of narcotic drugs as a second or subsequent offense, all as a repeater. Pursuant to a plea agreement, Iseini pled guilty to three counts of delivering heroin as a second or subsequent offense, and one count each of resisting an officer, possession of drug paraphernalia, and possession of narcotic drugs as a second or subsequent offense, all as a repeater, and the remaining counts were dismissed and read in for sentencing purposes. The court sentenced Iseini to a total of ten years of initial confinement and eight years of extended supervision.

The no-merit report addresses whether there would be arguable merit to a challenge to Iseini's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire and waiver of rights form that Iseini signed, satisfied the court's mandatory duties to personally address Iseini and determine information such as Iseini's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794.

Iseini asserts in his no-merit response that the plea colloquy was deficient because the circuit court did not inform him that an attorney may discover defenses or mitigating circumstances that may not be apparent to a layman nor did the court inform him of the direct consequences of his plea. *See* ***id.***, ¶18. Iseini also contends that his trial counsel was ineffective by failing to explain that information to him before he entered his plea. We disagree with Iseini that these issues have arguable merit. First, because Iseini was represented by counsel throughout the proceedings in the circuit court, neither the court nor defense counsel was required to explain to Iseini that an attorney may discover defenses or mitigating circumstances that may not have been apparent to Iseini if he had proceeded pro se. Second, our review of the plea colloquy, as supplemented by the plea questionnaire and waiver of rights form that Iseini signed, establishes that Iseini was notified of the direct consequences of his plea before the court accepted the plea. Moreover, Iseini does not assert that he was unaware of any of the direct consequences of his plea at the time he pled guilty. *See* ***id.***, ¶4 n.5.

Iseini also asserts that his trial counsel was ineffective by failing to determine through discovery that the State had no scientific testing to support the charge of possession of a narcotic drug. Iseini asserts that, had his counsel discovered that the State had no supporting test results, Iseini would not have pled guilty to that charge. We disagree that this issue would have arguable merit. According to the criminal complaint charging Iseini with possession of a narcotic drug, a correctional officer discovered a paper containing a white powdery substance in the toilet in Iseini's jail cell, which appeared to be a crushed-up pill, and Iseini stated that it was the narcotic drug Percocet. The defense stipulated that the court could rely on the complaint for a factual basis for Iseini's guilty plea. In light of Iseini's admission, nothing in the record indicates that

the charge of possession of a narcotic drug was dependent on scientific testing, or that the absence of scientific testing would have had any impact on Iseini's decision to plead guilty.

Iseini also asserts that his trial counsel was ineffective by failing to file a suppression motion on Iseini's behalf. Iseini contends that, had counsel pursued suppression, the evidence would have been suppressed and the outcome of the case would have been different. No-merit counsel filed a supplemental no-merit report asserting that trial counsel filed a suppression motion, but did not pursue the motion because, instead, counsel made a reasonable strategic decision to give up pursuit of the motion as part of negotiations that resulted in a more favorable plea for Iseini, that counsel conveyed the State's plea offer to Iseini, and that Iseini chose to accept the offer. We conclude that a claim of ineffective assistance of counsel would lack arguable merit. Iseini does not assert that he was unaware of any information that his trial counsel should have explained to him at the time he entered his plea, nor does he assert that his trial counsel misinformed him or misled him in any way regarding his plea.

We conclude that nothing in the records, no-merit reports, or no-merit response establish any non-frivolous basis to seek plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Iseini's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Iseini's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *See* ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Iseini's character and criminal history, and the need to protect the public. *See* ***State v.***

Gallion, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed by the circuit court was within the maximum Iseini faced and, given the facts of this case, was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Iseini 492 days of sentence credit, waived the DNA surcharge, and found Iseini eligible for both the Challenge Incarceration and Earned Release Programs. We discern no erroneous exercise of the circuit court's sentencing discretion.

Iseini argues in his no-merit response that the State engaged in prosecutorial misconduct by failing to disclose, prior to sentencing, the evidence the State intended to introduce at the sentencing hearing. Iseini asserts that the State violated the discovery statute and the rules of evidence by introducing hearsay at the sentencing hearing without first disclosing that evidence to the defense. Iseini contends that the circuit court erroneously exercised its discretion by allowing the hearsay evidence at the sentencing hearing, and that defense counsel was ineffective by failing to seek discovery prior to the hearing or to object to the admission of that evidence. We disagree that there would be arguable merit to this issue. "The rules of evidence contained in [WIS. STAT.] chs. 901 to 911 (other than ch. 905 with respect to privileges) … do not apply to sentencing proceedings. Sec. 911.01(4)(c)." ***State v. Scherreiks***, 153 Wis. 2d 510, 521-22, 451 N.W.2d 759 (Ct. App. 1989). Because hearsay was allowed at the *sentencing* hearing, the circuit court did not err by allowing the evidence and defense counsel was not ineffective by failing to take steps to exclude it.

Upon our independent review of the records, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eileen Hirsch is relieved of any further representation of Malik Iseini in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals