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DISTRICT IV

September 11, 2013

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

2012AP1334-CRNM State of Wisconsin v. George A. McNair, Jr. (L.C. #2009CF155)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

George McNair, Jr., appeals a judgment convicting him of causing mental harm to a child. He also appeals an order denying his postconviction motion for plea withdrawal. Attorney Timothy O'Connell 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

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

(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 McNair's plea and sentence. McNair was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, 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 for plea withdrawal to be warranted after sentencing, there must be a plea colloquy defect that affects whether the defendant knowingly entered his or her plea or there must be some other manifest injustice, such as coercion, the lack of a factual basis to support the charge, failure by the prosecutor to fulfill the plea agreement, or an unknowing plea despite an adequate plea colloquy. *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 file an amended information and dismiss a charge of first-degree sexual assault of a child and to make a joint probation recommendation in exchange for the plea, and the State followed through on that agreement. The circuit court conducted a brief plea colloquy exploring McNair'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 also inquired into McNair's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire. McNair 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).

McNair filed a postconviction motion to withdraw his plea, alleging that he was misinformed about a collateral consequence of his plea. Specifically, McNair alleged that he would not have entered his plea if he had been informed that a condition of his probation would be that he could not enter taverns or possess alcohol because it would prevent him from achieving his goal of owning and operating a bar. Trial counsel testified that McNair had informed him that he had come into some money from a legal settlement and intended to use it to open a business, but did not recall any mention of a tavern. Counsel said he did inform McNair that a drug and alcohol assessment would be a condition of probation, and that his probation agent would have the authority to set additional rules of probation. McNair himself testified that he had told his attorney about his plan to open a bar, and counsel had informed him that, if the court did not include a no-drinking condition of probation, it would be up to the probation agent whether to allow it. He acknowledged that counsel had never told him definitely that he would be able to own a bar while on probation. The court found that counsel had not made any misrepresentations and further, based upon McNair's past experience with an AODA assessment and no-drink condition of supervision on a past case, that McNair would have been aware of that possibility. The court's factual findings were firmly grounded on the record before it and were not clearly erroneous.

The facts set forth in the complaint and provided at the preliminary hearing through a recorded interview with the child—namely, that McNair had touched the breasts of the ten-year-old victim on one occasion—provided a sufficient factual basis for the plea. Trial counsel filed a number of pretrial motions, and there is nothing in the record to suggest that counsel's

performance was in any way deficient. McNair has not alleged any other facts that would give rise to a manifest injustice. Therefore, McNair's plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

McNair moved to suppress the child's videotaped statement at the time of his preliminary hearing, but expressly declined to renew his suppression motion for trial. Even if the motion had been renewed, the record shows that the circuit court applied the relevant test to the facts of record.

A challenge to McNair's sentence would also lack arguable merit because the court withheld sentence and followed the parties' joint recommendation for probation. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

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 and order denying postconviction relief are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy O'Connell is relieved of any further representation of George McNair, Jr., in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals