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DISTRICT II

September 11, 2013

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

2013AP824-CRNM State of Wisconsin v. Andrew E. Diaz (L.C. # 2012CF152)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Andrew Diaz appeals from a judgment convicting him of repeated sexual assault of the same child contrary to WIS. STAT. § 948.025(1)(d) (2011-12).¹ Diaz's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Diaz received a copy of the report and was advised of his right to file a response. He

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

has not done so. Upon consideration of the report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Diaz's guilty plea was knowingly, voluntarily and intelligently entered; and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty plea, Diaz answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Diaz's guilty plea was knowingly, voluntarily and intelligently entered, *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, *State v. Harrington*, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Diaz signed is competent evidence of knowing and voluntary plea. *State v. Moerderdorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. *Hoppe*, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Diaz's guilty plea.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d

535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Diaz to fifty years (thirty years of initial confinement and twenty years of extended supervision). In fashioning the sentence, the court considered the seriousness of the offense and the effect on the victim, Diaz's character, alcohol abuse and history of other offenses, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court stated reasons for refusing to consider the Challenge Incarceration Program. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Kaitlin Lamb of further representation of Diaz in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Kaitlin Lamb is relieved of further representation of Andrew Diaz in this matter.

Diane M. Fremgen
Clerk of Court of Appeals