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 III

September 6, 2023

To:

Hon. Lamont K. Jacobson
Circuit Court Judge
Electronic Notice

Shirley Lang
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

Erica L. Bauer
Electronic Notice

Winn S. Collins
Electronic Notice

Theresa Wetzsteon
Electronic Notice

Steven S. Miller 690443
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2021AP295-CRNM State of Wisconsin v. Steven S. Miller
(L. C. No. 2019CF338)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Counsel for Steven Miller has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] concluding that no grounds exist to challenge Miller's convictions for possession of child pornography, capturing an intimate representation without consent (victim under age eighteen), and capturing an intimate representation without consent. Miller filed a response to the no-merit report raising three issues, and counsel filed a supplemental no-merit

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

report addressing those issues. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, in April 2019, sixteen-year-old Marie[2] found a round object with a memory card inside it clipped to a wire shelf in her closet. Marie brought the object to her mother, Tamara, who then brought it to the police department. The object was determined to be a camera, and the memory card inside it contained multiple videos of Marie in her bedroom and in a bathroom in the residence where she and Tamara lived. These videos included recordings of Marie nude, partially nude, using the bathroom, and, in one instance, masturbating. The memory card also contained a video of Tamara using the bathroom and then removing her clothes before getting into the shower. Other footage on the memory card showed Miller, who was Tamara's live-in boyfriend, placing the camera in Marie's bedroom and in the bathroom. When interviewed by police, Miller admitted that he had placed the camera in those locations and had recorded Marie and Tamara without their consent. Miller further admitted that his purpose in placing the camera was to capture nude images of Marie for his own sexual gratification and that he had masturbated to the videos of Marie.

Based on these allegations, the State charged Miller with eight counts: possession of child pornography (Count 1); sexual exploitation of a child—filming (Count 2); two counts of invasion of privacy—surveillance device (victim under age eighteen) (Counts 3 and 5); three

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86, we use pseudonyms when referring to the victims in this case.

counts of capturing an intimate representation without consent (Counts 4, 6 and 7); and invasion of privacy—surveillance device (Count 8). Counts 1 through 6 pertained to the videos of Marie, while Counts 7 and 8 pertained to the video of Tamara.

The State later filed an Information that contained the same charges, with two exceptions. Namely, Counts 4 and 6 in the Information were amended to specify that the victim was under the age of eighteen. As amended, Counts 4 and 6 were Class H felonies, rather than Class I felonies. *See* WIS. STAT. § 942.09(2)(am)1., (2)(dr).

Miller subsequently entered no-contest pleas to Counts 1, 4 and 7 in the Information, pursuant to a plea agreement. In exchange for Miller's pleas, the State agreed that the remaining counts would be dismissed and read in, along with a felony bail jumping charge in another case. The parties also agreed that uncharged offenses regarding another minor victim would be read in at sentencing. In addition, the State agreed to cap the initial confinement portion of its sentence recommendation at ten years.

Following a plea colloquy, supplemented by a signed plea questionnaire and waiver of rights form, the circuit court accepted Miller's no-contest pleas, finding that they were freely, voluntarily, and intelligently made. Miller stipulated that the court could rely on the facts alleged in the criminal complaint as the factual basis for his pleas, and the court found that an adequate factual basis existed. The court later imposed concurrent sentences totaling seven years' initial confinement followed by ten years' extended supervision. The court also ordered restitution in an amount stipulated by the parties.

The no-merit report addresses whether there would be any arguable merit to a claim that Miller should be permitted to withdraw his no-contest pleas. We agree with counsel's

description, analysis, and conclusion that this issue lacks arguable merit. As explained in the no-merit report, the circuit court complied with its mandatory duties during the plea colloquy, with two exceptions. However, neither of those deficiencies gives rise to an arguably meritorious basis for appeal.

First, the no-merit report notes that while the circuit court correctly informed Miller that he faced up to twenty-five years' imprisonment on Count 1 and six years' imprisonment on Count 4, the court did not inform him of the maximum penalty for Count 7. Appellate counsel observes, however, that the plea questionnaire listed the correct maximum penalty for Count 7, which was less than the maximum penalty for Count 4 because the victim in Count 7 was an adult. Moreover, appellate counsel asserts that she discussed this issue with Miller, and he "did not express a desire to withdraw his plea[s] on the grounds that he failed to understand the maximum potential penalties." We therefore agree with appellate counsel that any claim for plea withdrawal on this basis would lack arguable merit.

Second, the no-merit report observes that the circuit court failed to advise Miller of the deportation consequences of his pleas, as required by WIS. STAT. § 971.08(1)(c). The record shows, however, that Miller is a United States citizen and is therefore not subject to deportation. Accordingly, the court's failure to provide the deportation warning was harmless and does not give rise to an arguably meritorious basis for appeal. *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶¶1-3, 378 Wis. 2d 504, 904 N.W.2d 773.

We agree with appellate counsel that, aside from the deficiencies discussed above, the circuit court adequately complied with its mandatory duties during the plea colloquy. Nevertheless, in his response to the no-merit report, Miller contends that the plea colloquy was

defective because the court "did not explain what the elements were to the charges in which the defendant was pleading." More specifically, Miller asserts that "two separate types of jury instructions" were potentially applicable to the child pornography count: WIS JI—CRIMINAL 2146A (2020) and WIS JI—CRIMINAL 2146B (2020).[3] Miller contends that he "needed to know which one of these applied to the elements of his charges, and in relation to the facts of his conduct."

As explained in the supplemental no-merit report, this issue lacks arguable merit. Count 1 charged Miller with possession of child pornography, contrary to WIS. STAT. § 948.12(1m). That subsection prohibits a person from *possessing* or *accessing* child pornography, *see* § 948.12(1m), and the jury instruction applicable to that offense is WIS JI—CRIMINAL 2146A. WISCONSIN JI—CRIMINAL 2146B, in turn, applies to violations of § 948.12(2m). That subsection prohibits a person from *exhibiting* or *playing* child pornography. *See* § 948.12(2m). Because Miller was not charged with violating § 948.12(2m), the circuit court had no duty to review the elements of that offense with him, and WIS JI—CRIMINAL 2146B was plainly inapplicable.

Moreover, Miller's plea questionnaire contained an attachment listing the elements of *possession* of child pornography, contrary to WIS. STAT. § 948.12(1m), as set forth in WIS JI—CRIMINAL 2146A. During the plea colloquy, the circuit court confirmed that Miller had reviewed those elements with his attorney and understood that the State would be required to prove each of those elements beyond a reasonable doubt in order to obtain a conviction. Appellate counsel also

[3] All references to WIS JI—CRIMINAL 2146A and 2146B are to the 2020 versions of those instructions.

asserts in the supplemental no-merit report that Miller "never previously indicated to counsel that he did not understand any portion of the elements of the charged offenses." Under these circumstances, we agree with appellate counsel that there would be no arguable merit to a claim for plea withdrawal on the grounds that the court failed to adequately explain the elements of the charges.

Miller also argues in his response to the no-merit report that he should be permitted to withdraw his no-contest pleas because the State breached the plea agreement during its sentencing argument. As noted above, the plea agreement required the State to cap the initial confinement portion of its sentence recommendation at ten years. At sentencing, the State recommended exactly that. Miller claims, however, that the State breached the plea agreement by "covertly and indirectly" indicating to the circuit court that a longer sentence was warranted.[4]

"[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. When making a sentencing argument, "[a] prosecutor may convey information to the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement." ***Id.***, ¶44. However, the State may not "accomplish by indirect means what it

[4] As appellate counsel notes in the supplemental no-merit report, because Miller did not object to the State's alleged breach of the plea agreement at sentencing, any claim for plea withdrawal on that basis would have to be framed as an ineffective assistance of counsel claim. However, when a defendant claims that his or her trial attorney was ineffective by failing to object to a breach of the plea agreement, "the threshold inquiry … is whether the State's actions constituted a breach of the plea agreement." ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. If the State did not breach the plea agreement, then the defendant's trial attorney did not perform deficiently by failing to object. ***Id.*** We therefore confine our analysis to the issue of whether there would be arguable merit to a claim that the State breached the plea agreement.

promised not to do directly, and it may not covertly convey to the circuit court that a more severe sentence is warranted than that recommended." ***Id.***, ¶42 (citation omitted).

Here, Miller asserts that the State breached the plea agreement by suggesting that "new information it obtained" was "gravely concerning" and by arguing that the circuit court should not impose the mandatory minimum period of three years' initial confinement on the child pornography charge because of the "aggravated" facts of Miller's case. This claim lacks arguable merit. The State's argument that the court should not impose the mandatory minimum period of three years' initial confinement was entirely consistent with its agreement to recommend ten years' initial confinement. Furthermore, the State's references to aggravating factors did not covertly suggest that a sentence exceeding ten years' initial confinement was warranted. Rather, the State appropriately argued that the circumstances of Miller's case justified a sentence that exceeded the mandatory minimum. To the extent the prosecutor referenced new information that had come to light after the parties entered into the plea agreement, the prosecutor did not "make comments that suggest[ed] the prosecutor now believe[d] the disposition he or she [was] recommending pursuant to the agreement [was] insufficient." *See* ***State v. Liukonen***, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 686 N.W.2d 689. Thus, the record does not support a claim that the State's sentencing argument breached the plea agreement.

For the reasons explained above, we agree with appellate counsel that there would be no arguable merit to a claim that Miller should be permitted to withdraw his no-contest pleas. We further note that Miller's valid no-contest pleas forfeited the right to raise other nonjurisdictional defects and defenses arising before Miller entered his pleas, including claimed violations of constitutional rights other than a double jeopardy issue that could be resolved based upon the

record. *See* ***State v. Kelty***, 2006 WI 101, ¶¶18 & n.11, 34, 294 Wis. 2d 62, 716 N.W.2d 886; *see also* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

The no-merit report also asserts that there are no arguably meritorious grounds to challenge Miller's sentences. Specifically, the no-merit report contends that: (1) Miller's sentences were lawfully imposed; (2) Miller exercised his right of allocution at sentencing; (3) the circuit court did not erroneously exercise its sentencing discretion; (4) the sentences were not unduly harsh; and (5) Miller received the correct amount of sentence credit. We agree with appellate counsel's description, analysis, and conclusion that any challenge to Miller's sentences on these grounds would lack arguable merit, and we therefore do not address these issues further.

Finally, in his response to the no-merit report, Miller asserts that Count 4 in the criminal complaint was charged as a Class I felony, but his judgment of conviction inaccurately states that Count 4 is a Class H felony. Miller therefore contends that his judgment of conviction should be amended "to reflect the charge in the complaint." As noted above, Count 4 in the complaint charged Miller with capturing an intimate representation without consent, contrary to WIS. STAT. § 942.09(2)(am)1., which is a Class I felony. The State later filed an Information, however, that amended Count 4 to a charge of capturing an intimate representation without consent where the victim is under the age of eighteen, contrary to § 942.09(2)(dr), which is a Class H felony. Consequently, Miller's judgment of conviction correctly states that Count 4 is a Class H felony, and there would be no arguable merit to a claim that the judgment should be amended to reflect that Count 4 is a Class I felony.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of her obligation to further represent Steven Miller in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals