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 IV

April 6, 2016

To:

Hon. James Evenson
Circuit Court Judge
Sauk Co. Courthouse
515 Oak Street
Baraboo, WI 53913-0449

Vicki Meister
Clerk of Circuit Court
Sauk Co. Courthouse
515 Oak Street
Baraboo, WI 53913-0449

Michael J. Herbert
10 Daystar Ct., Ste. C
Madison, WI 53704-7358

Linda Hoffman
Assistant District Attorney
515 Oak Street
Baraboo, WI 53913

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

Palmer R. Hall 402305
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2015AP1551-CRNM State of Wisconsin v. Palmer R. Hall (L.C. # 2013CF158)

Before Lundsten, Sherman and Blanchard, JJ.

Attorney Michael Herbert, appointed counsel for Palmer Hall, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision denying Hall's presentence motion to withdraw his plea, the validity of Hall's plea, or the sentence imposed by the circuit court. Hall was sent a copy of the report, but has not filed a response. Upon independently reviewing the

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

entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. We modify the judgment of conviction to reflect the circuit court's oral pronouncement as to the DNA surcharge and, as modified, we affirm.

Hall was charged with aggravated battery by use of a dangerous weapon, false imprisonment, and second-degree sexual assault, all as domestic abuse. A criminal information set forth the same charges, and added a repeat offender penalty enhancer to each charge. Pursuant to a plea agreement, Hall pled no contest to an amended charge of aggravated battery by use of a dangerous weapon and false imprisonment, both as domestic abuse, and the State agreed to dismiss the sexual assault charge. Prior to sentencing, Hall moved to withdraw his plea. Following a hearing, the circuit court denied the motion. The court sentenced Hall to a total of four years of initial confinement and three years of extended supervision and ordered $46,847.91 in restitution.

The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's exercise of discretion in denying Hall's motion to withdraw his plea prior to sentencing. *See* ***State v. Jenkins***, 2007 WI 96, ¶¶29-35, 303 Wis. 2d 157, 736 N.W.2d 24 (a circuit court decision to deny a presentence motion for plea withdrawal is discretionary, and "[t]he defendant has the burden to prove by a preponderance of the evidence that he has a fair and just reason" to withdraw his plea that is "something other than the desire to have a trial, or belated misgivings about the plea" (citations omitted), ***id.***, ¶32).

Hall asserted in his motion that, at the time he entered his plea, he did not understand consecutive sentencing and its effect on sentence credit; he pled in haste; he felt coerced by his counsel to accept the State's plea offer; he informed his attorney that he did not want to accept

the State's offer; and that he was misled by his attorney into entering his plea. At the hearing on his motion to withdraw his plea, Hall testified consistently with the assertions in his motion and supporting affidavit. Hall's prior defense counsel testified as to the circumstances surrounding Hall's plea. The circuit court found that Hall's assertions of haste and coercion were directly refuted by defense counsel's organized and objective testimony as to the chronology of events leading up to the plea; that Hall's testimony was unclear and not credible; and that Hall and his counsel had multiple discussions over time as to the State's plea offers, during which defense counsel explained the disputed issues to Hall. We agree with Attorney Herbert's assessment that it would be wholly frivolous to argue that the circuit court erroneously exercised its discretion by denying Hall's motion to withdraw his plea. *See* ***id.***, ¶33 ("[W]e apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact ... [and] credibility determinations.").

The no-merit report also addresses whether there would be arguable merit to a challenge to the validity of Hall'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. ***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 Hall signed, satisfied the court's mandatory duties to personally address Hall and determine information such as Hall'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.[2] *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30-33, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Hall's plea would lack arguable merit.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. 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 severity of the offense, Hall'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 was within the maximum Hall faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where 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'"

[2] The no-merit report notes that, during the in-court colloquy, the circuit court did not specifically address Hall's education, general comprehension, and ability to understand the proceedings, or whether any threats or promises had been made to Hall to obtain his plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The no-merit report also notes, however, that the circuit court engaged Hall in a colloquy regarding the plea questionnaire and waiver of rights form, which set forth Hall's education and general comprehension abilities, and indicates that no promises or threats had been made to Hall to induce his plea. Additionally, no-merit counsel asserts that, despite the apparent deficiencies in the plea colloquy, counsel has discovered no arguable basis to challenge Hall's plea. *See* ***id.***, ¶4 & n.5. Hall has not filed a response disputing those assertions.

(quoted source omitted)). We discern no erroneous exercise of the circuit court's sentencing discretion.

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

Before concluding, we address a DNA surcharge issue. At the sentencing hearing, the circuit court stated: "If you have not already done so, you must submit a DNA sample and provide a DNA surcharge." The judgment of conviction imposes the DNA surcharge and states: "Provide DNA sample unless already provided." However, unlike the oral pronouncement, the judgment of conviction does not reflect that payment of the surcharge is dependent on whether Hall previously provided the sample and paid the surcharge. We note that the court's oral pronouncement is controlling. *See* ***State v. Prihoda***, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857. Because Hall's obligation to pay the DNA surcharge is dependent on previous submission and payment, and because the failure to include that qualification on the judgment of conviction was a clerical error, upon remittitur the clerk of the circuit court shall enter a second amended judgment of conviction that states: "Provide DNA sample and surcharge unless already provided."

IT IS ORDERED that the judgment of conviction is modified to reflect the court's oral pronouncement that Hall shall provide a DNA sample and surcharge unless already provided and, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael Herbert is relieved of any further representation of Palmer Hall in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals