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DISTRICT IV

September 3, 2013

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

2012AP932-CRNM State of Wisconsin v. Benjamin D. Kamedulski (L.C. #2009CF68)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Benjamin Kamedulski appeals a judgment convicting him of second-degree reckless homicide as a repeat offender. Attorney Devon Lee filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of

[1] All further references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

Kamedulski's plea and sentence. Kamedulski was sent a copy of the report, and filed a response alleging a new sentencing factor, to which counsel filed a supplemental report. Attorney Jefren Olsen has since been appointed to replace Attorney Lee, and Olsen has not moved to withdraw the no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues.

First, the conviction was based on the entry of a no contest plea, and we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective, or demonstrate some other manifest injustice, such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to reduce the reckless homicide charge from first- to second-degree, to dismiss an additional charge of child abuse, and to cap its sentence recommendation to twenty years of initial confinement and argument as to the length of extended supervision in exchange for the plea, and the State followed through on that agreement. The circuit court conducted a plea colloquy exploring Kamedulski's understanding of the nature of the charge, the penalty range and other direct consequences of the plea, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Kamedulski understood that the court would not be bound by any sentencing recommendations and could impose up to the maximum penalties. The court also inquired into Kamedulski's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea

questionnaire. Kamedulski indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint—alleging that Kamedulski's infant son died of head trauma and injuries consistent with shaking while in Kamedulski's exclusive care—provided a sufficient factual basis for the plea. Although the court did not inquire at the plea hearing as to facts supporting the repeater allegation, Kamedulski could not challenge his conviction on that basis because, as we will discuss below, the court did not impose an enhanced penalty.

There is nothing in the record to suggest that counsel's performance was in any way deficient, and Kamedulski has not alleged any other facts that would give rise to a manifest injustice. Therefore, Kamedulski's plea was valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Kamedulski's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Kamedulski was afforded an opportunity to comment on the PSI and to address the court. The court asked about a claim that the infant had fallen down or been dropped on the stairs, and the State explained that there was medical evidence that disproved that theory, including retinal hemorrhaging and coin-shaped bruises consistent with finger tips, not stair edges. The defense pointed out that they had an expert who would have testified that the head injury could have been consistent with a fall on the stairs. The court proceeded to consider

the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court stated that it did not buy Kamedulski's contention that the child's death was an accident, and further observed that this was the kind of case that judges, cops, prosecutors, and doctors lose sleep over. With respect to Kamedulski's character, the court noted that Kamedulski appeared to lack the capacity for empathy, which was necessary for both remorse and any real possibility of rehabilitation. The court concluded that a substantial prison term was necessary as an expression by society that this type of conduct would not be tolerated.

The court then sentenced Kamedulski to eighteen years of initial confinement and six years of extended supervision, consecutive to a sentence he was already serving. The court did not check boxes on the judgment of conviction showing that the sentence would be a risk reduction sentence or that Kamedulski would be eligible for the Challenge Incarceration Program or Earned Release Program.

The components of the bifurcated sentence were within the applicable penalty ranges for the underlying offense by itself, and the total confinement period constituted about 77% of the maximum exposure Kamedulski faced including the penalty enhancer. *See* WIS. STAT. §§ 940.06(1) (classifying second-degree reckless homicide as a Class D felony); 973.01(2)(b)4. and (d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony); 939.62(1)(c) (increasing maximum term of imprisonment by six years for habitual criminality, where prior conviction is for a felony); and 973.01(2)(c) (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer) (all 2007-08 Stats.).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here is not "'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. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). That is particularly true given the read-in offense, which alleged that on an earlier occasion the same infant had suffered a broken leg in Kamedulski's care.

Kamedulski contends that he should be given a new sentencing hearing based on a statement by his older son, who was two years old at the time, that the son now remembers seeing his brother fall down the stairs. The circuit court already considered the possibility of a fall down the stairs, however, and did not find it credible based upon the medical evidence. Moreover, counsel informs us that a police report says the child told his mother immediately following the incident that Kamedulski "was mean" to the infant. Kamedulski's apparent willingness to manipulate his surviving son into supporting his already discredited defense theory only reinforces the circuit court's concern that Kamedulski is completely self-centered and unable or unwilling to take responsibility for his actions.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jefren Olsen is relieved of any further representation of Benjamin Kamedulski in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals