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September 10, 2013

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

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2012AP698-CRNM State of Wisconsin v. Kurt Edward Kostelecky (L.C. #2011CF28)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Kurt Kostelecky appeals a judgment convicting him of second-degree sexual assault of a child. Attorney Suzanne Hagopian has 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 Kostelecky's

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

plea and sentence. Kostelecky was sent a copy of the report, and has filed a response claiming that trial counsel provided ineffective assistance in multiple respects. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

First, the conviction was based upon 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 dismiss and read in ten other felonies and a misdemeanor and to recommend a sentence of ten years of initial incarceration and ten years of extended supervision in exchange for the plea, and the State followed through on that agreement. The dismissal of the other charges reduced Kostelecky's sentence exposure from 350 years and 9 months (over 185 years of which would be available for initial confinement) to 40 years (only 25 of which would be available for initial confinement).

The circuit court conducted a plea colloquy exploring Kostelecky'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 that Kostelecky understood that the court would not be bound by any sentencing recommendations.

The court also inquired into Kostelecky's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire with an attached jury instruction. Kostelecky 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—namely, that Kostelecky had admitted to police that he had a number of inappropriate interactions with one of his ninth grade students, including five incidents of oral sex in the school during school hours and one incident of sexual contact that occurred in a car during summer vacation—provided a sufficient factual basis for the plea. In his response to the no-merit report, Kostelecky also acknowledges his sexual conduct with the student.

Although Kostelecky indicated satisfaction with his attorney's representation during his plea hearing, he now contends that trial counsel provided ineffective assistance prior to the entry of the plea in three regards: (1) by failing to file a suppression motion based upon Kostelecky's impulse control disorder; (2) by informing Kostelecky that the victim's past sexual conduct with other teachers, or what she told Kostelecky about her sexual experience, would be inadmissible at trial; and (3) by informing Kostelecky that he was likely to get a much longer sentence if he went to trial. None of these allegations are sufficient to obtain a plea withdrawal hearing.

As to Kostelecky's confession, he has not identified a single improper or coercive measure undertaken by police during his interrogation. Although he correctly notes that the same police tactics may have a greater or lesser coercive effect upon different defendants based upon those defendants' respective psychological states or cognitive abilities, there must still be at

least some challenged police conduct before suppression can be an appropriate remedy. This is because the purpose of the suppression rule is to deter improper police conduct. Here, Kostelecky seems to assert that he more or less blurted everything out during his interview because his impulse control disorder prevented him from acting in his own best interests by invoking his rights to counsel and to remain silent.[2] That is in no way the fault of the police.

As to the victim's past sexual conduct, WIS. STAT. § 972.11(2)—commonly known as the rape shield law—generally prohibits the introduction of evidence about a complaining witness's prior sexual history. The statute provides three exceptions:

> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

***Id.*** Kostelecky's allegation that the student in this case told him that she had performed oral sex on three other teachers does not fit into any of the statutory exceptions. Moreover, since the victim was fourteen when the incidents began and consent is not an element of sexual assault of a child, the evidence has no apparent relevancy. We therefore cannot conclude that counsel performed deficiently by informing Kostelecky that the evidence would not be admissible.

[2] We note that, at the sentencing hearing, Kostelecky stated that he believed admitting the truth in the interrogation room was "the right thing" to do, and that he believes his deceased mother's presence was with him, telling him it was time to be truthful and to seek help.

As to counsel's purported statement that Kostelecky was likely to receive a much longer sentence if he went to trial, we do not agree with Kostelecky's characterization of counsel's advice as "scare tactics." As we noted above, Kostelecky was originally facing over 185 years of initial incarceration based primarily on allegations that he had oral sex with a student multiple times, in the school building. Given that Kostelecky continues to admit that those allegations were substantially true, counsel could reasonably have considered there to have been a high probability that Kostelecky would have been convicted of multiple felonies at trial, after which the State would not have been constrained to ask for only ten years of initial confinement and could well have requested consecutive sentences. In short, counsel's suggestion that Kostelecky should take the plea deal to limit his sentence exposure was sound advice well within professional norms.

Kostelecky has not alleged any other facts affecting the plea that would give rise to a manifest injustice. Therefore, we conclude that Kostelecky'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 Kostelecky'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 Kostelecky was afforded an opportunity to comment on the PSI, to present his own sentencing memorandum including an evaluation by another professional and interviews with Kostelecky's family, friends and coworkers, and to address the court, both personally and through counsel. Kostelecky took that opportunity to admit that some of the

answers he had given to the PSI agent regarding the victim's conduct were "despicable" and that he could see why people were disgusted with him for pointing fingers at her when he was the only one to blame for his conduct.

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 observed that the read-in charges showed that Kostelecky's conduct was not a single isolated lapse of judgment, but a repetitive pattern occurring over more than a year. The court also noted that the victim had experienced both difficulty sleeping and taunting at school as a result of the situation, and that her emotional scars were likely to be long lasting. With respect to Kostelecky's character, the court noted that, although Kostelecky had taken some responsibility by entering a plea, he had also attempted to minimize his conduct by saying that his life had spiraled downward after his mother died and suggesting that the victim (and another teenaged student with whom he had also admitted having a sexual relationship) had each persistently pursued a sexual relationship with him. The court concluded that, while Kostelecky's rehabilitative needs could be handled in a community setting, a prison term was necessary for punishment and for deterrence to other teachers.

The court then sentenced Kostelecky to ten years of initial confinement and six years of extended supervision. The court also awarded seventeen days of sentence credit and imposed standard costs and conditions of supervision, plus restrictions on contact with any children other than his own. The components of the bifurcated sentence were within the applicable penalty ranges, and the total imprisonment period constituted 40% of the maximum exposure Kostelecky faced. *See* WIS. STAT. §§ 948.02(2) (classifying second-degree sexual assault of a child as a

Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of 25 years of initial confinement and 15 years of extended supervision for a Class C felony) (both 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 was certainly 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).

Kostelecky contends that he should be granted a new sentencing hearing because trial counsel: (1) failed to bring a sexual assault case involving another teacher, Ryan Zellner, to the court's attention for purposes of comparison as Kostelecky had requested; (2) failed to challenge an allegation in the complaint, repeated in the PSI, that Kostelecky had directed the student on the occasion of one of the incidents of oral sex to tell her mother that she was staying after school for detention; (3) failed to interview other teachers who could have disputed the student's assertion that this had been her first sexual experience; (4) failed to point out that the student had also been raped by a neighbor when she was sixteen and aborted the child; (5) failed to emphasize that Kostelecky's risk to reoffend would be limited by the fact that he would never be able to teach again; (6) failed to expand upon what having an impulse control disorder meant; and (7) failed to argue that the student's distress stemmed more from publicity about the case than from the assaults themselves. Kostelecky alternately characterizes these issues as ineffective assistance of counsel, erroneous exercise of the circuit court's discretion, or being sentenced based on inaccurate information. None of these allegations provide grounds for a new sentencing hearing.

As to a comparison with how Ryan Zellner was treated, Kostelecky has not provided us with any case numbers. Based on Kostelecky's description of Zellner being charged with 27 felonies and being sentenced to 15 years of initial confinement and 18 years of extended supervision, we assume that Kostelecky is referring to Brown County Case No. 2010CF773, Manitowoc County Case Nos. 2010CF150 and 2010CF191, and Calumet County Case No. 2010CF54, which were handled in a joint plea negotiation. Kostelecky does not think it is fair that Zellner only received five more years of initial confinement when Zellner faced more than twice as many felony counts and had multiple victims. A mere comparison of the number of felony counts does not tell the full story, however, because many of the charges against Zellner were for Class H and I felonies, whereas all of Kostelecky's felony counts were Class C or D charges. Moreover, not only did the Manitowoc court impose more initial incarceration time for Zellner up front, the court also withheld sentence and ordered probation on multiple additional counts, meaning that Zellner could ultimately end up serving more time. In short, we do not see how a comparison to Zellner's sentence would have helped Kostelecky's cause, and cannot fault counsel for deciding not to pursue that argument.

Kostelecky's second, third, fourth, and seventh claims all revolve around disputing the student's account of what happened to her and what impact it had upon her. Apparently, notwithstanding his own comments at the sentencing hearing about how despicable it was for him to point blame at the student, Kostelecky continues to believe that, if he can paint the student as promiscuous, it somehow diminishes his own culpability. However, the circuit court explicitly noted that Kostelecky had alleged the student "pressured" him by telling him that three other teachers had let her give them "blow jobs," and that he had described both the student in this case and another student with whom he had inappropriate sexual relations as "persistent" in

their advances toward him. The court did not view Kostelecky's allegations as mitigating factors, but rather as an inappropriate attempt to shift blame. Therefore, it would have been counterproductive for counsel to have made additional attempts to highlight Kostelecky's disputes with the student's account of the offenses or other allegations about her behavior.

Kostelecky's fifth and sixth claims involve complaints that trial counsel did not sufficiently emphasize points that counsel did in fact make to the circuit court. Counsel argued that Kostelecky could be safely put on probation because the most important risk factor no longer existed. Taken in context with counsel's subsequent statements that Kostelecky should never have been in a school setting, and that he could not control his impulses when opportunity presented itself in a school setting due to his disorder, it is clear the reduced risk factor that counsel was referring to was the fact that Kostelecky would not be teaching again. The circuit court did not entirely buy this argument, however, viewing the number of times that Kostelecky had engaged in inappropriate conduct as an indication that it could happen again. The court noted that the restriction on Kostelecky having unsupervised contact with any minors other than his own children was to make sure there was no opportunity for him to reoffend—the implication being that the school setting was not the only potential opportunity for Kostelecky to interact with minor girls. The bottom line is that the circuit court was aware both of the fact that Kostelecky would no longer be teaching and that he had been diagnosed with an impulse disorder. Counsel did his job in bringing these matters to the court's attention.

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 Suzanne Hagopian is relieved of any further representation of Kurt Kostelecky in this matter pursuant to WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*